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THE  
FEDERAL REPORTER.

VOLUME 133.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 133.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup> Appointed January 6, 1905.

<sup>2</sup> Resigned February, 1905.

<sup>3</sup> Appointed to succeed Francis J. Wing.

<sup>4</sup> Died December 16, 1904.

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<sup>5</sup> Retired.<sup>6</sup> Became Circuit Judge.<sup>7</sup> Resigned January 9, 1905.<sup>8</sup> Appointed to succeed Romanzo Bunn.



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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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MOUNTAIN COPPER CO., Limited, v. VAN BUREN et al.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1904.)

No. 1,049.

**1. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.**

The testimony of a number of witnesses that the timbering in a copper mine did not reach to the roof, or back of the stope, by several feet, and that for several hours before the caving in of the roof, by which plaintiff's intestate, working in the mine, was killed, pieces of rock kept falling from the roof upon and through the timbers, was sufficient to authorize the submission to the jury of the question of the negligence of the defendant mining company in failing to keep the mine properly timbered.

**2. INSTRUCTIONS—FORM—REFUSAL OF REQUESTS.**

The court is not required to give instructions in the language used by counsel, but its duty is fully discharged if its charge embraces all of the principles of law arising in the case in its own language.

**3. SAME.**

It is the duty of the court to simplify its charge to the jury, and the practice of taking the instructions as requested by the respective parties, and from them formulating a general charge embracing all the matters of law arising upon the pleadings and evidence, is always to be commended, because in this way the points in issue may be sufficiently declared and clearly presented to the jury, without unnecessary repetition.

**4. SAME—EXCEPTIONS—SUFFICIENCY AND TIME FOR TAKING.**

In the federal courts, exceptions to the charge are of no avail unless the record shows that they were taken and the points of exception designated while the jury were at the bar; and it is improper practice to permit formal exceptions to be then noted, and the specification of objection to be supplied in the record later; the object of the rule being that the attention of the trial court shall be called to the precise point to which exception is taken while it may be remedied.

**5. MASTER AND SERVANT—ASSUMED RISK.**

An inexperienced person going to work in a mine assumes only the ordinary risks incident to his employment, and, where he has nothing

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¶ 5. Assumption of risks incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

to do with the timbering of the mine, he has the right to assume that it is properly done by his employer, unless advised to the contrary, or the danger is obvious.

6. **APPEAL—REVIEW—INADVERTENT EXPRESSION IN INSTRUCTIONS.**

A judgment should not be reversed because of inadvertent expressions in the charge, to which the attention of the trial court was not called, and which evidently did not affect the verdict.

7. **MASTER AND SERVANT—ACTION FOR KILLING OF SERVANT—INSTRUCTIONS.**

The charge of the court considered, in an action against a mine owner to recover for the death of an employé killed by the caving of the mine, and *held*, taken as a whole, and construed together, to state the law of the case fully and correctly.

8. **EVIDENCE—RELEVANCY TO ISSUES.**

On an issue as to defendant's negligence in failing to properly timber a mine, by reason of which, as alleged, there was a cave, and plaintiff's intestate was killed, where defendant had shown by an expert witness that a cave might occur in a mine properly timbered, it was not error to exclude testimony as to particular causes which might produce it, when there was no evidence that any such cause existed at the mine in question.

9. **WITNESSES—CROSS-EXAMINATION.**

Where a disinterested witness had testified to the defective timbering of a mine in which he was a workman, at the place where a cave occurred which killed plaintiff's intestate, the court properly excluded a question on cross-examination as to whether he suggested to the foreman that the place was dangerous, as a matter which could not bind the plaintiff, and did not tend to impeach the witness.

In Error to the Circuit Court of the United States for the Northern District of California.

For former opinion, see 123 Fed. 61.

This is a suit to recover damages for the death of John Van Buren, occasioned by the alleged negligence of the plaintiff in error. A brief outline of the general character of some of the facts of this case will be sufficient to illustrate the points raised by the assignments of error:

The defendants in error are the sole heirs at law of John Van Buren, deceased, to wit, his widow and three children. About February 10, 1900, John Van Buren went to Iron Mountain, in Shasta county, and sought employment with the Mountain Copper Company, the plaintiff in error herein. He had no experience as a miner, but was a bridge carpenter. He was engaged by the corporation as a carpenter, but was first put to work in the rock quarry. After he had worked there a few days he was ordered by the foreman in charge of the work to go to work as a mucker in the mine. (A mucker is one who, after the ore or muck has been mined by the miners, shovels it into cars, and then moves it out to the surface of the mine.) He first declined to go to work in the mine, on account of his inexperience in such work. His foreman told him he would have to go to work in the mine, or quit work. He continued working in the mine as a mucker.

The mine of the Mountain Copper Company is not a vein or ledge of mineral-bearing rock or ore in place, but is a large, lenticular mass of ore, and is mined by drifting or tunneling into the ore body from the mountain side, and stopping out the ore in large chambers or sections. The superintendent of the plaintiff in error at the time of the death of Van Buren testified that: "The shape of the deposit I can liken to the hull of a ship, with the prow pointing to the south, and the west side of the mass flatter or at less pitch than the east side."

On February 28, 1900, about 12 o'clock p. m., or early in the morning of March 1st, a cave occurred in the mine. Several workmen, including Van Buren, were killed. Some idea of the extent of this cave is gleaned from the testimony of witnesses that it took from 12 to 14 days to recover the bodies. The cave occurred in what was known as stope 4 in the Copper level. At the

time of this accident the mine consisted of three opened-up levels, known as the Fielding, the Copper, and the Peck levels. The Fielding was the lowest level of the three; the next level was the Copper level; above that, the Peck level. The distance between the top of the Fielding level and the bottom of the Peck level was 38 feet, and the distance between the top of the Copper level and the bottom of the Peck level was 14 feet, at the place where the accident occurred.

Counsel for the plaintiff in error, in his brief, epitomizes the method of working the mine, as shown by the testimony of its witnesses, as follows: "The system under which the mine of plaintiff in error was worked was peculiar. Going in upon any given level, a drift was run into the ore body; and, working forward from this drift as a base, the ore was stoped out along the side of the drift. The drift was timbered up to the roof, bracing the roof, and then, as the miners worked forward, stoping out the ore, the timbering was advanced towards the face of the stope; the ground back of the point at which the ore was being extracted being filled in between the timbering with country rock; this filling in, together with the timbering, supporting the weight of the mountain above; room at all times being allowed for mining and mucking in the face of the stope. The timbering was in square sets. As the ore was stoped out these sets of timbers were advanced towards the face of the stope, and, whenever sufficient room was obtained, complete sets were put in. In the meantime timbers were projected from over the completed sets, resting upon the edge of such sets, and at the back end against the roof of the mine; extending out over the place where the miners were working, to protect them as much as possible from loose and falling rock."

The trial of the case before a jury resulted in a verdict in favor of the defendants in error for the sum of \$8,750. The plaintiff in error seeks a review in this court, and makes 26 assignments of error, which may be classified under four different heads: (1) That the court erred in refusing to direct the jury to render a verdict in favor of the defendant; (2) that the court erred in refusing to give instructions (nine in number) requested by defendant's counsel; (3) that the court erred in instructing the jury (four instructions); (4) that the court erred in sustaining objections (eight in number) of plaintiff to certain questions asked witnesses by defendant.

Van Ness & Redman, for plaintiff in error.

Geo. O. Perry and Campbell, Metson & Campbell, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement).

1. Did the court err in refusing to instruct the jury to find for the defendant in the court below (plaintiff in error here)?

The arguments of counsel upon this point cluster around the proposition as to whether or not there is any evidence in the record showing or tending to show any negligence on the part of plaintiff in error; the contention of the defendants in error being that the evidence shows that the cave occurred by reason of the insufficient and negligent timbering of the mine by the plaintiff in error, and its failure to take the necessary precaution to protect the workmen therein, or to take any reasonable steps to secure their safety; the contention on the part of the plaintiff in error being that the mine was properly timbered; that the cave occurred, or might have occurred, by what is called by its witnesses a "side thrust," without any fault or negligence or want of reasonable care or precaution on its part to secure the safety of its employes. These contentions call for a brief review of the testimony offered by the respective parties upon this point. The defendants in er-

ror introduced witnesses who testified, among other things, as follows:

Nickerson testified that he worked in stope 4 of the Copper level with Van Buren and others; that he quit working before the accident because he was hit in the head with a rock that came out of the timbers from above; that he heard rocks fall on the lagging; that he could see the roof 25 or 30 feet from the bottom, 12 feet above the height of the timbers; that there was an open space above the timbers of about 12 feet.

Anderson testified that he worked in stope 4, at the point where the cave occurred, a few days before the accident; that "the last morning I worked there I observed rocks dropping from the roof or back of the stope. Some of the rocks struck the timbers and the lagging, and some of them fell out in the ground. The stope was not timbered up to the roof. \* \* \* During the time I worked there, there was a considerable cave from the roof or back of the stope."

Fayle testified that he worked in the Copper level on February 28th, when Paul Edwards, the shift boss of the plaintiff in error, took the men out to wait until the ground quit settling. "Rocks fell there that night from the place where it had caved the day before where I was working. There must have been fifty or sixty cars in the cave of the day before. The timbermen that day put in a false set there to protect the muckers from the falling rock. \* \* \* The Oats boys timbered in there that night. They were working there at the time of the accident, and were killed. \* \* \* I worked there until about 10 o'clock, when Paul Edwards, shift boss, called us out. It quit settling then, and Paul Edwards said he thought it was all right, and we all went back to work. I quit there then because I thought the place looked dangerous. I told Paul Edwards I didn't want any more of that, and he said I could go over and work in line 3. When I left, the Oats boys were starting in to lag up over the sets they had put in."

Pemberthy testified: That he was familiar with all branches of mining. That he understood timbering, stoping, and blasting; that he was working in the stope on the Copper level "at the time of the cave in which eight men were killed. \* \* \* I was in sight of the men who were working in the stope, and who were afterwards killed. I could see them that night. I was working there at the time of the cave. The material that came down fell where I was working, after I got out." That he had helped to open all the stopes in question. That he had made an examination of the timbers on the night of the accident, and gave a minute description of how the timbering was done, and said there was lots of open ground above the timbers. That he was 6 feet 1½ inches tall, "and could stand on top of those timbers without stooping, and my head did not touch the roof." That where the cave occurred the ground was broken and settling. That "the timbering that was in there, and on top of which and between which and the roof there was no cribbing, did not serve any purpose at all in holding up the roof. \* \* \* I saw rock falling the night of the accident, before the cave. A piece dropped down as big as my head every once in a while, and once in a while a car load would drop down. It would come down in broken pieces." During the course of his testimony the following questions and answers appear:

"Q. by Mr. Perry: From what you have seen and know of the mine at the time the accident occurred, on the morning of the 1st of March, 1900, would you say that that portion of stope 4 where these men were working was in a safe condition for men to be put to work in? A. I would testify it was not. Q. And why would you say it was not? A. The fact that the timbers— The back was not properly caught up."

And at another point, with reference to the falling of the cave:

"Mr. Perry: Q. What I want to know, Mr. Pemberthy, is, did it come down suddenly, or was there a gradual cracking and popping? A. It came down suddenly in that portion of the stope, and then it started to cave both ways. Q. The center of the stope, so far as you could judge, caved first? A. Yes, sir. Q. And it came down with a sudden crash? A. Yes, sir. Q. And then the cave extended? A. Both ways. Q. So far as you could tell? A. Yes, sir."

Lundwick testified that he was timbering at the place where the accident occurred the day before and the night of the accident until a late hour; he was on top of the timbers, and could see it was open above; that the timbers did not reach up so as to support the roof or back of the stope; that many places were not cribbed; that a cave occurred the evening before the accident which broke down the staging upon which they were working putting in timbers; that a man working with him who stood on top of the timbers could not reach the back of the stope without extending the six-foot staff or pole. He gave in detail the manner in which the timbering was done, and upon his cross-examination by Mr. Van Ness:

"Q. Do you know to what extent along the line of that stope cribbing had been put in above the timbering, say between line 4 and line 5? Do you know to what extent along the timbering had been cribbed up to the roof? A. I know some places it was not. Q. In how many places was it not cribbed? A. I do not know. Q. About how many? A. A good many. I do not think it was more than half cribbed. Q. You would say, as a matter of fact, that about half the timbering was cribbed, and about half of it was not cribbed? A. Well, something like that, and even then some of the cribbing was not wedged up tight at all."

Prater testified that there was from 10 to 12 feet of open space above the timbers; that the timbers did not support the roof; that he did not think it was a safe place, and his brother-in-law, Paul Edwards, who was the shift boss there, changed him, on account of the dangerous condition, to work in line 3.

Roberts testified that he was in the stope where the accident occurred between the hours of 9 and 10 o'clock on the night of the accident; that he noticed the ground was caving away all of the time and falling; that rock falling from the Peck level came down into the Copper level at the time of the cave.

Davis testified that Van Buren declined to go to work in the mine on account of inexperience as a miner; that the shift boss, Woods, told him he would have to go to work in the mine or quit his job; that on the night of the accident the shift boss, Paul Edwards, warned him (Davis) not to go through that stope, because it was not safe; that the timbering did not reach up to the roof; and that the timbers in that place were set on loose muck.

The witnesses on behalf of the plaintiff in error, especially the superintendent, the assistant superintendent, the foreman, assistant foreman, and head timberman, testified in detail as to how the work was



done; that the mine was thoroughly, completely, and effectively timbered, and the work done in such a manner as to make it safe for the workmen in the Copper level. These witnesses, or most of them, expressed the opinion that the cave which caused the death of Van Buren and others was not the result of defective timbering, but was in fact a "side thrust" resulting from some independent cause, and that the caves and droppings of rock, as testified to by the witnesses on the part of the defendants in error, were but incidents common to mining, and in no wise from want of proper timbering.

There was some testimony to the effect that lateral caves—"side thrusts"—might occur in properly timbered mines, and the plaintiff in error argues that the cave which occurred was of that character, and that it could not be held responsible therefor. Notwithstanding this testimony, several of the witnesses on behalf of the plaintiff in error testified that, if a mine was properly timbered, there would be no falling of rock through from the roof or sides.

John Minear, who had been a miner for 35 years, and at the time of the accident was timber foreman of the Mountain Copper Company's mine, upon his cross-examination said:

"I know what a mine properly timbered is. A properly timbered mine will hold up the ore. It is a pretty hard question to say whether, if a mine is timbered and don't hold up the ore, then it is not properly timbered. There might be something come, like an earthquake, that will shake it down. If a mine is properly timbered, there will be no falling either from the roof or from the side. If not only one car load, but a number of car loads, would come down from the top of the stope, my judgment as a miner would be that that mine was not properly timbered."

There was no earthquake on the night in question.

Archer, the superintendent of the plaintiff in error, testified upon cross-examination that:

"No such a thing happened as three car loads of ore coming down into the place where the muckers were working from the top. If it had, there would be danger. If that ore came from the top, or the roof, and came through the timbers, it would indicate that the mine was not properly timbered."

Charles Knuckey, who had been a miner for 42 years, and was day shift boss, and thoroughly familiar with the method of timbering the mine on the Copper level at that time, upon his cross-examination testified:

"Q. By Mr. Campbell: It is a fact, is it not, that a mine properly timbered will not scale, and will not cave? A. No, sir; it is bound to settle; it does not matter how you timber it. Q. But will the top of the roof drop down? A. It will come gradually on the timbering. It gradually settles on the timbering. Q. Will it drop down on the men? A. How can it drop down on the men if it was timbered? Q. Then, if it is properly timbered, it cannot drop down on the men? A. Of course not. It will not drop down on the men if it is properly timbered. Q. If a mine does cave, and drops down on the men, then, in your opinion as a miner, it is not properly timbered? A. I did not say that. Q. I say, if it does cave, and drops down on the men from above, then, in your opinion as a miner, it is not properly timbered? A. If it drops down on the men, it is not properly timbered."

We are not called upon to discuss the weight of the evidence. That was passed on by the verdict of the jury. It is enough to say that there was ample testimony on the part of the defendants in error to au-

thorize the court to submit the question in issue, as to the negligence of the plaintiff in error, to the jury.

2. Did the court err in refusing to give the instructions requested by the plaintiff in error, or in giving certain instructions of its own motion? The rule is well settled that the court is never required to give instructions in the language used by counsel. The duty of the court is always fully discharged if its charge embraces all of the principles of law arising in the case in the court's own language. This court has in at least two cases expressly so decided. *Swensen v. Bender*, 114 Fed. 1, 9, 51 C. C. A. 627; *Stockslager v. United States*, 116 Fed. 590, 599, 54 C. C. A. 46. The courts in other circuits have announced the same rule. *Union Pacific v. Jarvi*, 53 Fed. 65, 71, 3 C. C. A. 433; *Alabama Ry. Co. v. O'Brien*, 69 Fed. 223, 16 C. C. A. 216; *Western Co. v. Ingraham*, 70 Fed. 219, 222, 17 C. C. A. 71; *Texas Ry. Co. v. Elliott*, 71 Fed. 378, 382, 18 C. C. A. 139; *Missouri Ry. Co. v. Fuller*, 72 Fed. 467, 469, 18 C. C. A. 641; *Boston R. Co. v. McDuffey*, 79 Fed. 935, 941, 25 C. C. A. 247. In so declaring, the Circuit Courts have but followed the decisions of the Supreme Court. *Indianapolis R. Co. v. Horst*, 93 U. S. 291, 295, 23 L. Ed. 898; *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301; *Railroad Co. v. McDade*, 135 U. S. 555, 575, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Marchand v. Griffon*, 140 U. S. 517, 528, 11 Sup. Ct. 834, 35 L. Ed. 527; *Railroad Co. v. Winter's Adm'r*, 143 U. S. 61, 74, 12 Sup. Ct. 356, 36 L. Ed. 71; *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 447, 12 Sup. Ct. 671, 36 L. Ed. 496.

The practice of taking the instructions as requested by the respective parties, and therefrom formulating a general charge embracing all the matters of law arising upon the pleadings and the evidence, is always to be commended, because in this way the points in issue may be sufficiently declared, and clearly presented to the jury, without unnecessary repetition and verbose language. The court's duty is to simplify its charge to the jury, and make every effort to render it as free from complexity as possible.

Conceding, for the purpose of this discussion, that the instructions asked by plaintiff in error were correct, still, if the principles embodied therein were correctly given by the court in its charge, no error occurred. The record shows that at the close of the charge, when counsel were called upon to announce whether they desired to reserve any exceptions, the following colloquy occurred:

"Mr. Van Ness: I have not, as your honor is aware, in the way in which your honor has given your instructions, been able to determine how closely you may have followed, or to what extent you may have departed from, the instructions requested. While I think you have substantially given the instructions, still you have departed from the language, and I cannot at this moment determine that. In order to preserve the record, if there is any departure from those instructions, I desire to reserve formal exceptions. Under the ruling of the court, it is necessary to reserve exceptions now. The Court: You can have the record appear that it is done in the presence of the jury. \* \* \* Mr. Van Ness: The usual practice is to take an order from the court giving us leave within ten days to specify in writing such exceptions as we may deem proper, and those written specifications to be deemed given, under the rule, in the presence of the jury, and while at the bar. The Court: You can have the record show that you each except. I will say to you, however, I think I have covered all your instructions. Mr.

Van Ness: I think your honor has. Mr. Campbell: That is our opinion, as well. The Court: Some of your instructions were rather leading, which I never give, and some were duplicates of others."

The trial court was too liberal in permitting counsel to have formal exceptions noted, without requiring them then and there to designate the points of their exceptions, before giving further time to formulate them. The court overlooked the object of the rule in this respect, and ignored the repeated and uniform decisions of the Supreme Court and the several Circuit Courts of Appeals upon this subject, to the effect that exceptions to the charge of the court are of no avail unless the record shows that they were taken or reserved while the jury were at the bar. As was said by the court in *Harvey v. Tyler*, 2 Wall. 328, 339, 17 L. Ed. 871:

"Justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

The attention of the trial courts, as well as of counsel, is here called to the necessity of enforcing this rule in the method herein indicated; otherwise the appellate courts are not bound to consider them.

After an examination of the instructions asked for by the plaintiff in error, and of the charge of the court upon the points presented by the requested instructions, our conclusion is that the points involved were fully covered by the charge of the court. In fact, the contention of the plaintiff in error is not that the charge of the court is erroneous, but that it "was so worded as to take the minds of the jurors from the proposition to which counsel for plaintiff in error desired to attract their attention." It is the duty of the trial court to enunciate the principles applicable to every material point in as clear and direct language as possible, without attracting the attention of the jury in favor of or against either party. There being two theories as to the cause of the cave in the mine, one of which, if believed to be true by the jury, would exempt the plaintiff in error from all liability, and the other hold it responsible for the injuries resulting from it, and there being evidence to support both theories, it was the duty of the court to impartially submit both theories to the jury by appropriate instructions. We deem it unnecessary to incur the record with a copy of all the requested instructions, or the instructions given by the court in lieu thereof.

It is claimed, among other things, that the instructions asked by the plaintiff in error expressed the law of this case as given in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361, and as laid down upon a former appeal herein (*Mountain Copper Co. v. Van Buren*, 123 Fed. 61, 59 C. C. A. 279), and should have been given; and it is suggested, in this connection, that the court, in its charge, departed from this rule. It is therefore proper to notice some portions of the charge upon this point, to show that the court did not depart from the rule as announced in the cases referred to.

The court charged the jury:

"That an accident occurred, through which Van Buren was killed, is not disputed, but you cannot infer that it resulted from the defendant's negligence simply because it occurred. The negligence must be proven. To main-

tain this action the plaintiffs were compelled to allege that the accident resulted from defendant's negligence, and also they must prove it to your satisfaction by at least a preponderance of evidence."

Again: "During the trial of this case several matters have been referred to, from some of which it might be inferred that the accident happened. I refer to the testimony concerning different caves. You cannot, because the accident occurred, infer or conclude it might have happened from some other cause, unless the evidence points to that. In other words, you must be governed by the evidence. You cannot indulge your imagination, and presume it might have occurred from something other than that which is shown. You must know from the evidence substantially how it occurred, but especially you must know that it was from the defendant's negligence that it occurred. That is the main point."

With reference to another point involved in the instructions which are complained of, the court, in its charge, said:

"I will here call your attention to the evidence upon the vital question in the case—that is, the one I consider the vital question—but I do not intend to indicate any views myself as to what the evidence points to. I leave that for you. The important question is this: You remember the plaintiffs' testimony was to the general effect that as they timbered along in that stope there were large spaces left over the timbering—after the upright posts were placed, and the caps placed on them, and some other timbers on top, there were large spaces left from there to the top of the stope, or the back of the stope, as it is termed; and experts have testified that, if that is so, it would not be good mining. You, of course, will understand that yourselves. You will know that the object of this timbering is to support the roof of the stope. If the timbering does not go up to that, but is simply built up in the air, you will readily conclude it would not be any support. That is, in part, the testimony of the plaintiffs—that the timbering was not placed up against the top of the stope, so as to support the superincumbent mass. On the contrary, the defendant's witnesses testify that the timbering was built up and was made solid against the top of the roof, or the back of the stope, as it is termed in mining. This is one of the important questions for you to determine. I have no suggestions to make to you as to which of the witnesses you must follow. You have their testimony before you, and it is for you to determine how that mining was done."

It is claimed that the court erred in instructing the jury as follows:

"(22) The question in this case that I call your attention more directly to is this: As you have discovered from the testimony of witnesses, there are two kinds of timbering used in large mines. One is what is called the 'square sets,' in which the timbers are all fitted, one on top of each other. Then they are often filled up by throwing in the waste material of the mine, but in that kind of square sets waste material is not necessary, because the timbers are presumed to stand by themselves. In those cases the timbers are about six or seven feet long, under the system adopted. The other mode of timbering, such as was used in this mine, was where the timbers were longer, and were covered with caps; and the proper mode of timbering would be from those caps to carry the timbers up to the top or back of the stope, so as to support the weight. After the timbering had been set, those spaces between the timbers are filled up with rock. The witnesses say that the rock is built in tight, so that the pressure comes not only on the timbers, but also on the rock. The witnesses have testified as to that class of timbering. *You, through your own good sense, can judge whether timbering of that kind would be safe.* I may say to you that both classes of timbering, as the witnesses have testified, and it is not disputed, are approved of, when properly done. That is a question we will come to later on.

"(23) In all industrial pursuits there are risks and dangers of such character that they cannot be foreseen and provided against by the exercise of reasonable care, and which may be said to be incident to the pursuit. For these the master cannot be held responsible, but the servant assumes the risk

of them. Also, when the danger is apparent to the servant, he has the right to object and to cease working, and it becomes his duty to do so if he knows the danger exists; but when the servant is not advised of the danger, when he is inexperienced, as is said to be the case here, then it becomes the duty of the master to give him better care than he would others, to advise him of the danger. If the master advises him of the danger, and the servant then assumes it, it is his own fault, and he must bear the burden himself."

"(25) The master is not liable for injury to a servant resulting from the negligence of a fellow servant. This, however, is not a field for mere speculation on your part; but, to apply it to defendant's benefit, you must find from the evidence that the injury resulted from some direct, specific act of carelessness of the fellow servant. If a number of servants are working together in carrying on the general operations of the mine, and do their work in such a generally careless way that accident results, the master is still liable, because it is his duty to see that the general operations and work are properly done; but when the injury results from some direct, careless act of a fellow servant or fellow servants, which can be pointed out distinctly by the testimony, the master is not liable, for he cannot be required to watch and direct each individual act of each of his servants, but he can and must watch and direct their general manner of working. To illustrate that: If two miners are working together in a mine, being fellow servants, and one of them through carelessness loosens a rock in the top of a stope, and drops it down on the head of the other and kills him, that would be the carelessness of a fellow servant, and the master would not be responsible for that. In other words, fellow servants have to bear the results of the acts of their fellow servants, when done in that way; but when it comes to a number of fellow servants working together, and under the general direction of the master, in carrying out the process of mining, carelessness there is something that the master must assume."

The claims of error are based upon the italicized portions of the instructions. In the consideration of these questions, it must be borne in mind that the entire charge must be taken as a whole. It is always easy to criticise certain sentences, which, taken disconnectedly from what appears before or after, may appear to be erroneous or to convey a wrong impression; but, when construed in the light of all that is said in the charge, it becomes manifest that the jury could not possibly have been misled by the isolated sentence complained of.

These remarks are specially applicable to instruction 22, under review. It is claimed that the italicized portion conveyed the idea to the jurors that it was their duty to determine the fact "through their own good sense," independent of the evidence. The jury was previously charged generally that it was its duty to determine all questions of fact from the evidence. The instruction in question, after the inadvertent expression referred to, explained that both classes of timbering are approved of, when properly done; and in other parts of the charge, not objected to, the court instructed the jury that it was its duty to determine from the evidence whether the work was properly done.

One of the objects of the rule requiring counsel to note their exceptions to the charge before the jury retires is to enable the court to correct omissions or mistakes, if any are inadvertently made. If the attention of the court had been called, as it ought to have been, to the fact that, instead of the jury determining the point "through their own good sense," it should be determined "from the evidence," it would undoubtedly have been corrected.

It is questionable whether this court ought to consider the objections made by counsel to instruction 22.

In *Western Coal M. Co. v. Ingraham*, *supra*, the assignment of error was based upon the omission of the word "reasonably" in the phrase "safe place to work." The court said:

"If the defendant intended to except to the absence of the qualifying word 'reasonably,' it should have pointed out the error specifically at the time. It could not object to the whole paragraph, which states the law accurately on one point, and in the appellate court, for the first time, rest its objection on the absence of a single qualifying word, the absence of which no jury would ever perceive, and which the court would readily have inserted if its attention had been called to the technical omission at the time."

The same court, in *Western C. & M. Co. v. Berberich*, *supra*, said:

"If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such an administration of the law would be intolerable."

We are of opinion that the principle of law announced in instruction 23 is correct. We also think it was applicable to the facts of this case. Van Buren was wholly inexperienced in mining. By going to work as a "mucker," he only assumed the ordinary risks and dangers incident to such employment. He had nothing to do with the timbering of the mine. He had the right to assume (not having any knowledge on the subject) that the timbering would be done by his employer in a proper manner. *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 69, 3 C. C. A. 433, and authorities there cited; *Western Coal & M. Co. v. Ingraham*, 70 Fed. 219, 224, 17 C. C. A. 71; *Swensen v. Bender*, 114 Fed. 1, 7, 51 C. C. A. 627, and authorities there cited; *Bunker Hill & S. M. & C. Co. v. Jones* (C. C. A.) 130 Fed. 813, 818.

The vital point relied on by the defendants in error was that the plaintiff in error was careless and negligent in the timbering of the mine, and that the cave was occasioned by such neglect. Touching this theory of the case, the court was authorized to give this instruction.

In *Mather v. Rillston*, 156 U. S. 391, 399, 15 Sup. Ct. 464, 39 L. Ed. 464, where the plaintiff in the court below claimed that the injuries he received were caused through the carelessness and negligence of the defendant "in storing the powder and caps in the house without informing him of the increased risk and danger of his remaining in employment therein," Mr. Justice Field, in delivering the opinion of the court, called attention to the fact that where occupations which are attended with danger can be prosecuted, by proper precautions, without fatal results, such precautions must be taken, and in this connection, among other things, said:

"So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers, and suffer in consequence, the employers will also be chargeable for the injuries sustained."

It may be said that that was an extreme case. But if the testimony of defendants in error is worthy of belief—and the jury have so found—then the method of timbering in the mine in question left as great a hazard of danger as if powder or other explosives had been stored away in the upper levels. The principles announced by Mr. Justice

Field have been frequently followed in mining, railroad, and other cases, *Burke v. Anderson*, 69 Fed. 814, 817, 16 C. C. A. 442; *Western Coal & M. Co. v. Ingraham*, 70 Fed. 219, 221, 17 C. C. A. 71; *Western C. & M. Co. v. Berberich*, 94 Fed. 329, 333, 36 C. C. A. 364; *Cincinnati Ry. Co. v. Gray*, 101 Fed. 623, 628, 41 C. C. A. 535, 50 L. R. A. 47; *Kelley v. Fourth of July M. Co.*, 16 Mont. 484, 497, 41 Pac. 273, et seq.

With reference to instruction 25, it is not claimed that Van Buren had anything to do with the timbering of the mine, or that it was any part of his duty to inspect or repair the same.

In *Western Coal & M. Co. v. Ingraham*, supra, the court said:

"The rule is well settled that, after a mine is once opened and timbered, it is the duty of the owner or operator to use reasonable care and diligence to see that the timbers are properly set, and keep them in proper condition and repair. For this purpose it is his duty to provide a competent mining boss or foreman to make timely inspections of the timbers, walls, and roof of the mine, to the end that the miners may not be injured by defects or dangers which a competent mining boss or foreman would discover and remove. This is a positive duty which the master owes the servant. A neglect to perform this duty is negligence on the part of the master, and he cannot escape responsibility for such negligence by pleading that he devolved the duty on a fellow servant of the injured employé. It is an absolute duty which the master owes his servant to exercise reasonable care and diligence to provide the servant with a reasonably safe place in which to work, having regard to the kind of work, and the conditions under which it must necessarily be performed."

3. This brings us to the exceptions taken to the rulings of the court in sustaining the objections to certain questions asked witnesses by the plaintiff in error. Of the eight assignments on this point, only two are discussed by counsel. These we will notice:

(1) The record shows that the witness Jones testified on behalf of the plaintiff in error that caves occasionally happen without premonitory symptoms of their coming. He was then asked:

"Q. Will you give us an idea as to what it is that will produce caves in mines without any premonitory symptoms of their coming, and notwithstanding the best method of timbering known to your profession? Mr. Campbell: Do you propose to show that any of those things were in existence there at that time? The Court: Unless that is connected with the actual facts as to that particular property, I should think the testimony would be irrelevant. Do you propose to show that some of these occurrences that he will testify to actually existed in that mine? Mr. Van Ness: I do not know whether I can do that or not. The Court: There is only one thing I want to know. I want an answer to the question I put to you, and that is whether you propose to connect his testimony with actual facts? Mr. Van Ness: I propose to rebut the testimony of some of these people that a cave cannot occur if a mine is properly timbered. \* \* \* The Court: The objection is sustained."

We think the ruling of the court was correct. The witness had already testified to the fact which counsel wished to impress upon the jury—that caves might occur in properly timbered mines—and it was then sought to obtain the witness' idea as to what might cause such caves, without reference to any conditions existing at the mine in question. It may be that a hidden cavern filled with flowing water might seep through the upper levels and cause a cave, which human foresight could not guard against. But there is no pretense that anything of that kind existed at the time of the cave in question. It may be that a

volcanic eruption might cause a cave in a mine that was properly timbered, but nothing of that kind is shown to have occurred. The same as to an earthquake, and numerous other imaginary things. The court was right in restricting the testimony to conditions existing at the time, and refusing to enter into the wide field of speculation and conjecture as to what might cause a cave in a well-timbered mine. The question for the jury to determine was whether the cave was caused by the defective timbering of the mine, or by a "side thrust."

(2) The next exception has less merit. Upon cross-examination the witness Pemberthy was asked:

"Q. Did you ever suggest to the foreman or the shift boss or the head timberman, or anybody else, that there was any danger to you yourself while you were working in there by the falling down of that roof because it was unsupported?"

How could the defendants in error be in any manner bound by any omission upon the part of Pemberthy to suggest to the foreman or shift boss or head timberman of the corporation that there was danger in working in the mine on account of the defective timbering? The fact, if it be a fact, that Pemberthy did not report the danger, did not tend to impeach him, and did not tend to contradict his testimony as to the condition of the timbering. The most that could possibly be said is that, if the conditions were such as testified to by him, it would be natural for him to have spoken about it. It would, at best, only show that he was careless, and perhaps negligent, in not reporting the danger.

We have examined the entire record with a view of ascertaining whether or not any prejudicial error occurred at the trial. Our conclusion is that the trial was in all respects fair and impartial, and free from such error.

The judgment of the circuit court is affirmed, with costs.

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#### KANSAS CITY SOUTHERN RY. CO. v. PRUNTY.

(Circuit Court of Appeals, Fifth Circuit, October 4, 1904. On Rehearing, December 3, 1904.)

##### No. 1,320.

#### 1. FEDERAL COURTS—JURISDICTION—DUTY TO EXAMINE RECORD.

It is the duty of a Circuit Court of Appeals of its own motion to examine the record in a cause brought before it to test its own jurisdiction and that of the court below.

#### 2. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SUFFICIENCY OF PETITION.

Where the jurisdiction of a federal court depends upon the citizenship of the parties, such citizenship, and not merely their residence, must be shown by the record; and a right of removal on the ground of diversity of citizenship is not shown by a petition therefor which does not allege the citizenship of the plaintiff, although his petition in the state court alleges him to be a resident of the state in which the action is brought.

#### 3. SAME—IMPROPER REMOVAL—COSTS.

Where the judgment of a Circuit Court is reversed by the Circuit Court of Appeals on the ground that the cause was improperly removed from a state court, costs should be awarded against the removing party.



## On Rehearing.

## 4. SAME—AMENDMENT OF PETITION IN APPELLATE COURT—JURISDICTIONAL AVERMENTS.

A Circuit Court of Appeals may properly permit the amendment in that court of a petition for removal by supplying an averment of citizenship requisite to give jurisdiction, where it appears that its omission was inadvertent and it is shown by stipulation of the parties that the requisite diversity of citizenship in fact existed.

## 5. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff stood on the footboard at the back of an engine to make a coupling to a car toward which the engine was moved slowly. The drawbar on the car was out of repair, and was not in line with that on the engine, and plaintiff attempted to shove the drawbar on the engine to one side with his foot, so as to meet that on the car, when the engine lurched by reason of a defect in the track, and plaintiff's foot was caught and crushed between the two drawbars. There was evidence tending to show that such manner of making a coupling was customary and safe under ordinary circumstances, and that plaintiff would not have been injured if it had not been for the defect in the track; also that there was no rule of the railroad company prohibiting brakemen from going between the cars to make a coupling or requiring the engine to be stopped while the drawbars were moved. *Held*, that under the evidence plaintiff could not be said as matter of law to have been chargeable with contributory negligence. Pardee, Circuit Judge, dissenting.

## 6. SAME—PROXIMATE CAUSE OF INJURY.

It is an essential element in contributory negligence to defeat a right of action for an injury that there should be a causal connection between the act charged as negligence and the injury, and when the act and the injury are not known by common experience to be naturally and usually in sequence, and the injury does not according to the ordinary course of events follow from the act, they are not sufficiently connected to make the act a proximate cause of the injury.

## 7. INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.

A general exception to a charge, or to a portion thereof containing different propositions, is unavailing, if any of such propositions are correct.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

Samuel W. Moore and J. D. Wilkinson (T. Alexander, on the brief), for plaintiff in error.

J. A. Thigpen, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit was brought in the First Judicial District Court of Caddo parish, La., by Clark Prunty against the Kansas City Southern Railway Company to recover damages for personal injuries received by the plaintiff, who is defendant in error, while acting as a brakeman in the employ of the defendant, who is plaintiff in error. The case was removed to the Circuit Court of the United States for the Western District of Louisiana on the application of the railway company, and was tried before a jury, and verdict and judgment had against the railway company.

There are limits imposed by law to the jurisdiction of the United States courts, and it is an inflexible rule that this court of its own motion should examine the record to test its own jurisdiction and the jurisdic-

tion of the court below. *M., C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Grace v. Amer. Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. The ground upon which it was sought to remove this case from the state to the federal court was that it is a case between citizens of different states. No other ground of federal jurisdiction is suggested. The petition for removal was filed by the defendant, the Kansas City Southern Railway Company, and the following is all that the petition contains on the question of the citizenship of the parties:

"While the defendant is now, and was at the date of bringing said action, and long before, and has always been, a resident and domiciled in the state of Missouri, and is not, nor has it ever been, a resident of the state of Louisiana, or domiciled therein, having only an agent, viz., T. Alexander, of your said parish and state, on whom process might be served; but your defendant was at time of filing this suit a citizen of the state of Missouri, and is still a citizen thereof, residing in the city of Kansas City, of said state of Missouri, and no other, while said plaintiff is a citizen and resident of the state of ———; and your petitioner desires to remove this suit, before the trial thereof, into the next Circuit Court of the United States to be held in the Western District of Louisiana."

A corporation created by and doing business in a state is to be deemed, for the purpose of fixing the jurisdiction, a citizen of such state. It would have been sufficient, therefore, so far as the status of the petitioner was concerned, to have averred that the petitioner was a corporation chartered or organized under the laws of Missouri. But it is not alleged that it is a corporation. It may be a joint-stock company, so far as the averments of the petition are concerned. It is at least doubtful whether the petition is sufficient to show the status of the petitioner so as to affirmatively show federal jurisdiction. In the *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451, it was held that it is not enough, in order to give jurisdiction, to say that the corporation "is a citizen of the state where the suit is brought." See, also, *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. We do not dwell on this phase of the case, however, because in the petition filed by the plaintiff in the state court declaring his cause of action it is stated that the Kansas City Southern Railway Company is "a corporation organized under the laws of Missouri," and this averment makes the record show the status of the company, and would supply the defect in that regard of the petition to remove.

But the petition entirely fails to show the citizenship of Clark Prunty, the plaintiff suing in the state court. The only averment is that the "plaintiff is a citizen and resident of the state of ———." How the petitioner intended to fill the blank left we have no means of telling. If the petition to remove, aided by the other parts of the record, shows that the petitioner was a corporation organized under the laws of Missouri, it does not affirmatively show that Clark Prunty was not a citizen of Missouri; and if he is a citizen of Missouri the federal court has not jurisdiction of the case. We have carefully examined the record to see if any part of it would supply the defect. We find nothing to show that Clark Prunty is a citizen of a state other than Missouri. In the petition filed in the state court by him stating his cause of action he describes himself as a "resident of Caddo parish, Louisiana." But this averment

ment does not supply the defect. When the jurisdiction of a court of the United States depends on citizenship of the parties, such citizenship, and not simply their residence, must be shown by the record. *Abercrombie v. Dupuis*, 1 Cranch, 343, 2 L. Ed. 129; 1 *Rose's Notes*, 177; *Robertson v. Cease*, 97 U. S. 647, 24 L. Ed. 1057; *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715; *Horne v. Hammond*, 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197; *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657. The record failing to affirmatively show the jurisdiction of the Circuit Court, that court should have remanded the case to the state court.

The cause was improperly removed to the Circuit Court. The costs should be awarded against the party wrongfully removing the cause. *M., C. & Lake M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462.

The judgment of the Circuit Court is reversed, with costs against the plaintiff in error, and the case is remanded to the Circuit Court, with directions to proceed according to law and in conformity to the opinion of this court; and it is so ordered.

#### On Application for Rehearing.

Heretofore a judgment was entered in this court, reversing the judgment of the Circuit Court, because the record did not show the facts necessary to sustain the jurisdiction of the Circuit Court. Afterwards the following petition for a rehearing and agreement of counsel was filed in this court:

"In the above entitled and numbered cause, now comes the plaintiff in error, and, with the leave of the court and with the consent of the defendant in error, shows unto the court that at the time of filing the petition for removal from the state court to the Circuit Court of the United States for the Western District of Louisiana, it was a corporation organized under the laws of the state of Missouri, and no other, and a citizen of that state, and no other, with its domicile at Kansas City, in said state, and that the defendant, Clark Prunty, was a citizen and resident of the state of Louisiana, and no other, both at the time of filing his said suit and at the time of said application to remove said cause, and still is a citizen of said state; that through an oversight the state in which said defendant had his domicile as aforesaid was left blank in the petition asking said removal, but said diverse citizenship was averred in said petition for removal, and appears from said petition of said defendant in error to the state court, in which he set forth that he was a resident of the state of Louisiana, meaning thereby that he was a citizen thereof, and that your petitioner was a corporation organized under and domiciled in the state of Missouri; and, as a fact, diversity of citizenship still exists, and your petitioner desires to amend his original pleading, so as to conform to the facts as existing at the time and still existing. Premises considered, plaintiff in error prays to be permitted to amend its petition for removal herein in this court, so as to show the true facts existing, and asks in the interest of justice that this amendment be allowed in this court, and for general relief.

"J. D. Wilkinson, Attorney for Plaintiff in Error.

"Personally came and appeared J. A. Thigpen, a person to me well known, a resident of the parish of Caddo, state of Louisiana, who stated and declared to me, notary, that he is attorney for the defendant in error in the case of *Kansas City Southern Railway Company v. Clark Prunty*, above set forth, and that he admits all of the facts stated in the foregoing application to be true, and hereby specially consents that the court permit said amendment to be filed and considered a part of the record on appeal in said case, and he

hereby consents on the part of said Clark Prunty that the court consider the merits of said cause, because he admits as a fact that the diverse citizenship of the parties to said suit did exist at the time of filing said suit and at the time of filing said petition for a removal thereof, and still exists.

"In testimony whereof, he has hereunto affixed his name in presence of the attesting competent witnesses on this, the 5th day of October, 1904.

"J. A. Thigpen, Attorney for Clark Prunty.

"E. F. Thigpen, Notary Public.

"Attest: J. C. Pugh,

"J. M. Foster.

"State of Louisiana, Parish of Caddo.

"Personally appeared J. D. Wilkinson, a person to me well known, who, being by me duly sworn, says that he is the attorney for the Kansas City Southern Railway Company, plaintiff in error in the above entitled and numbered cause; that he has read the application aforesaid, hereto attached; and that all the facts stated therein and allegations made therein are true and correct, to his own knowledge.

"Sworn to and subscribed before me this the 6th day of Oct., 1904.

"J. D. Wilkinson.

"John F. Slattery, Notary Public."

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Both parties having appeared in this court and agreed in writing that the defective allegation of citizenship be amended, it is proper, we think, under the circumstances, to permit the amendment to be made. *Kennedy v. Georgia State Bank*, 8 How. 586, 12 L. Ed. 1209; *Fletcher v. Peck*, 6 Cranch, 126, 3 L. Ed. 162; *Fitchburg Railway Company v. Nichols*, 85 Fed. 869, 29 C. C. A. 464. The record being amended, so as to remove the defect pointed out in our former opinion, the application for a rehearing is allowed, and the judgment heretofore rendered by this court, reversing the judgment of the Circuit Court, is set aside.

The cause has been argued orally by counsel for both parties, and also submitted on briefs, and we now proceed to examine the case on its merits. This is an action for damages for personal injuries received by Clark Prunty, the plaintiff in the court below and the defendant in error here (who will be referred to hereafter as the plaintiff), while engaged in the performance of his duty as an employé of the plaintiff in error, the Kansas City Southern Railway Company (which will be referred to hereafter as the railway company). The following excerpt from the petition briefly describes the way in which the injury occurred:

"In undertaking to couple said car to his said train, after it had been placed on the main line, the engine drawing the train on which the petitioner was employed was backed toward said car in order to make said coupling, and that your petitioner was riding on the footboard on said engine; that your petitioner, standing on the footboard of said engine as it approached said car, noticed that the drawbar on said car was not in proper position, and noticed that same would have to be moved to one side before a coupling could be made; that as the engine approached very near to said car, being at that time almost at a standstill and moving very slow, your petitioner attempted to shove said drawbar to its proper place with his foot, and that, as he was in the act of shoving the said defective drawbar to its proper place, the engine suddenly and without warning dipped or lurched to one side, causing petitioner to lose his balance, and causing his foot to be caught between said drawbar and the coupling on the engine; that, as thus caught, his foot was broken, mangled, and badly crushed."

The negligence alleged is the defective and dangerous condition of the track and the defective and dangerous condition of the drawbar. The answer of the railway company denied the allegations of negligence on its part, and averred that the accident occurred by reason of the contributory negligence of the plaintiff. The case was tried on these issues, and resulted in a verdict and judgment for the plaintiff. The assignments of error will each be considered.

The first is that the court refused to instruct the jury to find for the railway company. The plaintiff himself testified that he was on the footboard of the engine, which was moving slowly towards the car to which the coupling was to be made. Just before the engine and the car came together, he discovered that the drawbar on the engine was not in line to meet the drawbar on the car, so as to effect the coupling; that the engine and the car came together, and the coupling was not made. The car and engine then separated. Immediately the engine was pushed slowly back towards the car to make the second effort to effect the coupling. The plaintiff was standing up, holding with one hand to steady himself, and in the other hand he had the brake lever, and he was in the act of pushing the drawbar on the engine so as to put it in line to meet the drawbar on the car, when the engine ran on a defective place, or a low place in the track, and the lurch came which made him lose his balance, and his right foot was crushed between the cars. His evidence is to the effect that, but for the defect in the track, he could have easily made the coupling without danger to himself; and, except for the defect in the drawbar, causing it to hang to one side, so as not to be in alignment with the other drawbar, the coupling would have been made without his interference when the engine and car first came together. The plaintiff's evidence as to the defective condition of the track and the drawbar is strongly corroborated by several witnesses. There could be no question, therefore, about the proof being sufficient to submit the question of the railway company's negligence to the jury.

The main contention of the railway company is that the court erred in not instructing the jury to find for the defendant company because of the contributory negligence of the plaintiff. The evidence tends strongly to show that the effort that the plaintiff made to couple the cars was made in the usual way under the circumstances that existed, and that it was the safest way; that he was in less danger to use his foot to change the position of the drawbar, than if he had lain down and used his hand. The question on the first assignment of error resolves itself into this inquiry: Was it so clearly the duty of the plaintiff to stop the car and adjust the drawbar that the court as a matter of law should instruct the jury that he was guilty of contributory negligence? The question of negligence is usually one for the jury. It is well settled, however, that the court may direct a verdict for the plaintiff or the defendant on the question of negligence, where the evidence is undisputed and is of such conclusive character as to the inferences to be drawn that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. But can it be said that this case is of that kind? The evidence tends to show that the car was moving very slowly, and

that the act of the plaintiff alleged to be negligent would have been safe, except for the defect in the roadbed. The manner in which the plaintiff was endeavoring to perform his duty was the usual way under the circumstances. The fact that it was the usual way does not, of course, remove the stamp of negligence, if that way was dangerous, and there was another way to safely perform the same duty; but, when the evidence shows, as it does here, that the brakemen had for many years performed the duty in the way in question without injury or apparent danger, it tends strongly to show that the mode, if the roadbed was in good condition, was not dangerous in the sense that would make the plaintiff guilty of contributory negligence.

There was no rule of the railway company, as there was in some of the cases cited by counsel, that required the train to be stopped to couple the cars, or that forbade the brakemen going between the cars to couple them. A witness for the plaintiff testified on cross-examination that there was such a rule, but no such rule was produced, by the railway company, and at a later period of the trial the "defendant" offered in evidence the rules of the company as to the duties of brakemen to show that there was no rule on the subject. The custom of the brakemen to couple the cars while the trains were in motion, which custom was proved without objection, was not, therefore, shown to be in conflict with the rules of the company. The record would not justify the court in assuming that the plaintiff was guilty of contributory negligence upon the theory that he violated a rule of the company. The position of the railway company may be best stated in the words of its distinguished counsel:

"Upon the undisputed testimony the court should have directed a verdict for the defendant, upon the theory that, where there is a safe way and a more dangerous way known to the servant by which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes all risk of injury therefrom."

The meaning of this position appears from what follows: "If he had stopped the engine," etc., then there would have been no danger. It is true that, when there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury it entails. But is this principle applicable to this case? The duty the plaintiff was attempting to perform was to couple the moving engine to the car. If he carefully and without negligence attempted to perform that duty, does it charge him with negligence as matter of law to show that he would not have been hurt if the engine had been stopped? If a conductor were going from one car to another in the performance of his duty, and was injured by reason of a defect in the car or in the roadbed, would it be a defense to his action for damages to say that he would not have been injured if he had stopped the cars before he attempted to pass from one car to the other? We think not, because such delay would be impracticable; and it is his duty to pass from one car to the other, and he is not expected to stop the train for that purpose. The evidence abundantly shows that neither the railway company nor its employes considered it the duty of the brakeman to stop the cars to

couple them. The fact is apparent, without evidence, that cars apart must be moved together to be coupled. The record shows that it was not unusual for the drawheads to get out of line, and a witness was asked:

"What was the rule with brakemen? Would they stop the engine, and shove it over, rather than use their foot?"

He answered:

"I never stop them; been railroading twenty years. If we stopped them every time for that, we could not get freight over the road."

It seems evident that when a drawhead is out of line by reason of defects, causing it to swing loose, lower, or to one side, if the engine is stopped to adjust it, the subsequent movement of the car, or probably gravity alone, would cause it to resume its original position out of line, and that the coupling at last could only be made by adjusting it as the car and the engine come together. The act of coupling or uncoupling cars while in motion, by going between them, though attended with more or less danger, has been often held, under the circumstances of the particular case, not to constitute negligence as matter of law. *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720, cited and approved in *Gardner v. M. C. R. R. Co.*, 58 Mich. 584, 592, 26 N. W. 301; *Eastman v. Railway Co.*, 101 Mich. 597, 60 N. W. 309; *Ashman v. Railroad Co.*, 90 Mich. 567, 51 N. W. 645; *Porter v. Railroad Co.*, 71 Mo. 66, 36 Am. Rep. 454; *Preston v. Central R. R. & Banking Co.*, 84 Ga. 588, 11 S. E. 143; *Curtis v. Railway Co.*, 95 Wis. 460, 70 N. W. 665. See, also, *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

There are two essential elements in contributory negligence—a want of ordinary care, and a causal connection between the act and the injury complained of. *Beach on Cont. Neg.* (2d Ed.) §§ 7, 19. As to the first, the question is: Should we hold as a matter of law that the plaintiff was negligent; that he did something which a prudent and reasonable man, under the circumstances proved, would not do? The evidence tends to show that the act which is charged to be contributory negligence was not unusual and was generally safe; that the plaintiff was not a trespasser or interloper, but was at the place to which his employment called him; and that he was violating no rule of the railway company, but, on the contrary, was pursuing the course usual with others engaged in its service. But if the plaintiff's act was one showing a want of ordinary care, before it could be deemed contributory negligence to defeat his action, it must appear to be a proximate cause (not the sole proximate cause) of the injury; that is, there must be a causal connection between the act and the injury. *Beach on Cont. Neg.* (2d Ed.) §§ 25, 26. Can the plaintiff's act be so considered? As has been said, the act was not unusual and was generally safe; and some of the evidence tended to show that under the circumstances he pursued the safest way to effect the coupling. When the act and the injury are not known by common experience to be naturally and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the

injury. Cooley on Torts (2d Ed.) 73; Beach on Cont. Neg. 32. We do not think the trial court erred in refusing to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence.

The second assignment of error is in these words:

"The court erred in charging the jury as follows:

"If you find the method or way he was using to make the coupling was one of the ways frequently or ordinarily used by brakemen under such conditions, and that he was at the time under the circumstances prudently using that way, he was not guilty of contributory negligence."

"And again:

"It is contended on the part of the defendants that the weather and frequent rains had caused such defects, if there was any; that is, if there were any defects in the condition of the track, the rainy weather was the cause of such defects, and the defendant is excusable. On this issue, there being no evidence one way or the other as to directly show when the defects in the track occurred, or how they were caused, or what was done to avoid such defects, I charge in the case presented you should not consider any excuse along that line offered by defendant."

This excerpt from the charge is excepted to and assigned as a whole as error, without specifying the part of it to which objection is made. The last paragraph of the charge is simply to the effect that a contention of the railway company, which there is no evidence to support, need not be considered by the jury. This is so clearly correct that we need not further comment on it. This, in fact, disposes of the whole assignment; for an objection to an entire charge, consisting of several propositions, some of which are right, should not be sustained, even if the charge contained errors not specifically pointed out. *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106; *Anthony v. L. & N. R. R. Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

But we find no error in the first paragraph of the charge, when construed with other portions of the general charge. Immediately preceding the paragraph in question, the court had instructed the jury:

"Now, considering the case, I suggest that you apply the evidence as to these issues. Was the plaintiff, under all the circumstances surrounding the time and place he was hurt, endeavoring with prudence and due care to effect the coupling? If you find favorable to him on this issue, it will follow that he was not guilty of contributory negligence."

And further, on the subject of contributory negligence, the court said:

"I charge you that if you find that the plaintiff, in attempting to effect a coupling of the engine to the car, assumed a dangerous position to do so, and there was any other practicable and safer way in which he might have made the coupling, he would then be guilty of contributory negligence, and would be debarred from a recovery."

We do not think that the charge, taken as a whole, asserts the objectionable doctrine that the habitual negligence of others would excuse the negligence of the plaintiff; and, however that may be, the language on which it is now sought to place that construction was not separately excepted to, nor is it specifically assigned as error.

The third assignment is that the trial court erred in refusing to grant a new trial. The granting or refusing of such motion, as has been fre-



quently decided by this court, was within the discretion of the lower court, and is not the proper subject of an assignment of error here.

The fourth assignment of error is in effect that the court erred in refusing to give 14 special charges requested by the railway company. The railway company was not entitled to have all these charges given to the jury, because we find by an inspection of the several bills of exception that many of them were properly refused, as shown by the record, for the reason that they were covered by the general charge. *Anthony v. L. & N. R. R. Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

The fifth assignment is that the court erred in entering a judgment in favor of the plaintiff. There was, of course, no error in entering a judgment on the verdict.

We are of the opinion that the record, as now amended by consent, contains no reversible error. The judgment of the Circuit Court is therefore affirmed.

PARDEE, Circuit Judge. I concur in reinstating the case on the consent of both parties, but I dissent on the merits. On his own showing and under the undisputed facts in the case, Prunty contributed to his own injury. In coupling the engine to the cars there was a safe way and a dangerous way. Of his own motion he selected the dangerous way. Thereby and therein he was injured. The couplers in use were automatic, and he knew that the drawhead on the car was out of alignment and out of order, and he knew, or ought to have known, that from bad weather and repairing then going on the track was uneven and irregular, and these facts particularly cautioned him, in trying to make the necessary coupling, not to resort to the dangerous way of mounting the rear of the engine (then going backwards at about six miles an hour) so as to push over the drawbar or drawhead of the engine to properly meet and connect with the drawhead of the car, which was out of order and out of alignment. All this is sound in principle and good law (*Bailey on Personal Injuries*, vol. 1, §§ 1121-1123) and well supported by adjudged cases. See *Cunningham v. Railroad Co.* (C. C.) 17 Fed. 882; *Gleason v. Railroad Co.*, 73 Fed. 647, 19 C. C. A. 636; *Morris v. Railway Co.*, 108 Fed. 747, 47 C. C. A. 661; *Dawson v. Railway Co.*, 114 Fed. 870, 52 C. C. A. 286; *Gilbert v. Railway Co.* (C. C.) 123 Fed. 832; *Hurst v. Railroad Co.*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; *Elmore v. Seaboard Air Line Co.* (N. C.) 42 S. E. 989; *Karrer v. Detroit Railway Co.*, 76 Mich. 400, 43 N. W. 370; *Central of Ga. Ry. Co. v. Mosely* (Ga.) 38 S. E. 350; *Alabama Ry. Co. v. Ritchie* (Ala.) 20 South. 49; *George v. Mobile Ry. Co.*, 109 Ala. 245, 19 South. 784.

The trial judge, in charging the jury, instructed them, over the objection of the defendant, as follows:

"If you find the method or way he was using to make the coupling was one of the ways frequently or ordinarily used by brakemen under such conditions, and that he was at the time under the circumstances prudently using that way, he was not guilty of contributory negligence."

Prunty's own witnesses testified, and there was no dispute about it, that to make such a coupling as the one in question the engine could

have been stopped and the drawheads aligned before backing the cars together, and that this method was without hazard to the brakeman. In my judgment, and as I understand the principles declared in the above-cited cases, no amount of usage justifies an employé, without superior orders and in the absence of extraordinary emergency, in taking a dangerous way to perform a duty when a safe one is at hand. The test of negligence on the part of the brakeman is not what other brakemen habitually and customarily do. They may be prudent or negligent; and after all, as said in *Dawson v. Railway Co.*, supra, "the inherent quality of an act is not changed, whether it is done by one or many." Habitually careless or negligent conduct on the part of many cannot make such conduct prudent in the eye of the law. In *Warden v. Louisville & N. R. Co. (Ala.)* 10 South. 279, 14 L. R. A. 552, the court said:

"The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence per se for persons to walk upon the track of railroads. Doubtless many persons are in the habit of using the track in this way. Yet it has never been supposed, and it cannot be the law, that such customs would convert the track, which the law declares to be per se a dangerous place, into a safe place. So a person may be in the habit of crossing railway tracks without stopping and looking and listening for approaching trains; yet we have never heard it suggested [that] such person, when he finally reaps the penalty of his lack of care, is, because of such habit, not guilty of contributory negligence as a matter of law. Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself."

As to some of the adjudged cases cited in the court's opinion, I have only to say that when the link and pin coupling was in use it was not negligent, as a matter of law, to step between moving cars to couple or uncouple them; but since the introduction and common use of automatic couplers, as in this case, I am confident that the rule is, and ought to be, that going between moving cars to couple or uncouple them is negligent as a matter of law. An act of Congress requires the introduction and use of automatic couplers, and it is common knowledge that, when in use, there is a distance of about two feet and a half between cars and a foot and a half between the wooden bumpers placed on the cars, and surely it requires no evidence nor controlling authority to show that to go between cars thus provided, when they are coming together, for the purpose of coupling, is extremely dangerous and decidedly negligent.

## FRANSEN et al. v. REGENTS OF EDUCATION OF SOUTH DAKOTA.

(Circuit Court of Appeals, Eighth Circuit. September 21, 1904.)

No. 2,012.

## 1. CONTRACTS—ACTION FOR BREACH—EQUITABLE ESTOPPEL AS DEFENSE.

The provision of Civ. Code S. D. § 1287, that "a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise," does not preclude the application of the doctrine of equitable estoppel to defeat an action for the nonperformance of a written contract where sufficient cause exists therefor, and such defense is, moreover, expressly recognized by section 1173.

## 2. SAME.

Where the failure of a state board to maintain full insurance on a public building while in course of construction, as required by the building contract, for the benefit of both parties, was induced by the objection of the contractors, who were chargeable with the expense, and their representations that they had procured sufficient insurance, made to officers and agents of the board, they are estopped to maintain an action against the board to recover their loss resulting from a fire on the ground of nonperformance of the contract.

## 3. SAME.

An architect employed by a state board to superintend the construction of a public building, and a local secretary of the board, having charge of financial matters connected with the building, represent the board in such sense that an estoppel in its favor may be created by statements made to them by the contractor with respect to insurance which the board was required by the contract to procure on the building, while in course of construction, in part for the contractor's benefit.

## In Error to the Circuit Court of the United States for the District of South Dakota.

This was an action by Nels P. Fransen and Hans J. Fransen, partners as N. P. Fransen & Co., against the Regents of Education to recover damages alleged to have been sustained because of the failure of the latter to procure and maintain for their benefit insurance upon a public building in course of erection at Aberdeen, S. D. The plaintiffs were contracting builders, the defendant a body corporate created by a law of South Dakota with power to sue and be sued, and having the management and control of the educational institutions of the state. A written contract was entered into between the parties for the erection of a normal and industrial school building. The specifications which were a part of the contract required the contractors to secure policies of insurance, payable in case of loss to the defendant to reimburse it for advance payments made on the contract; but the contract itself contained a provision requiring the defendant to maintain full insurance on the building and the materials about the premises for the benefit of both parties, as their respective interests might appear, the premiums to be paid by the contractors. In September, 1901, during the progress of the work, the contractors, at the suggestion of a representative of the defendant, procured insurance to the amount of \$5,000. On the 18th of the following December, the building, then in an incomplete condition, was almost totally destroyed by fire. No other insurance than that mentioned had been obtained. At that time the contractors had been paid the sum of \$11,000, while the value of the material which had been furnished and the labor expended by them upon the building was \$24,000. The proceeds of the policy of insurance which had been obtained was applied by the defendant toward the reconstruction of the building, and the contractors sustained a loss of \$13,000, against which there was no protection by insurance. They claimed that their loss was due to the neglect of the defendant to procure insurance as provided by the language of the contract, and upon that ground their action was instituted. It was not

denied that as a matter of law the provision in the contract superseded the provision in the specifications, but, notwithstanding this, it appears that prior to the time of the fire both parties proceeded upon the assumption that the initiative in the procurement of insurance rested upon the contractors. One of the defenses interposed by the defendant—and it is the one upon which the case finally turned—was that by reason of certain acts and declarations of Hans J. Fransen, the member of the contracting firm who had charge of the work, the plaintiffs were estopped from complaining of defendant's neglect to procure and maintain the insurance. In support of this defense evidence was offered and received tending to establish the following facts: E. W. Van Meter was the defendant's architect and superintendent of construction. The \$5,000 policy of insurance was procured by Hans J. Fransen at his suggestion about September 14, 1901. The latter complained of the excessive insurance rates. In the latter part of October Van Meter said to him that there ought to be more insurance, but Fransen said he hardly thought it was necessary, as the walls were newly plastered, the materials therein were wet, and the building was not then in condition to burn. He again complained of the high rate of premium. Van Meter again took up the subject of additional insurance early in November, when Fransen contemplated using artificial heat to dry the plastering, and for that purpose had placed coke and coal in the basement. He said to Fransen, "If you are going to put in fire there for the drying of the building, you had better get some more insurance," but Fransen objected to doing so, and said that with the introduction of the drying apparatus he would have a watchman, and that he thought that would be sufficient protection. He again mentioned the high rate of premium, and said that additional insurance was not needed. Van Meter informed Mr. Lincoln of one or more of these conversations.

Isaac Lincoln was the local secretary and general executive agent of the Board of Regents at Aberdeen, and the scope of his duties included the supervision of the financial phases of the work of construction and attention to the matter of insurance. In September, before any insurance was secured, he spoke to Fransen about it, and the latter replied: "I will take out \$5,000 insurance. Will that satisfy you?" Some time in October Mr. Lincoln said to him: "See here, Fransen, Van Meter says you do not want to take out more insurance. You must take out some more. There ought to be more insurance on the building." To this Fransen replied, "I have got all the insurance on the building that is necessary now." Shortly afterwards, in response to another demand by Lincoln that more insurance be obtained, he said: "That building won't burn. There is not much inflammable material in it;" and, further, that a good deal of the lumber was piled outside, and he did not see any need of taking any more insurance then. In the last week of November or the first week of December, shortly after the third estimate had been made, this conversation occurred: "Lincoln: Well, now, you go and take out some more insurance. Fransen: Lincoln, there is not any need of any insurance. I have got old man Johnson as a watchman. He is careful and all right, and will look after things. Lincoln: I do not believe that is safe, and before you get any more money I am going to have some more insurance. Fransen: I am satisfied with the insurance. I am not particular about the insurance. There is no need of insurance. Lincoln: Why are you not willing to take it out? Fransen: I have got the contract on a pretty close margin, and I do not want to blow in any money in insurance. The premiums are high, and I can better afford, as long as I have got a watchman, to take my chances." Fransen never receded from this position before the fire occurred.

Dr. F. A. Spafford was the president of the board of regents. On November 27th or 28th he inspected the grounds and building. In a conversation with Fransen, Dr. Spafford asked him, "Have you plenty of insurance on this building?" Fransen replied, "Yes, I am looking after that matter all right myself." Dr. Spafford testified that he relied on Fransen's statement.

The record shows some conflict in the evidence touching these conversations, but, as the verdict was for the defendant, it should be assumed that the jury gave credence to the foregoing recitals, and that Fransen made the declarations therein indicated.

Ambrose Tighe (O'Reilly & Burns and J. M. Lawson, on the brief), for plaintiffs in error.

Philo Hall, for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The written contract between the plaintiffs and the defendant cast upon the latter the duty of procuring the insurance upon the building during the period of construction. The insurance protection was to be for their joint benefit, but at the cost of the former. The plaintiffs (now plaintiffs in error) rely upon a provision of the Civil Code of South Dakota that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise" (section 1287; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181; *Barnard & Leas Mfg. Co. v. Galloway*, 5 S. D. 205, 58 N. W. 565), and contend that the defendant is seeking to alter the contract and to escape its obligations thereunder by proof of oral declarations which do not meet the statutory requirements. In view of the acts and statements of one of the plaintiffs, which we have recited, and the effect of which is chargeable to both of them, the Circuit Court by appropriate instructions submitted to the jury the question whether the plaintiffs were not estopped from complaining that the defendant had failed to procure the insurance. The jury determined that question in favor of the defendant. The provision of the Code above quoted relative to the alteration or modification of a written contract does not preclude the application of the doctrine of equitable estoppel when sufficient cause therefor exists. More than this, the course of the Circuit Court in this particular was justified by another provision of the laws of that state confirmatory of the rule already existing, and which, so far as material to the matter in hand, is as follows:

"The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: \* \* \* When the debtor is induced not to make it, by an act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time." Rev. Civ. Code, § 1173.

As to this the plaintiffs contend that a necessary and essential element in an equitable estoppel consists in an inducement extended by the conduct of the person to whom the estoppel is sought to be applied, and the reliance thereon by him who invokes the application of the doctrine; and that in the case at bar there is wholly lacking any evidence that the defendant, its officers or representatives, were led to refrain from procuring the insurance because of the conduct of the plaintiffs. There is thus presented in narrow compass the principal question in this case: Was there a reliance by the defendant, its officers or representatives, who were charged with the protection of its interests, upon a course of conduct of the plaintiffs which was intended to induce them not to obtain the in-

insurance or which naturally tended to that result? This question should be answered in the affirmative, and the requisite element of a complete estoppel is thereby supplied. That there was an intentional purpose of inducement in the repeated declarations of that one of the plaintiffs who had immediate charge of the work of construction is clearly shown by the record. He protested vigorously and continuously against the procurement of additional insurance, the cost of which, under the contract, was chargeable to his firm. He assigned a number of reasons for his position, which seemed at the time to be plausible. In so far as the insurance authorized by the contract was for the protection of the plaintiffs themselves, and that is the only phase of the matter with which we are now concerned, one of the plaintiffs declared that they did not need it, could not afford it, and did not want it. In the face of his persistent opposition it would have been an unusual and exceptional act had the defendant forced upon the plaintiffs, at their expense, a protection which they did not desire. It is equally clear that these declarations naturally tended to produce the result which was desired and sought by the plaintiffs, namely, that no more insurance be procured which they would have to pay for. And it is not perceived that it is material or important as affecting the conclusion that both parties acted upon the supposition that the mere duty of going to the office of an insurance agent and obtaining the policy or policies of insurance rested upon the plaintiffs rather than upon the defendant as provided by the contract.

The failure to keep the building adequately insured was due wholly to the conduct of the plaintiffs, and this necessarily signifies reliance on the part of the defendant upon such conduct. In order to create an estoppel in pais it is not necessary in every case that there be an affirmative declaration by one party that he relied upon the acts of the other. Such reliance may appear as an irresistible inference from established facts and circumstances. In the case before us the entire cost and expense of protection of the parties from loss or damage by fire was chargeable to the plaintiffs, and there could have been, in the very nature of the situation, no other motive on the part of the representatives of the defendant in refraining from procuring insurance upon the uncompleted building than that caused by the plaintiffs' expressed opposition thereto. Moreover, it may be observed that about three weeks before the fire the president of the defendant, after an inspection of the premises, inquired of one of the plaintiffs whether he had sufficient insurance upon the building, and the latter replied, "Yes, I am looking after that matter all right myself;" and the president testified that after that assurance he made no further inquiry, and relied on the statement. The verdict of the jury is conclusive as to the facts, and we are of the opinion that ample justification may be found in them for the enforcement of an equitable estoppel, the rules governing which were sufficiently expressed in the instructions given by the Circuit Court.

Criticism is made of a paragraph of the instructions relating to the requisite conditions of an estoppel. It is true that a few words were omitted — doubtless inadvertently — and that the omission

somewhat impaired the sense of that part of the instructions, but almost immediately thereafter the court accurately and correctly stated the converse of the proposition. We are of the opinion that, taking the charge as a whole, the jury could not have been misled as to the true rule by which they were to be guided. Complaint is also made of the admission of the testimony of the architect and superintendent of construction, of the local secretary, and of the president of the defendant as to the declarations of one of the plaintiffs regarding the insurance. These men sustained such a relation to the defendant that it was clearly their province and within the scope of their powers and duties to take up and discuss with the plaintiffs the matters connected with the performance by them of their contract, and to see to it that they complied with its stipulations. No debt or obligation of the defendant was to be created. The matter of insurance was simply one of those details of the contract the burden of which was on the contractors. The architect and superintendent, the local secretary and the president, stood in the place of and represented the defendant corporation. What was said to them was in legal effect said to the defendant. Their reliance thereon was the reliance of their principal, and the protective effect of the resulting estoppel inured to its benefit.

The judgment of the Circuit Court will be affirmed.

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STEVENS et al. v. GRAND CENTRAL MIN. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1904.)

No. 1,827.

1. MINING CLAIMS—CONSTRUCTIVE TRUST—RELOCATION BY CO-OWNER.

The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect to the joint estate, and that a distinct title acquired by one will inure to the benefit of all, applies with full force to the joint owners of a mining claim; and a co-owner who amends the location notice, relocates the claim, or otherwise procures the issuance of a patent in his own name, will hold the title in trust for all; nor will the trust be avoided, or its enforcement defeated, merely because a stranger to the original claim joins with such joint owner in the relocation, and acquires title jointly with him to the relocated claim.

2. SAME—FAILURE TO ADVERSE APPLICATION FOR PATENT.

Rev. St. § 2325 [U. S. Comp. St. 1901, p. 1429], providing for the filing of adverse claims on the application for a patent to a mining claim, has reference to adverse claims arising from independent and conflicting locations, and not to a controversy between co-owners or others claiming under the same location; and the fact that one owner did not adverse the application of his co-owner does not affect his right to establish and enforce a trust in the patented claim.

3. EQUITY—DEFENSE OF LACHES IN FEDERAL COURT—FOLLOWING STATE STATUTE.

A federal court of equity is not bound by a state statute of limitations, and, while it usually acts or refuses to act in analogy to it, will not follow such statute where unusual conditions or extraordinary circumstances render it inequitable.

## 4. SAME.

One of two joint owners of mining claims, without the knowledge of his co-owner and in fraud of his rights, joined with another in making a relocation of the property, and in applying for a patent therefor. On learning of such action the excluded owner brought suit to establish his interest in the amended claim, which was pending at the time of his death, and was thereafter dismissed without trial, at the instance of defendants, before the appointment of his administrator, who after his appointment instituted a new suit for the same purpose, which was dismissed without prejudice to another suit. Decedent's interest having been transferred to complainants, they, within nine months after the dismissal of the suit brought by the administrator, and within five months after the termination of the administrator's possession, instituted the present suit to recover such interest, and for an accounting. During all the time before the transfer to complainants, except the interval between decedent's death and the appointment of his administrator, one or the other was in the actual possession of the property, and performed the assessment work thereon required by law. *Held* that, under the unusual circumstances shown, complainants would not be denied relief in a federal court of equity on the ground of laches, regardless of the statute of limitations of the state.

Appeal from the Circuit Court of the United States for the District of Utah.

This was a suit in equity to enforce a constructive trust in favor of the appellants in a mining claim patented by the United States to Henry Kohl and Charles H. Blanchard, two of the appellees. The suit was commenced March 11, 1901, and the case made by the material allegations of the amended bill is substantially as follows:

Subject to the paramount title of the United States, one Timothy Kelly and the defendant Kohl were the joint and equal owners, entitled to the possession and in actual possession, of four mining claims in the Tintic mining district, Juab county, Utah. May 23, 1889, while this situation continued, the defendants, Kohl and Blanchard, for their own benefit, and for the purpose of excluding Kelly from any interest in these claims, amended the location notice of one of them, and restaked it upon the ground in such manner as to embrace therein portions of each of the four claims. They then caused the amended claim to be surveyed, made application October 1, 1889, at the United States land office, for the issuance to them of a patent therefor, and obtained a patent January 9, 1892. They fraudulently concealed the amended location, survey, and application for patent from Timothy Kelly until about January 23, 1891, when he evidently learned of these proceedings, although it is not expressly so stated, and, with others not named, commenced a suit in one of the territorial courts of Utah against Kohl and Blanchard to establish his interest in the amended claim. February 27, 1893, during the pendency of that suit, Timothy Kelly died. Thereafter, without his estate being in any manner represented, a dismissal of the suit was procured by Kohl and Blanchard, without a trial or determination of its merits. July 12, 1895, Daniel Kelly became administrator of the estate of Timothy Kelly, and in 1901 the estate was finally settled, and the administrator was discharged. October 1, 1899, the administrator, with others, commenced a suit in the district court of Juab county against the present defendants to recover the interest in the property held by Timothy Kelly in his lifetime, and to recover for ores extracted therefrom; but the suit was dismissed, without prejudice to a new one, about June 30, 1900. Up to the time of his death Timothy Kelly remained in the actual possession of said claims, working and developing the same, and doing upon each the annual work required by the laws of the United States and the rules and regulations of the mining district. Daniel Kelly, immediately after his appointment as administrator, went into possession of the claims on behalf of the estate of Timothy Kelly, and continued in such possession, working and developing the claims, until November 1, 1900, when the interest owned by



Timothy Kelly in his lifetime was conveyed to the complainants, who are now the owners thereof, and of all rights of action for ores extracted therefrom. The mining company acquired an interest in the patented claim from Kohl and Blanchard, with full knowledge of the rights of the complainants and their predecessors in interest; and, since the issuance of the patent, large quantities of valuable ores have been extracted from the claim by the defendants, for which they refuse to account. The complainants offer to pay their proportionate share of the moneys expended in procuring the patent, and pray that the defendants be declared trustees for the complainants in respect of the title to an undivided one-half of the patented claim, and be required to convey the same to the complainants, and to pay them for their share of the ores extracted.

The defendants severally demurred to the amended bill, assigning as cause that the bill made no case for equitable relief, and that the suit was barred by the statute of limitations of the state and by inexcusable laches. The demurrers were sustained, and this appeal is prosecuted from a decree dismissing the bill.

Harrison O. Shepard (Richard B. Shepard, on the brief), for appellants.

W. H. Dickson (A. C. Ellis and A. C. Ellis, Jr., on the brief), for appellees.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect of the joint estate, and that a distinct title acquired by one will inure to the benefit of all, applies with full force to the joint owners of a mining claim. A co-owner who amends the location notice, relocates the claim, or procures the issuance of a patent in his name, will not be permitted to thus exclude the other owners and appropriate the claim to himself, but will be declared to hold the right or title thereby acquired in trust for all. *Lindley on Mines* (2d Ed.) §§ 331, 398, 406, 728, 788; *Turner v. Sawyer*, 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; *Franklin Mining Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016, 55 Am. St. Rep. 118; *Hallack v. Traber*, 23 Colo. 14, 46 Pac. 110; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Suessenbach v. Bank*, 5 Dak. 477, 41 N. W. 662; *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590, s. c. 12 S. D. 7, 80 N. W. 135, 50 L. R. A. 184; *Gore v. McBrayer*, 18 Cal. 582; *Morton v. Solambo Copper Mining Co.*, 26 Cal. 527; *Hunt v. Patchin* (C. C.) 35 Fed. 816; *Royston v. Miller* (C. C.) 76 Fed. 50; *John C. Teller*, 26 Land Dec. Dep. Int. 484; *Samuel H. Auerbach*, 29 Land Dec. Dep. Int. 208. Nor will the trust be avoided or its enforcement be defeated merely because a stranger to the original claim participates with the unfaithful co-owner in the proceedings to wrongfully exclude his companions in interest, and jointly with him acquires the title to which they are entitled.

It is urged that the present suit cannot be maintained because the complainants' predecessor in interest, Timothy Kelly, did not adverse

the application of Kohl and Blanchard for a patent to the amended claim. The point is not well taken. In prescribing the manner of obtaining the government title to a mining claim, the statute directs that notice of the application be published and posted for the period of 60 days, and declares:

"If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Rev. St. § 2325 [U. S. Comp. St. 1901, p. 1429].

The statute has reference to an adverse claim arising from independent and conflicting locations of the same ground, and not to a controversy between co-owners or others claiming under the same location. *Lindley on Mines* (2d Ed.) § 728; *Turner v. Sawyer*, 150 U. S. 578, 587, 14 Sup. Ct. 192, 37 L. Ed. 1189; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911; *Malaby v. Rice*, 15 Colo. App. 364, 368, 62 Pac. 228; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Suessenbach v. Bank*, 5 Dak. 477, 501, 41 N. W. 662; *McCarthy v. Speed*, 12 S. D. 7, 80 N. W. 135, 50 L. R. A. 184; *Hunt v. Patchin* (C. C.) 35 Fed. 816, 820; *Thomas v. Elling*, 25 Land Dec. Dep. Int. 495, s. c. 26 Land Dec. Dep. Int. 220; *Coleman v. Homestake Min. Co.*, 30 Land Dec. Dep. Int. 364. The purpose of the present suit is not to defeat the amended claim, or to establish a superior right under an independent and conflicting location, but to establish and enforce a trust in the amended claim arising out of the circumstances surrounding its origin and the proceedings by which it was carried to patent.

By the statutes of Utah the time for commencing an action for the recovery of real property is limited to seven years after the plaintiff or his predecessor was seised or possessed of the property, the time for commencing an action for relief on the ground of fraud is limited to three years after the discovery of the facts constituting the fraud, and the time for commencing actions not otherwise provided for—which are claimed to include an action to enforce a constructive trust—is limited to four years. Rev. St. 1898, §§ 2859, 2877, 2883. In the view which we take of the special circumstances of the present suit, it will not be necessary to inquire which of these limitations is intended to embrace actions like it in character.

Statutes of limitation, applied in courts of law, are inflexible and framed upon the theory that mere lapse of time, irrespective of other considerations, should bar the claim, while the doctrine of laches, applied in courts of equity, is sufficiently flexible to give reasonable effect to the special circumstances of any case, and rests not alone upon the lapse of time, but upon the inequity of permitting the claim to be enforced, because of some change in the condition or relations of the property or the parties. *Hammond v. Hopkins*, 143 U. S. 224, 250, 12 Sup. Ct. 418, 36 L. Ed. 134; *Townsend v. Vanderwerker*, 160 U. S. 171, 186, 16 Sup. Ct. 258, 40 L. Ed. 383; *Ward v. Sherman*, 192 U. S. 168, 176, 24 Sup. Ct. 227, 48 L. Ed. 391; *Bryan v. Kales*, 134 U. S. 126, 135, 10 Sup. Ct. 435, 33 L. Ed. 829. In the application of the doc-

trine of laches, courts of equity are not bound by, but usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. If unusual conditions or extraordinary circumstances make it inequitable to permit the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the analogous statute, the chancellor will not follow the statute, but will determine the case in accordance with the equities which arise from its own conditions or circumstances. When a suit is brought within the time limited by the analogous statute, the burden is upon the defendant to show, either from the face of the bill or by his answer, that unusual conditions or extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show by suitable allegations in his bill that it would be inequitable to apply it to his case. *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 85 Fed. 55; *Ide v. Trorlicht, etc., Co.*, 53 C. C. A. 341, 352, 115 Fed. 137; *United States v. Chicago, etc., Co.*, 54 C. C. A. 545, 116 Fed. 969; *Boynton v. Haggart*, 57 C. C. A. 301, 312, 120 Fed. 819; *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257, 269; *Brown v. Arnold (C. C. A.)* 131 Fed. 723, 727; *Richardson v. Olivier*, 44 C. C. A. 468, 472, 105 Fed. 277, 53 L. R. A. 113.

It is insisted that the statute of limitations of Utah is, in terms, applicable to suits in equity, and therefore that the Circuit Court sitting in that state was required to act in obedience to the state statute, and not upon mere analogy to it. The rule is otherwise. While the courts of the United States are required by the statutes creating them to accept as rules of decision in trials at common law the laws of the several states, except where the Constitution, laws, and treaties of the United States otherwise provide, their jurisdiction in equity is to be exercised according to rules and principles applicable alike in every state, and cannot be impaired by the laws of the respective states in which they sit. *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569.

The case made by the amended bill shows unusual conditions and extraordinary circumstances, which make it inequitable to forbid the maintenance of this suit because of the lapse of time. The wrongful proceedings to exclude Timothy Kelly from an interest in the property in controversy were begun by the unfaithful co-owner, Kohl, and his confederate, Blanchard, May 23, 1889, and resulted in the issuance to them of a patent January 9, 1892. These proceedings were fraudulently concealed from Kelly until about January 23, 1891, and then, by his suit against Kohl and Blanchard to establish an interest in the amended claim, he declared his opposition to their purpose to appropriate the property to themselves, and asserted his purpose to insist upon the rights of a co-owner. After his death that suit was dismissed under circumstances which prevented it from creating an inference of an abandonment of the rights asserted therein, or operating as a bar to another suit. In a suit against the present defendants brought in 1899 in the same interest, the insistence of the first suit was reiterated. That suit was dismissed, without prejudice to a new one, less than one year before the present suit was commenced. Excepting the interim of upwards

of two years between the death of Kelly and the appointment of an administrator of his estate, upon whom the right to the possession of his property, real and personal, was cast by the laws of Utah (Rev. St. 1898, § 3912), Kelly and the administrator, in turn, were in the actual possession of the property in controversy, working and developing the same in the assertion of the right of a co-owner, from May 23, 1889, when the wrongful proceedings to exclude Kelly from an interest therein were begun, until November 1, 1900, a period of over eleven years. The present suit was commenced March 11, 1901, within five months after that possession terminated. The title obtained through the patent is now held by Kohl and Blanchard, who perpetrated the fraud, and by the mining company, which took with full knowledge of the rights of Kelly and his successors in interest. These conditions and circumstances effectually negative any acquiescence by Kelly or his successors in interest in the attempted appropriation of his interest in the property, satisfactorily establish that there could not have been any reasonable belief on the part of any of the defendants that Kelly's interest had been abandoned by him or his successors in interest, and unmistakably show that Kelly, in his lifetime, and his administrator thereafter, were permitted to exercise such substantial rights of ownership over the property as were reasonably calculated to induce a relaxation in the efforts which otherwise should, and probably would, have been made to obtain a judicial determination of the rights of the parties in the patented claim. *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728; *Massenburg v. Denison*, 18 C. C. A. 280, 287, 71 Fed. 618; *Hayes v. Carroll*, 74 Minn. 134, 139, 76 N. W. 1017. To hold that the case made by the amended bill, which stands admitted by the demurrer, is barred by laches, would be a perversion of the settled rule that the doctrine of laches is applied to promote, not to defeat, justice.

The decree is reversed, and the case is remanded to the Circuit Court, with a direction to overrule the demurrers to the amended bill, and to take such further proceedings as may not be inconsistent with the views herein expressed.

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In re NYE.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1904.)

No. 32.

**1. BANKRUPTCY—HOMESTEAD—RIGHT OF POSSESSION.**

Under the homestead exemption law of Colorado (Mills' Ann. St. Colo. §§ 2132-2139), which exempts to the head of a family a homestead not exceeding \$2,000 in value, while occupied by him, but provides that, on the affidavit of a creditor that the homestead is of greater value, it may be sold as in ordinary cases, and, if it realizes more than \$2,000, that amount shall be paid to the owner, and the excess applied on the creditor's demand, but, if it sells for less, the sale shall be ineffective, a trustee in bankruptcy is not entitled to possession of the bankrupt's homestead, whatever may be its alleged value; the bankrupt being entitled to possession until its sale under an order of court made pursuant to the statute.

**2. SAME—WAIVER OF EXEMPTION IN MORTGAGE.**

The waiver of homestead exemption in a mortgage given by a bankrupt is in favor of the mortgage creditor alone, and does not inure to the

benefit of others. If the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption, and the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance given him by statute in case of sale.

#### On Petition for Review.

George P. Costigan, Jr. (Milton R. Welch and Edward P. Costigan, on the brief), for petitioner.

Thomas D. Cobbey (Philo B. Tolles, on the brief), for respondent.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge. This is a petition for a review of an order of the District Court in Colorado requiring the surrender to the trustee in bankruptcy of the possession of lands occupied by the bankrupt and his family under the homestead exemption laws of that state. The lands embrace a farm of 165 acres, worth not exceeding \$9,000, appraised at \$6,750, and incumbered by a mortgage securing the payment of a debt of \$7,500, with more than \$500 of accrued interest, and containing a waiver of the homestead exemption. The right to a homestead exemption, the proper designation of the lands as a homestead according to the laws of the state, and the due assertion of the exemption in the bankruptcy proceedings, are conceded. The single question is, does the fact that the value of the lands exceeds \$2,000 authorize the bankrupt court to take from the bankrupt and his family the possession and occupancy of the lands as an exempt homestead, otherwise than by a sale of the lands for more than \$2,000, and a direction for the payment of that sum to the bankrupt out of the proceeds of the sale? The answer must be found in the laws of the state. The express terms of the bankruptcy act are such that it does not affect the allowance to bankrupts of the exemptions which are prescribed by state laws, and does not invest the trustee in bankruptcy with the title to property which is exempt. Act July 1, 1898, c. 541, §§ 6, 70, 30 Stat. 548, 565 [U. S. Comp. St. 1901, pp. 3424, 3451]; *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *Ingram v. Wilson*, 60 C. C. A. 618, 125 Fed. 913; *In re Irvin*, 57 C. C. A. 147, 120 Fed. 733; *Huenergardt v. Brittain Co.*, 53 C. C. A. 505, 116 Fed. 31; *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968. The provisions authorizing bankrupt courts to determine all claims of bankrupts to their exemptions, and directing trustees to set apart the bankrupt's exemptions (sections 2, 47, 30 Stat. 545, 557 [U. S. Comp. St. 1901, pp. 3420, 3438]), disclose no purpose to render the exemptions less beneficial than intended by state laws, but are in harmony with the purpose of the act, disclosed in other provisions, to make those laws the measure of the extent and nature of the exemptions, as well as of the right to them.

By the laws of Colorado (Mills' Annotated Statutes), every householder, being the head of a family, is entitled to a homestead, exempt from execution and attachment (section 2132), which may consist of a house and lot or lots in any town or city, or of a farm consisting of any number of acres, so that the value does not exceed \$2,000 (section 2136). The homestead must be designated by causing the word "homestead"

to be entered in the margin of the recorded title (section 2132), and "shall only be exempt \* \* \* while occupied as such by the owner thereof, or his or her family" (section 2134). Upon the death of the owner the homestead descends to the widow or husband or minor children, and, if there be none of these, it is liable for the debts of the deceased (section 2135). Where the homestead is sold, no judgment or other claim against the owner is a lien against the same in the hands of a bona fide purchaser for value, and any subsequent homestead acquired with the proceeds of the sale is exempt in like manner as the one sold. Section 2139. If any creditor is of opinion that the homestead is of greater value than \$2,000, he may, on filing an affidavit of that fact with the clerk of the district court, proceed against the homestead as in ordinary cases, and, if it sells for more than \$2,000 and costs, the excess is to be applied to the payment of the demand of the creditor, "but in all such cases the sum of two thousand dollars, free of charge or expense, shall be paid to the owner of the homestead; and in case the said homestead shall not sell for more than two thousand dollars and costs, the person instituting the proceeding shall pay all costs of such proceeding and the said proceeding cease and not affect or impair the rights of the owner of the homestead." Section 2138.

The decisions of the Supreme Court of the state are to the effect that the purpose of this legislation is to preserve the home for the family, subject to three restrictions: One, that the designation of the homestead shall be noted upon the recorded title; another, that the exemption shall continue only during the homestead occupancy; and another, that, if the lands so designated and occupied exceed \$2,000 in value, this does not avoid the exemption or the right of homestead occupancy, or require a new designation of some portion of the premises not exceeding the prescribed value, but any creditor making oath that the lands are of greater value than \$2,000 may have them sold to satisfy his claim, with the qualification that, if they do not sell for more than \$2,000 and costs, the sale will be of no effect, and, if they do sell for more, that \$2,000 thereof is to be paid to the homestead debtor, that he may obtain therewith another homestead, to be likewise exempt. *Barnett v. Knight*, 7 Colo. 365, 370, 374, 3 Pac. 747; *McPhee v. O'Rourke*, 10 Colo. 301, 307, 15 Pac. 420, 3 Am. St. Rep. 579. See, also, *Dallemand v. Mannon*, 4 Colo. App. 262, 267, 35 Pac. 679; *Copeland v. Bank*, 13 Colo. App. 489, 59 Pac. 70; *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349.

No statement or proof of the value of the homestead is required to be made when it is designated. The value being largely matter of opinion, impossible of certain ascertainment and likely to change, the debtor and his family would receive uncertain or no protection from the exemption if it could be wholly avoided by showing that at the time of the designation of the homestead, or at any subsequent period, its value was, in the opinion of others, in excess of the amount prescribed. Upon the other hand, the exemption would operate unreasonably and unjustly against creditors if the homestead were permanently exempted, irrespective of its value. In recognition of this, the several provisions of the statute are construed to mean that a homestead designated and occupied as such becomes and remains exempt until by a judicial sale,

had at the instance of a creditor, more than the prescribed amount with costs is realized therefrom, when the excess is to be applied to the demand of the creditor, and the prescribed amount is to be paid to the debtor, free of charge or expense, to enable him to acquire another homestead.

Thus it is said in *Dallemand v. Mannon*, *supra* :

"Our homestead act does not fix the quantity of land which may be held as a homestead. It is the value, and not the amount, which is limited; and, where a creditor is of the opinion that the value is greater than the debtor's right, he may, by taking the steps prescribed, have it all sold, and if it brings more than \$2,000 he will get the excess; but there is no setting apart of any separate portion to the debtor, and calling that the exemption to which the law entitles him."

The same view is expressed by the Supreme Court of the state in *Barnett v. Knight*, *supra*. In that case, after indicating that the conveyance of an exempt homestead not exceeding \$2,000 in value could not be fraudulent as to creditors, the court said :

"Of course, when the value of the property exceeds the exemption allowance, the creditor is interested; yet in such a case it by no means follows that, if a conveyance were set aside for fraud at the suit of creditors, the debtor would be estopped from still claiming and holding the exemption privilege acquired before the fraudulent transfer. \* \* \* Section 1637 (2138) provides for cases where the premises exceed in value the exemption allowance of \$2,000. The creditor may sell the same under his execution, but he is required to pay the debtor this amount from the proceeds. He is only entitled to apply to the discharge of his demand the surplus, after paying all costs, and \$2,000 to the exemption claimant."

The right to occupy the homestead for homestead purposes is an inseparable part of the exemption, because its purpose is to protect such occupancy, and because when that is voluntarily discontinued the exemption ceases. It is clear, therefore, that the bankrupt has a homestead exemption in these lands, which antedates the bankruptcy proceedings, and that this exemption carries with it a right of homestead occupancy, which, like the exemption itself, can be terminated only by a sale of the lands for more than the prescribed amount and costs, when the exemption will be transferred to the proceeds of the sale.

Doubtless the bankrupt court has authority, upon a showing that the value of the homestead exceeds the mortgage debt and the exemption allowance, to direct a sale of the homestead, and—depending upon the amount realized at the sale—to give effect to the sale, or otherwise, as provided in the state statute; but it cannot otherwise terminate the homestead occupancy against the objection of the bankrupt. Possession of the homestead premises by the trustee in bankruptcy is not a prerequisite to such a sale.

The waiver of the exemption in the mortgage is in favor of the mortgage creditor alone, and does not inure to the benefit of others. If in other respects the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption, and the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance. *Waples, Homestead & Exemption*, 551; *Brown v. Cozard*, 68 Ill. 178; *Colby v. Crocker*, 17 Kan. 527; *McArthur v. Martin*, 23 Minn. 74.

In the course of the argument, we were asked to say, when the homestead exceeds the prescribed value, whether the bankrupt is entitled to growing crops, and whether he may rent portions of the homestead and retain the rents. As these questions do not arise upon the present petition, we think their consideration should be deferred until there is occasion for their decision.

The order of the District Court is reversed, with costs.

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BROADMOOR LAND CO. v. CURR et al.

(Circuit Court of Appeals, Eighth Circuit. September 15, 1904.)

No. 2,112.

1. EMINENT DOMAIN—REMOVAL OF CONDEMNATION PROCEEDINGS INTO FEDERAL COURT—CONFORMING SUPERSEDEAS TO STATE STATUTE.

Where a proceeding to condemn real estate, or an easement therein, under the power of eminent domain, is removed from a state court into a Circuit Court of the United States, and after compensation has been ascertained a writ of error is prosecuted from the judgment, any supersedeas obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the state court; and, where the state statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the supersedeas in the federal court will be modified to conform to such provision.

2. SAME—PROCEEDINGS TO CONDEMN EASEMENT IN IRRIGATION DITCH—COLORADO STATUTE.

The Colorado statutes relating to condemnation proceedings under the power of eminent domain, including Mills' Ann. St. § 1728, which gives the petitioner the right to proceed with the work on paying the compensation awarded into court, notwithstanding proceedings for review, is applicable to proceedings to condemn an easement through an existing ditch for irrigation purposes, brought under the statute of 1881 (Sess. Laws 1881, p. 164).

In Error to the Circuit Court of the United States for the District of Colorado.

On motion to modify supersedeas.

This proceeding was instituted in the district court of El Paso county, Colo., by John Y. Curr, the defendant in error, against the Broadmoor Land Company, the plaintiff in error, to condemn the right to enlarge and use a portion of the Myers Ditch, so called, which is owned by plaintiff in error, and also the right of way for a new ditch over and across lands of plaintiff in error to convey water for irrigation purposes to lands of defendant in error. On petition of the plaintiff in error, the proceeding was removed to the United States Circuit Court for the District of Colorado. Upon trial, the jury returned a verdict assessing the damages of the plaintiff in error at \$2,500, and thereupon the court entered a decree granting to the defendant in error the rights, right of way, and easement petitioned for, upon payment into court of the sum so assessed and costs; and it was, in effect, conceded at the argument that these sums were paid to the clerk of the court within the time limited in said decree. A writ of error was taken to this court from said decree, and a supersedeas obtained upon the filing and approval of a bond in the sum of \$3,000. The defendant in error now moves the court for an order modifying the said supersedeas so that he may, pending the determination of said writ of error, and at once, have the right to enter into the possession



of said land, and use and enjoy the same, and the rights and easements granted by said decree.

K. C. Schuyler, for the motion.

Charles W. Waterman, opposed.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

Ordinarily, where real estate or an easement therein is proposed to be taken under the exercise of the power of eminent domain for a purpose for which the law permits it to be so taken, the only matter to be contested is the amount of compensation to be paid. And when that amount, after full hearing, has been fixed by a jury, it seems just, and it is usually provided by statute, that the proposed enterprise shall not be delayed by proceedings on writs of error, in case the petitioner pays into court the amount awarded by the verdict and costs. The amount fixed by the jury is presumably just, and the party invoking the power, and who goes on with the enterprise, will have to pay any additional sum that may ultimately be awarded to the landowner. The Colorado statute gives this right, and, had the proceeding remained in the state court, no supersedeas would have been effectual to delay the prosecution of the enterprise. 1 Mills' Ann. St. § 1728. Where such a proceeding is removed from a state court to a Circuit Court of the United States, and after compensation has been ascertained, if a writ of error is prosecuted, any supersedeas obtained should be modified so that the petitioner in the proceeding to condemn shall have the same rights which he would have had if the proceedings had remained in the state court. *East Tennessee, etc., Ry. Co. v. Southern Telegraph Co.*, 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746. A different case might be presented if upon the motion to modify the supersedeas it was made to appear that the property or easement proposed to be taken was already devoted to an inconsistent public use, or was of a character which the law would not permit to be so taken.

The Colorado statute of 1881 (Sess. Laws 1881, p. 164) is intended to prevent improved lands from being needlessly cut up by many ditches to lead water to lands of other owners. It provides that, where there is one such ditch, any other person seeking to lead water across the same land must do so by occupying the same ditch, if practicable. The case of *Downing v. More*, 12 Colo. 316, 20 Pac. 766, holds that this statute does not apply to a private ditch wholly on the land of a proprietor, and used only to irrigate that land. The Myers Ditch is not of that character. It is not used to irrigate the land through which it passes, but to convey water beyond that land to the lands of the Broadmoor Company and of its grantees beyond the land through which that ditch passes. It is true that the Broadmoor Company, instead of acquiring an easement to construct and maintain the Myers Ditch, purchased in fee simple the situs of that ditch, a strip of land 25 feet in width; but its use is just the same—not to irrigate the tract through which it passes, but to convey water to lands beyond that tract. The other case cited (*Junction Creek & N. D. D. & I. Ditch Co. v. Du-*

rango, 21 Colo. 194, 40 Pac. 356) is not in point, and merely holds that the irrigation statutes do not apply to ditches carrying water to towns for urban purposes.

The Colorado statutes relating to the exercise of the power of eminent domain apply to cases arising under the statute of 1881 above referred to. That statute grants and limits the right to enter upon and use the property of another for the very purpose for which the power of eminent domain may be exercised, and such exercise under the general provisions of the statutes relating to that subject affords the appropriate and only way for securing the rights granted by the statute of 1881.

The motion is granted, and the supersedeas is, pending the final determination of the writ of error, so modified that it shall not prevent the defendant in error from entering upon the land, right of way, and easement as granted to him by said decree of the Circuit Court.

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NIVENS v. NIVENS.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1904.)

No. 2,004.

1. ADMINISTRATOR—ACCOUNTING—BUSINESS CONDUCTED FOR ESTATE.

Where the owner of a possessory right in Indian lands of the Cherokee Nation operated a ferry thereon, which, although conducted under a periodical license, by the usages and customs of the nation was recognized as appurtenant to the land, its operation by his widow and administratrix after his death, although under licenses granted in her own name, must be regarded as having been for the benefit of the estate, and she is chargeable with the income therefrom.

2. SAME—ACCOUNTABILITY TO HEIRS.

Where the son of a decedent during his lifetime received from his mother, who was administratrix, far more than his share of the income from the estate, which was still undivided, the excess may be charged against income accruing after his death, in reduction of the amount which would otherwise be payable to his heirs.

3. SAME.

The widow of a decedent, who was left with small children, continued to conduct the farm and business of her husband, and, after paying his debts, raised and educated her children, and during the lifetime of a son, who was dissolute, gave him money largely in excess of the amount to which he was legally or equitably entitled from the estate, which had not been divided. *Held*, that his widow, who was his only heir, was not entitled to require his mother, as administratrix of the estate, to account to her for his proportionate share of the income received after his death.

Appeal from the United States Court of Appeals in the Indian Territory.

For opinion below, see 64 S. W. 604, 76 S. W. 114.

This suit was brought in the United States Court in the Indian Territory, Northern District, by Bettie Nivens against Julia Nivens, for the partition of a tract of land lying in the valley of the Arkansas river, and within the boundaries of the Cherokee Nation, and for an accounting of the rents and profits thereof and of a ferry property which was claimed to be appurtenant to the realty. The title to the land—about 150 acres—rested in the Cherokee Nation, a possessory right therein being held by one Moses Nivens at the time

of his death in 1871. Moses Nivens was a citizen by blood of the Cherokee Nation, and it is through him that the contending parties claim. When he died he left surviving him Julia Nivens, his widow, and two children, Emma and Jeff. A third child, Moses, was born after the death of his father, and died in 1876 at the age of five years. Jeff Nivens married the complainant, Bettie, and died in 1897 at the age of 28 years. Julia Nivens obtained letters of administration upon the estate of her deceased husband, but she never made a final settlement. She did settle, however, with her daughter, Emma, for the share of the latter, but it is a fair inference from the facts appearing in the record that the means came from the property of the estate. After the death of her husband, Julia Nivens procured the ferry licenses, and operated the business in her own name. While ferry rights were dependent upon the procurement of periodical licenses from the nation, they were generally considered as appurtenant to the adjacent realty. The administratrix listed the ferry in the inventory of the estate of her deceased husband. Bettie Nivens is the sole heir of Jeff, and it is his share in his father's estate which she claimed. In her complaint she alleged that she was entitled to recover from the defendant, Julia, one-third of the estate, including the rents and profits thereof and of the operation of the ferry. The master to whom the cause was referred found that Jeff Nivens had received from his mother his proper share of the profits of the estate accruing during his lifetime, but that complainant, as his heir, was entitled to recover the sum of \$1,000, that amount being one-half of the profits accruing after his death. The report of the master was confirmed by the trial court, and a decree was rendered against the defendant for the amount so found to be due, and for a like proportion of the profits thereafter arising and a partition of the property. This decree was affirmed by the United States Court of Appeals in the Indian Territory, and Julia Nivens, the defeated party, has brought the cause by appeal to this court.

Thomas Owen (De Roos Bailey, on the brief), for appellant.

Preston C. West, for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It was admitted at the argument that since the decree in the trial court the land in controversy had been allotted in severalty by the Dawes Commission, and that by such allotment the appellant, Julia Nivens, received 50 acres thereof, and the appellee, Bettie, a like quantity. This disposes of the controversy as to the land, and leaves nothing for consideration but the rents and profits thereof and of the appurtenant ferry. The ferry right depended upon periodical licenses, but under the usages and customs of the Cherokee Nation, in which it was exercised, and from whose governing authorities the licenses were procured, the preference was accorded to the owner of the adjacent realty. The possessory right of Moses Nivens to the lands adjacent to the ferry was recognized for many years prior to his death as being sufficient to call for the exercise of the preference, and he enjoyed for a long period the continuous and uninterrupted privilege of operating the ferry and collecting tolls therefrom. Upon his death the appellant, his widow, procured letters of administration upon his estate and continued the conduct of the business. It is true that she procured the licenses and operated the ferry in her own name, but under the circumstances recited she should, in respect of the rights so acquired and exercised, be held as a trustee for those beneficially interested as heirs in the estate

until there was a satisfaction or a severance of their interests. Therefore, in arriving at a conclusion in this cause, we have proceeded upon the theory that the appellant was properly debited with the profits of the ferry business until the allotment by the Dawes Commission.

Various questions were presented in the briefs and at the hearing concerning the respective interests of the contending parties in the property in controversy. Was the share of the widow, Julia, in the estate of Moses Nivens, measured by that of one of his children, or was she originally entitled to a third by way of dower? Who inherited the share of the deceased child, Moses? What law concerning descents and distributions governed? It is sufficient to say that giving to the son Jeff, through whom the appellee claims, that interest in the estate of his father which would result from an answer to these questions most favorable to him, we are nevertheless clearly convinced that it was more than exhausted prior to his death, and that even with the subsequent earnings of the estate there was nothing left for the appellee. We cannot adopt the suggestion which was made that an overpayment by his mother during his lifetime could not be used against the appellee in respect of profits accruing after his death in the absence of proof that it was intended as an advancement. These are the prominent facts which appear from the record before us: Upon the death of Moses Nivens, in 1871, appellant was left with two small children—Emma, then about two years of age, and Jeff, about fourteen months. The third child, Moses, was born about eight months afterwards. The value of the estate, exclusive of the farm and the ferry, was shown in the inventory to have been less than \$3,000, and some of it was sold for much less than its appraised value. Other items would naturally be worn out or exhausted in the rearing of a family. Shortly after her husband's death the appellant paid his debts, aggregating \$2,000. She raised two of her children—Emma and Jeff—to maturity, and gave to each of them an education. The latter was sent to a school at Tahlequah, to the Indian University at Bacone, and to the State Agricultural College at Manhattan, Kan. He dressed well, was dissolute and extravagant. His mother kept him constantly supplied with money, giving him in cash, as shown by the evidence, sums ranging from \$5 to \$500. Moreover, she indorsed his notes in bank and paid them. She paid his debts, including doctors' bills, and sent him to Hot Springs, Ark. Shortly after his marriage he came with his wife to live with appellant. They lived with her over four years, until his death, and his widow, the appellee, remained there about nine months thereafter. No witness testified that he was ever seen to do any physical labor of consequence about the home place. There was undisputed testimony that he was a spendthrift, and was addicted to drunken sprees. In the last eight years of his life appellant gave him as much as \$4,000, and finally she paid his funeral expenses. She produced before the master his note, which he had executed for some cattle to a third party, who gave it to her. After allowing liberally for an indefinite indorsement of a payment, there remained unpaid thereon at the time of the trial about \$2,000. The dwelling house on the farm was destroyed by fire shortly after the death of Moses Nivens. The appellant built another. She doubled the area of cultivated land, and set out a little peach or-

chard. She personally managed the farm, and part of the time the ferry. After more than 30 years of industry, practically all she has left is the 50 acres of land, with improvements, which were allotted to her from the farm. An attentive and careful consideration of the record has led us to the unavoidable conclusion that the son Jeff had received more than he was ever legally or equitably entitled to from the estate of his father as augmented by the labor and enterprise of his mother, and that nothing remained due to the appellee as his heir.

The decrees of the United States Court of Appeals in the Indian Territory and the United States Court in the Northern District thereof are reversed, with directions to enter a decree dismissing the complaint upon the merits.

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### UNITED STATES v. ONE GASOLINE LAUNCH.

(Circuit Court of Appeals, Ninth Circuit. November 7, 1904.)

No. 1,060.

**1. SHIPPING—LAUNCH ENTERING SEATTLE FROM BRITISH COLUMBIAN PORT—DUTY TO REPORT.**

An "open, clinker-built gasoline launch, about eighteen and a half feet long," arriving at Seattle from a port of British Columbia, and not shown to be a foreign vessel or to contain merchandise, is not required to report to the customs officer of the port, under the provision of Rev. St. § 2774 [U. S. Comp. St. 1901, p. 1862], requiring vessels from foreign ports generally to report, but is within Rev. St. § 3097 [U. S. Comp. St. 1901, p. 2025], relating to commerce with contiguous countries, which require only vessels carrying dutiable merchandise, arriving at ports on the northern and northwestern frontier adjacent foreign territory to report; nor is she required to report by section 3109 [U. S. Comp. St. 1901, p. 2030], which applies only to foreign vessels "laden or in ballast."

Morrow, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty.

William Martin and W. A. Keene, for appellee.

Argued before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The boat and engine seized and sought to be forfeited in this case are described in the libel and information as "one open, clinker-built gasoline launch, about eighteen and a half feet long, and the gasoline engine thereon." The libel alleges that the launch, equipped with the engine, arrived at the port of Seattle, at which an officer of the customs then resided, on the 14th day of August, 1903, "from a foreign port, to wit, the port of Victoria, British Columbia," and that the master of the launch failed to make any report of its arrival to the customs officer at any time. The libel does not allege whether it was a foreign or domestic boat, nor does it allege that it carried any merchandise of any character. The court below sustained exceptions to the libel, and dismissed it.

The court, of course, takes judicial notice that British Columbia is a province of the Dominion of Canada, and is country adjacent or contiguous to the northwestern and western frontier of the United States. The case is therefore, in our opinion, controlled by the provisions of chapter 11 of the Revised Statutes, entitled "Provisions Applying to Commerce with Contiguous Countries," and not by section 2,774 of the Revised Statutes [U. S. Comp. St. 1901, p. 1862], upon which the libel is founded.

Section 3097 of chapter 11 [U. S. Comp. St. 1901, p. 2025] provides that:

"All vessels, boats, rafts, and carriages, or what kind soever, arriving in such districts, on the northern and northwestern frontiers, containing merchandise subject to duties, on being imported into any port of the United States, shall be reported to the collector, or other chief officer of the customs at the port of entry in the district into which it shall be so imported; and such merchandise shall be accompanied with like manifests, and like entries shall be made, by the persons having charge of any such vessels, boats, rafts, and carriages, and by the owners or consignees of the merchandise laden on board the same; and the powers and duties of the officers of the customs shall be exercised and discharged in the districts last mentioned, in like manner as is prescribed in respect to merchandise imported in vessels from the sea; and generally, all such importations shall be subject to like regulations, penalties, and forfeitures as in other districts, except as is hereinafter specially provided."

This is the section which, in our opinion, applies to the present case; and the trouble with the libel is that it does not charge that the launch carried any merchandise subject to duty—probably for the reason that it was a pleasure boat, and did not carry any merchandise at all.

The case does not, we think, fall within the provisions of section 3109 of chapter 11 of the Revised Statutes [U. S. Comp. St. 1901, p. 2030]: First, because the libel does not show that the launch in question was a foreign vessel; and, next, because that section, by its very terms, applies only to foreign vessels "laden or in ballast," which latter terms are manifestly inapplicable to a little, "open, clinker-built gasoline launch, about eighteen and a half feet long."

The judgment is affirmed.

MORROW, Circuit Judge. I dissent. The libel is based upon section 2774 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1862], which provides, among other things, as follows:

"Within twenty-four hours after the arrival of any vessel, from any foreign port, at any port of the United States established by law, at which an officer of the customs resides, \* \* \* if the hours of business at the office of the chief officer of the customs at such port will permit, \* \* \* the master shall repair to such office, and make report to the chief officer of the arrival of the vessel. \* \* \*

The word "vessel" is defined by section 3 of the Revised Statutes [U. S. Comp. St. 1901, p. 4] as including every description of water craft or other artificial contrivance used or capable of being used as a means of transportation by water.

This is the general statute upon the subject requiring all vessels arriving from any foreign port at any port of the United States to report to the chief officer of the customs, and under its provisions the

libel in this case stated a cause of action. But to this statute there are certain exceptions. War vessels and other public vessels belonging to this or any foreign state are not required to report or make entry at the customhouse. Section 2791, Rev. St. [U. S. Comp. St. 1901, p. 1870]. Vessels used exclusively as ferryboats, carrying passengers, baggage, and merchandise, are not required to enter and clear, but upon arrival in the United States they are required to report baggage and merchandise to the proper officer of the customs. Section 2792, Rev. St. [U. S. Comp. St. 1901, p. 1870]. Steam tugs enrolled and licensed to engage in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, when exclusively employed in towing vessels, are not required to report and clear at the customhouse. But when such tugs are employed in towing rafts or other vessels without sail or steam motive power, not required to be enrolled or licensed, they are required to report and clear in the same manner as other vessels. Section 3123, Rev. St. [U. S. Comp. St. 1901, p. 2035].

These exceptions clearly do not include an "open, clinker-built gasoline launch, about eighteen and a half feet long." But it is said that it comes within the provisions of sections 3095 to 3098 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2025, 2026], which provide, among other things, in section 3097, that:

"All vessels, boats, rafts, and carriages, of what kind soever, arriving in such districts, on the northern and northwestern frontiers, containing merchandise subject to duties, on being imported into any port of the United States, shall be reported to the collector, or other chief officer of the customs at the port of entry in the district into which it shall be so imported; and such merchandise shall be accompanied with like manifests, and like entries shall be made, by the persons having charge of any such vessels, boats, rafts, and carriages, and by the owners or consignees of the merchandise laden on board the same; and the powers and duties of the officers of the customs shall be exercised and discharged \* \* \* in like manner as is prescribed in respect to merchandise imported in vessels from the sea."

Section 3098 provides a modification with respect to the entry of merchandise arriving in vessels not registered from such adjacent territory. The former section requires an entry and the production of a manifest when a vessel or boat arrives with merchandise subject to duty at the port of entry into which the merchandise is to be imported. The latter section requires the delivery of the manifest at the port nearest the boundary line, or nearest the road or waters by which such merchandise is brought. These two sections clearly relate to vessels containing merchandise subject to duty, and in no way apply to vessels not containing such merchandise, and cannot properly be construed as exempting the latter vessels from the report required by section 2774.

This construction of the statute appears to me to be supported by the provisions of section 3109 [U. S. Comp. St. 1901, p. 2030] relating to foreign vessels. These vessels, like vessels of the United States not registered, whether laden or in ballast, arriving in the waters of the United States from foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, must be reported by the master at the office of the collector or deputy collector of customs which shall be nearest to the port at which such vessel

may enter such waters; and it is further provided that such vessel shall not proceed farther inland, either to unload or take in cargo, without a special permit from such collector or deputy collector.

So far as the record in this case discloses, the customs officers found this vessel, on its arrival from contiguous foreign territory, unreported, and without register, enrollment, or license, and without any means of determining its character or nationality. It was accordingly seized as forfeited for violation of law. It was manifestly impossible for the United States to furnish any further information in its libel concerning this vessel; and, in the absence of a claim, and evidence in its support, showing that it was entitled to exemption under some statute of the United States, I do not see how it can be held exempt. I am not able, therefore, to say that the libel does not state facts sufficient to entitle the United States to maintain the action.

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LEE YUE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,025.

1. CHINESE EXCLUSION—ORDER OF DEPORTATION—SUFFICIENCY OF EVIDENCE.

The judgment of a District Court affirming an order of a commissioner directing the deportation of a Chinese person *held* sustained by the evidence, under the rule established by the exclusion acts, which casts upon the defendant in such cases the burden of proving his right to remain in this country.

Appeal from the District Court of the United States for the Northern District of California.

Henry C. Dibble & Dibble, for appellant.

Duncan McKinlay (Marshall B. Woodworth, U. S. Atty. of counsel), Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. In view of the rule that obtains in cases of this character, we are unable to say that the District Judge erred in affirming the order of the commissioner directing the deportation of the petitioner. See *United States v. Wong Dep Ken* (D. C.) 57 Fed. 206; *United States v. Lung Hong* (D. C.) 105 Fed. 188; *United States v. Chun Hoy*, 111 Fed. 899, 50 C. C. A. 57; *United States v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613; *United States v. Yong Yew* (D. C.) 83 Fed. 832; *United States v. Ah Chung* (C. C. A.) 130 Fed. 885; *Li Sing v. United States*, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634.

The judgment is affirmed.



## SPENCER et al. v. BERTRAND.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,052.

## 1. COLLISION—BARGE LYING AT DOCK—NEGLIGENT MANAGEMENT OF RAFT.

The finding of a trial court that an injury to a barge while lying at a wharf in the Willamette river was due to the negligent navigation of a steamboat towing a raft of logs, by reason of which the raft struck the barge, *held* sustained by the evidence.

Appeal from the District Court of the United States for the District of Oregon.

J. C. Moreland, for appellants.

Wm. T. Muir, R. R. Giltner, and Veazie & Freeman, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a libel in admiralty to recover damages for injuries received to the barge of appellee by the alleged negligence of appellants. It is alleged that the steamboat Charles R. Spencer was towing a raft of logs up the Willamette river, and handled the raft so negligently that it was thrown against Mr. Bertrand's scow and sunk it. The court, upon the testimony, found that the "libelant was on the 30th day of October, 1901, the owner of the barge described in the libel, and that on the evening of the said day, while said barge was lying at the landing slip on the east side of the Willamette river, in Portland, Oregon, at the north end of the dock of the Portland Flouring Mills Company, where said barge had a good right to be, the said barge was struck and injured by a raft of logs then and there being towed up the Willamette river by the steamboat Charles R. Spencer—said raft of logs being about 780 feet in length and 50 feet in width, and being towed by a hawser about 900 feet in length"—and that "said collision and injury were caused by the negligence, inattention, and want of proper care and skill on the part of the steamboat Charles R. Spencer, her master and crew, and through no fault, omission, or neglect on the part of said barge or the libelant," and assessed the damages at \$113.50 and \$67.16 costs.

It is claimed in the assignments of error that the court erred in making these findings and in entering the judgment. The argument of appellants is that it was a physical impossibility, from all the testimony, for the injury to have been occasioned to the barge or scow of the appellee. There were several theories advanced by the defendants in the court below as to how the injury might have occurred. At the close of the testimony the court said:

"There is only one conclusion that can be reached as to how this accident occurred, consistent with the testimony and the physical facts shown to exist

in the case. Upon the testimony offered for the defendant, I should think it impossible for such an accident to have occurred, were it not for the fact that it did occur. \* \* \* I don't see any other way for it. There is another thing about it—another fact to be considered in this connection—and that is well established, I think. That is the fact that the barge was swung around upstream. Something must have pulled that barge upstream at that time. The night watchman found her in that condition. What did it? It must have been the same accident that caused the staying in of those boards that swung the barge upstream. So my conclusion is that the tug Spencer is responsible for the accident."

There was a controverted question as to the damages. It was difficult to find out the precise amount of damages from the repairs made. Upon this question the court said:

"I take it that there were quite extensive repairs made on that barge, and that she came off the ways a great deal better than she was before the accident. The Spencer cannot be charged with all these expenses. The best I can do is to divide them between the parties."

Appellee was the only witness at the trial who testified as to what actually happened. He testified that:

"The Spencer passed by with the logs about, as near as I could judge, between five and six o'clock. Of course, I couldn't tell just exactly what time, but I know it wasn't over six, because it was just getting dark there and then. She towed up right along this channel, and then, when she got by us pretty well, she kind of swung over on the west side, and by doing so threw the tall end of the raft—say about 300 feet of it, or such a matter as that: 200 feet, anyway, I should judge—threw it right up onto the stern of the barge. Q. Did you see this? A. Yes, sir. Q. Where were you at that time? A. I was right on deck at that time it occurred. Q. On the deck of the barge? A. Yes, sir."

He then described the course of the Spencer and the raft of logs from the time he first saw them until after the accident.

In the light of the facts disclosed by the record, we are unwilling to say that the court erred in its findings, or that the judgment is erroneous. The judgment of the District Court is affirmed, with costs.

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## UNITED BLUE FLAME OIL STOVE CO. v. SILVER & CO.

(Circuit Court, E. D. New York. November 1, 1904.)

### 1. PATENTS—ANTICIPATION AND INVENTION—BLUE FLAME OIL BURNERS.

The Ruppel patent, No. 616,425, for a hydrocarbon burner, construed, and held not anticipated, and to disclose invention. Claims 6, 7, and 8 also held infringed.

### 2. SAME—INFRINGEMENT.

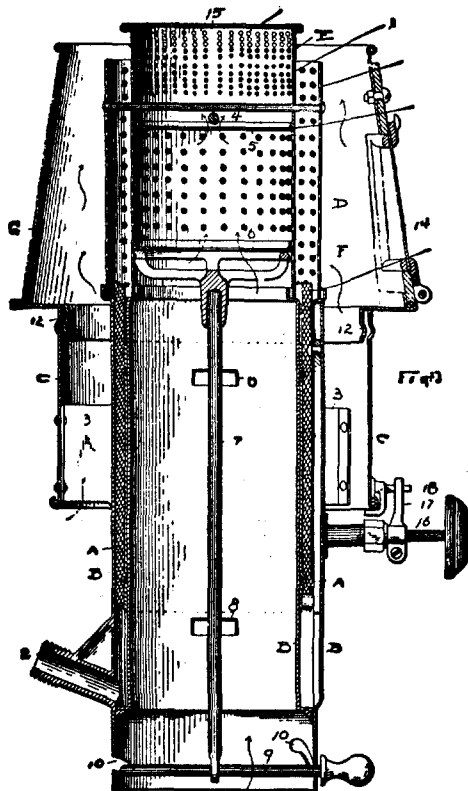
The Jeavons patent, No. 617,291, for a burner, held not infringed.

In Equity. Suit for infringement of letters patent No. 616,425, for a hydrocarbon burner, granted to Henry Ruppel December 20, 1898, and No. 617,291, for a burner, granted to William R. Jeavons January 3, 1899. On final hearing.

Herbert H. Gibbs (A. S. Pattison, of counsel), for complainant.  
Stephen J. Cox, for defendant.

THOMAS, District Judge. The complainant is the assignee of certain letters patent, viz., letters No. 616,425, issued on December 20, 1898, to Ruppel, and letters No. 617,291, issued on January 3, 1899, to Jeavons. The defendant is alleged to infringe claims 6, 7, and 8 of the former and claims 22 and 23 of the latter. The defendant denies infringement, and alleges anticipation and absence of invention. The subject involves blue flame oil burners, and is of very considerable commercial and economic importance. Petroleum burned in a wick or other lighting device is converted to a vapor, which passes upward between two concentric tubes (herein called a "combustion chamber") so perforated as to admit air, which, uniting with the vapor, ultimately forms carbon dioxide gas, or carbonic acid gas, which burns upon, and after passing out of, the tubes. That is, air passing from within and without, through the perforations to the space within the tubes, unites with the vapor therein, forms a gas, which is consumed largely after escaping into the open air. As the gas springs into flame after leaving the tubes or combustion chamber, its useful duty is to liberate its heat advantageously in direct contact with the utensil or surface placed above it, without throwing off offensive odors or unconsumed and poisonous elements. If the flame burn steadily, and blue in color, desirable combustion is evidenced. If the flame be yellow, imperfection of combustion and injurious results in use are indicated. Hence the production of a steady blue flame is the appearance sought, and to attain it burners of varied constructions have been devised. There has been a variety of devices for hindering or wholly preventing the passage of air to the upper part of the inner tube, and for the passage of the air admitted to such tube into the combustion chamber or to the flame. The uninterrupted passage of air through the whole length of the inner tube with a uniform opportunity to escape through its perforations into the combustion chamber would be injurious to the result desired. It is understood that the vapor, mingling with the air in the inferior part of the combustion chamber, and becoming gas, tends to reach the point of combustion as it rises, and that such combustion would take place disadvantageously within the tubes, rather than beneficially at the exit thereof, if the air supplied to the upper portion of the combustion chamber were not limited. Also, its increasing heat as the gas ascends tends to destroy the inner tube. Ruppel combined with the perforated tubes a chamber in the upper portion of the inner tube, closed the upper end with a cap and the lower end with a perforated partition or diaphragm; and to keep the upper inner sides of the inner tube cool Jeavons, among other things, provided for a partition or diaphragm with serrated or perforated edges, and located it below the upper end of the inner tube. Ruppel concluded, from the blue flame produced, and other favorable conditions, that there was an advantage in his device. Apparently he adjusted mechanical elements to facilitate phenomena that were recognized proof of a valuable result. Hence he invented, if anything, means to aid a known and desirable result. The most that can be

claimed for him is that he provided for parts and such mechanical adjustment thereof as would aid to cause proper combustion at an opportune location. But what did Ruppel construct, and what does he claim? The following figure illustrates it:



Claims 6, 7, and 8 are as follows:

"(6) In a burner, perforated tubes forming a combustion-chamber between them, two walls with a space between them spanning the bore of the inner of said perforated tubes and forming an air-chamber at the upper end thereof, means for supplying a limited volume of air to said chamber, and openings from said chamber for the escape of air, substantially as described.

"(7) In a burner, an outer and an inner perforated tube forming a combustion-chamber, a cap and a partition at the upper end of the said inner tube separated and forming an air-chamber between them, and means for supplying air to said air-chamber, substantially as described.

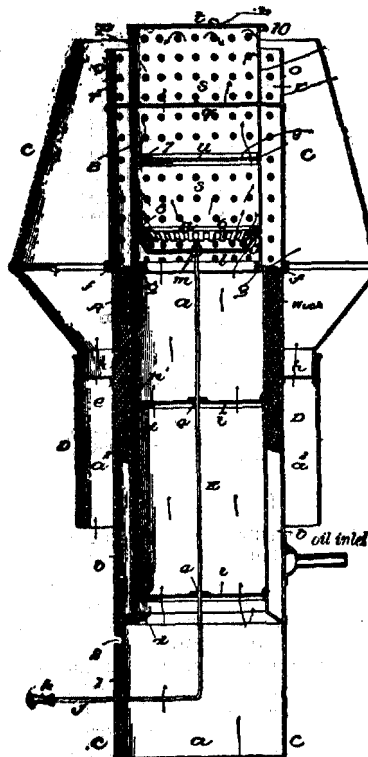
"(8) In a burner, an outer and an inner perforated tube forming a combustion-chamber, an air-checking partition in the upper end of the inner tube having an opening for the passage of a limited quantity of air, and a cap above and separated from said partition, substantially as described."

While there is some difference in the phraseology of the claims, Ruppel's conception embraced two perforated tubes, forming within them a combustion chamber, the closing of the inner tube at the top

with a cap, and placing at some distance below the top a diaphragm, through which air would pass in such limited quantity as to produce suitable combustion at the desired place. It is argued by defendant that his claims do not call for a closed top for the inner tube. His idea was to close the top. There is no evidence of contrary intention. The specification states:

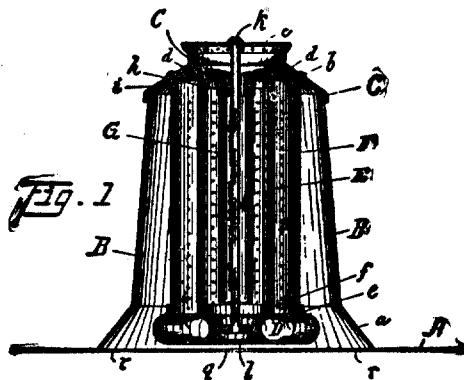
"The inner tube, E, extends a little above the outer tube, D, and in addition to the diaphragm, 5, in the said inner tube, there is a closed cover or cap, 15, across the top of said tube, these parts forming a chamber in the upper end of the inner tube. A small air-opening through the diaphragm, 5, permits the passage of a limited volume of air to the said chamber. The perforations in the side of this chamber for the escape of air to the flame are in this case smaller and more numerous than the perforations in the body of the inner tube, thus contributing to the uniform distribution of the limited volume of air from the chamber."

The defendant's burner in use differs in some details from the above description. The following figure illustrates the Silver patent:



The exhibits of the Silver burner show the upper end of the inner tube somewhat below the upper end of the outer tube. The diaphragm, like that of Jeavons, has several openings at its periphery, and the bubbles on the exterior of the inner tube, above the diaphragm, indicate

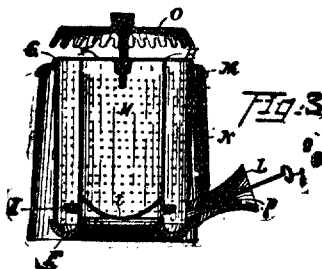
combustion, while similar bubbles do not appear usually in the Ruppel burner above the diaphragm. This shows that the Silver tube feeds more air to the combustion chamber than does the Ruppel burner, or that it feeds it more advantageously for passage through the perforations. If the Ruppel claims are narrowed, by the words "substantially as described," to the exact description quoted above from the specification, the Silver burner does not infringe. But without such limitation the Silver burner easily falls within the claims, and, if the claims be valid, the Silver burner infringes. But if the claims be not narrowed to exclude the Silver burner, is there any burner in the prior art that also falls within the claims? The defendant refers to the Ruppel burner, patented in 1891, as an anticipation. The figure shows it:



There is a chambered cap at the upper end of an inner imperforated tube. The specification states:

"Air also passes up through the air-induction tube or central flue, G, into the chambered cap, c, escaping therefrom through the holes, s, in said cap, thereby causing intense heat at the top of the burner."

There is no diaphragm at the inferior end of the chambered cap, nor does any air escape from the cap into the combustion chamber. Air does escape from it at a point above the combustion chamber, and in this regard it resembles the Ruppel burner in suit. The reference simply indicates the progress in the particular art. Ruppel patent, 1892, No. 471,399, is shown by Figure 3:



The inner tube is not divided into an upper and a lower chamber. There is a perforated disk in the lower part of the inner tube, and a perforated cap above it, surmounted by a deflector. There is no separate chamber in the upper end of the inner tube, to which is admitted a limited amount of air, which is fed to the combustion chamber. Figure 8 of the letters shows the openness of the cap. The specification states:

"Arranged in the lower part of said chimney, H, is a perforated disk, t, which is preferably concave-convex in form, as shown by dotted lines in Fig. 3. The purpose of this disk is to equalize the distribution of air passing up through the center of the burner."

In the reissued letters of 1897 the parts are described and their functions explained. It appears that the inventor intended by the lower disk to check and equalize the flow of air to the combustion chamber; or, as he says:

"In the lower part of the inner perforated chimney-tube, H, is arranged a perforated, preferably concave-convex device which spans the said tube, and by reason of its location a slight distance above the lower perforations in said tube, as well as slightly above the point of vaporization, not only retards the upward flow of air, but deflects a sufficient quantity of air into the combining-chamber at that low area to serve the needs of the burner at that point."

As to the upper disk he says:

"A disk, P, Fig. 8, covers the interior of the inner perforated chimney-tube, H, and is shown with six different perforations for the passage of air from beneath. \* \* \* The perforations, s, are relatively small, so as to sustain only a small flame, and are arranged in a circle some little distance from the edge of the disk, and hence do not interfere with the mixing-operation which goes on above said disk, as herein described.

"A scalloped deflector, O, is attached at its center to the center of disk, P, by a threaded stem extending some distance through said disk, whereby said deflector can be adjusted up and down or wholly removed. The gas rising from the combining-chamber flows over the disk, P, and said deflector about the scalloped edge thereof, as will appear more clearly in the description of the operation of the burner. \* \* \*

"Obviously the aggregate area of scattered perforations, s, in disk, P, is considerably less than the aggregate area of the perforations in plate, t, and the area of the perforations, s, being sufficient to supply the demands of the burner for air from within at its top the detained air beneath said disk which passes plate, t, is checked back, so as to flow through the perforations of the inner tube and supply the needs of the combining-chamber between said disk, P, and the plate, t, below."

He further describes the functions of the parts:

"In the operation of a burner with a perforated air-retarding plate, t, in the lower portion of the inner perforated tube, H, and a perforated disk at the top of said tube a novel effect and advantage is obtained by reason of the association or combination of said tubes apart from their individual function. Thus, while the device, t, deflects the requisite air into the combining-chamber at a low plane to promote vaporization of oil, and the disk, P, provides a mixing and combining space at the top of the burner as well as providing for limited combustion above perforations, s, the two devices act conjointly in this: that plate, t, checks the supply of air into the space above it and the disk, P, checks back the air passed by or through said device, and thus promotes an even distribution of air to the perforations

of the inner tube between said parts, P and t, and avoids or prevents an excessive supply of air at any point through said inner tube."

The specification further states that the globule or flame over each perforation in the tubes is small, and dependent on the size of the opening and the amount of air admitted; that the globules below the lower plate, t, are larger than those above it; that those just above the plate are larger than those higher up; that the "aggregate effect of these numerous dotted flames is to convert the rising vapors into what is known as 'carbonic oxide' or 'carbon-monoxide' gas"; and adds:

"The chamber between tubes G and H is therefore a combining-chamber for these gases, and the actual combustion of the gas does not occur until the gas issues from said chamber at its top and meets with the requisite oxygen or air."

To understand the importance of the deflector and the perforations in the upper disk the specification must be quoted at some length:

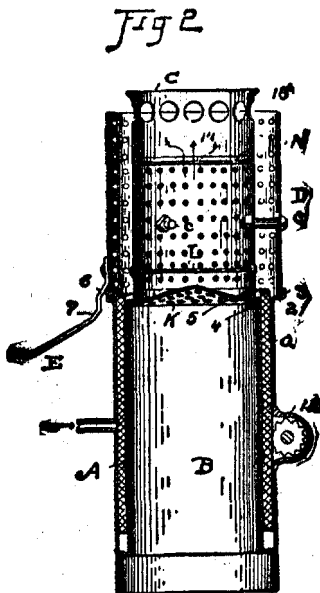
"When this point is reached, the construction of the top of the burner becomes material to the end not only that combustion shall be complete, so as to avoid obnoxious and unhealthful odors, but to produce an even and concentrated flame and perfect combustion. Hence the peculiar construction of the disk, P, with a large imperforate central area over which the gases and such traces of vapor as may have escaped from the combining-chamber uncombined can flow and eddy and become combined under the favorable conditions there existing, the air entering through perforations, s, and the flame supported thereby serving to contribute to this result. This commingling and combining process is continued over and above the deflector, O, as the gases are evolved about the scalloped edge of the said deflector to the eddying-space immediately over the same. As this occurs, there is no combustion within the body of these moving, eddying, and combining gases, because there is no air to support combustion except the small flames over perforations, s, but a blue flame plays over the said gases, which thus gather and commingle from all around the deflector, O, upon and above the same with the highest point of gases and flame at the center, the flame meantime enveloping and investing the body of said gases from about the top edge of the outer tube, G, over the edge of deflector, O, to a common center somewhat above the middle of said deflector. This eddying and mixing operation not only has the effect of evening combustion, so far as the gases from various points of the combining-chamber are concerned, but has the advantage of compensating for any inequalities in the character of the gas or gas and uncombined vapor that may reach the top of the burner. It is very difficult to so arrange the tubes G and H that the intervening space will be the same always all around. Hence more gas or gas and vapor will rise where there is most room, because at such points the combining process is liable to be defective. Therefore, if the gas were consumed directly at the top of the combining chamber by a supply of sufficient air both within and without, the flame would be higher at some points than at others, and a 'ragged flame' would result, with here and there tongues of yellow flame; but by having a common mixing space centrally over and above the disk, P, to which the gases and vapors will naturally flow by reason of the construction of the burner, substantially as shown, they are commingled and further combined and converted, so as to sustain an even and complete combustion across the top of the burner."

The end sought by Ruppel in his several patents was the same; the means used were different; the parts earlier employed were more; the location of the disks or plates in the inner tubes differed. Nor do



the claims of the Ruppel patent in suit cover the earlier device, for the cap is perforated; the air chamber is not at the upper end of the inner tube; it has a deflector to which an alleged important function is ascribed.

The Blackford patents—one No. 518,305, of 1894, and one No. 538,638, of 1895—are easily distinguished from the Ruppel in suit. No. 518,305 is illustrated by Figure 2:

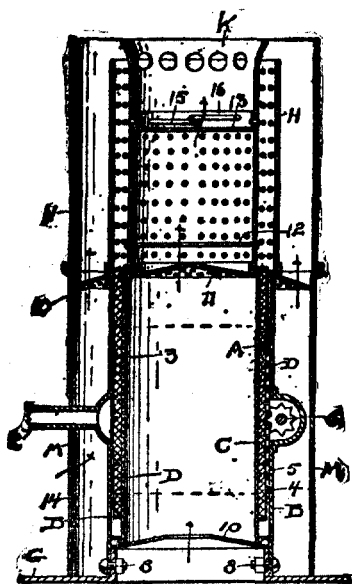


It has no cap. The specification best describes the several disks or diaphragms and their functions:

"A further feature of the invention is found in the perforated diaphragm, K, within the burner proper at its upper portion and about opposite the point of combustion. And in conjunction with this diaphragm is another perforated diaphragm, L, some short distance above the diaphragm, K, and supported within the inner tube, C, as shown, or in some equivalent way. The invention of the lower diaphragm is more particularly to prevent a rush of air up through the burner. It is found that with a diaphragm of this kind perforated for the passage of air, but yet serving as a damper or check to the flow of air, the burner itself is kept cool. There seems to be a quantity of cool air constantly present within the burner beneath said diaphragm, and the effect upon the burner is wholly different from what it would be if this diaphragm were omitted and there were a free flow of air through this space. The diaphragm, L, on the other hand, is contributory in a measure to this result, and is designed to prevent reflection downward of the heat of the burner. It will be noticed that an air space or chamber is thus formed between the two diaphragms, K and L, and this likewise contributes to prevent the downward radiation of heat, so that with the said diaphragms and the said chamber I am enabled to keep the body of the burner about the wick absolutely cool however long the burner may be used, and this is esteemed a great advantage on many accounts. It will be noticed that the

inner tube C, has also within it a diaphragm, N, toward its upper portion, and that there is a central air passage, 14, in this diaphragm or disk. Also that the said tube, C, is perforated beneath the said diaphragm, N, but is whole above the same except about the top where there are large openings or holes, 15. Now, one of the results of this construction is the supply of a flame centrally about the top of the said burner tubes. If some provision of this kind were not made combustion would occur only in a ring, as it were, about the top of the combustion chamber, and there would be a dead cold spot in the middle of the ring. This I overcome by the construction shown, and thus diffuse the flame and heat over the entire surface above the burner chamber. This occurs by reason of air flowing through the central hole, 14, which this meets with the products of combustion which flow inward from the combustion chamber through holes, 15, into what may be termed a partial vacuum within the top of the inner combustion tube. The fresh heated air fed through the said hole, 14, promotes and completes combustion in this central space."

The means for producing the result are quite unlike those of the Ruppel in suit. Blackford No. 538,638 is shown below:



The specification states:

"Now, having reached the top of the lower burner section, I provide an upper section consisting of two numerous perforated combustion tubes, H and K, seated upon the shouldered and flanged upper extremities of the tubes A and B, and about the top of the wick, C, on the said shoulders.

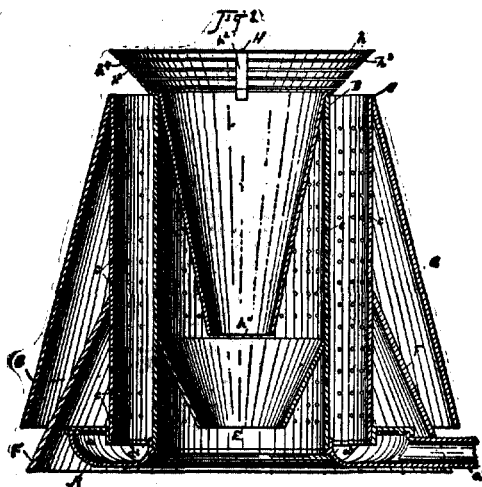
"Two diaphragms—12 and 13—span the inner tube, one near its bottom and the other toward its top; and both tubes have central air passages through them, but the upper one considerably smaller than the lower, thereby allowing enough air to pass through to supply the needs of combustion centrally in the top of the burner at a point just above the top of said combustion tubes, and at the same time checking back the air so as to cause it to flow freely to the combustion chamber between tubes H and K through the

perforations in K. The lower diaphragm—12—also serves as a heat deflector to protect the wick chamber beneath from becoming excessively heated.  
\* \* \*

"By the use of the tubes H and K and the associated parts, combustion, in fact, does not really take place at the wick except in starting the burner, but a vapor is evolved, which burns between said tubes, and a perfectly blue flame is assured at the top of said tubes while the wick remains unconsumed and will last for an entire season or longer."

Here both diaphragms are perforated, and there is no cap. The defendant states that the inner tube does not feed air above the upper diaphragm. The diagrams in both Blackford patents, and the absence of any limitation to the perforations in the tube, do not confirm this statement.

Lannert & Jeavons, 1891, patent, No. 464,076, is shown by Figure 1:

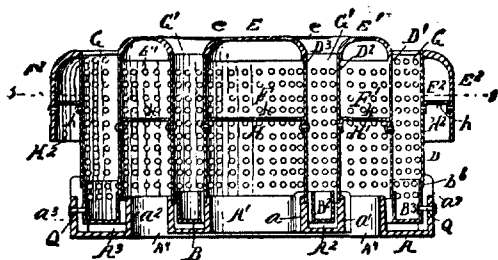


This shows two perforated tubes, one within the other, to avoid the escape of vapor through the perforations, "causing disagreeable odors in the room, and robbing the burner to that extent of its fuel." There are employed "deflectors, which extend around about the sides of the burner tubes, as shown, and serve to convey the escaping vapor or gas back into the burner chamber to be consumed." There are three such deflectors. It seems that the mechanism is such that these deflectors are deemed necessary, and their importance is emphasized in the specification. Within the inner tube is a "combined air and flame deflector, as well as a shield for the burner." "In form it has the shape of a section of a cone, its narrower portion resting on the top of the inner burner tube, and its wider portion extending outward a sufficient distance to protect the combustion chamber between the tubes." The head has parallel slots formed about its sides, and to divert the air through the slots the top of the head is closed, but the bottom is open. "The conical-shaped deflector tube, h', extends into the space within the inner tube a greater or less distance—say half way the length of the

tube—and is open at its bottom, so that a free air passage is formed through the same end through the lateral slots,  $h^2$ , in the head." It should be observed that where the deflector rests on the inner tube it closes it, so that no air beyond such point of closing can pass from the inner tube to the outer tube or to the flame, the air for feeding the flame above such point passing through the cone. In the lower part of the inner tube, and just below the cone mentioned, is the deflector, E, an inverted truncated cone. Its base spans the inner tube, and is entirely open, as is the lower and smaller end. Necessarily these two cones placed within the inner tube limit the air passing to such tube, but in fact the upper cone itself is an imperforated inner tube with slots entirely above the combustion chamber immediately under the cap.

It is considered that in no proper sense does this structure show "two walls with a space between them spanning the bore of the inner of said perforated tubes, and forming an air chamber at the upper end thereof." The most that can be said is that the two conical deflectors are so inserted into the inner tube that, together with the cap, they occupy such portion of the inner tube as to limit the access of air to it. The multiplicity of parts, tubes, deflectors, and cones, exterior and interior, bear but an imaginary similitude to the structure suggested by the patent.

The next reference is to the letters patent issued to Mummery, 1896, No. 563,788. Figure 1 illustrates it:



This has two concentric combustion chambers, simultaneously operated, formed by the perforated walls. There are three tubes that have air chambers formed by a perforated diaphragm and perforated cap. The whole interior of the inner tube is called an air chamber, and is marked "F," "into which the air may freely pass through the openings A', B', in the holder, A, and vaporizer, B." After providing for a cap over the inner tube "to engage the upper ends of the corresponding foraminous walls," and for a horizontal partition "intermediate the upper and lower edges" of such walls, it is stated that this partition is "constructed with orifices, h, preferably elongated, through which the air may freely pass into the regions of the chambers thereabove," and that the cap is "provided with suitable perforations or orifices, as at e, preferably elongated." Then follows this statement:

"These partitions, H, H<sup>1</sup>, H<sup>2</sup>, as indicated more especially in Fig. 5, are constructed with orifices, h, preferably elongated, through which the air may

freely pass into the regions of the chambers thereabove. The caps, E, E<sup>1</sup>, are also provided with suitable perforations or orifices, as at e, preferably elongated. The partitions, H, H<sup>1</sup>, H<sup>2</sup>, are employed for the purpose of holding the respective parts adjacent thereto in place.

"It will be understood that when the burner is in use the foraminous walls on the inner and outer peripheries of the respective combustion chambers become very highly heated, and these partitions prevent all liability of the warping of said walls in consequence of the heat holding the parts securely in position.

"It will be obvious that air is admitted into the respective combustion chambers through the surrounding foraminous walls on both the inner and the outer peripheries of each chamber, the bulk of air being admitted into the combustion chambers through the lower perforations of the walls. \* \* \*

"The upper orifices, e, in the caps, E, E<sup>1</sup>, are preferably elongated, as before stated, so as to let the air that may accumulate in the upper portions of the corresponding chambers, F, F<sup>1</sup>, more freely escape. These caps, E, E<sup>1</sup>, E<sup>2</sup>, are employed chiefly to deflect or hold down the air to cause its passage more efficiently through the foraminous walls of the combustion chambers. At the same time, in order to prevent an accumulation of dead air in the top of the air chambers and to prevent an undue deflection of the heat downward thereby, it is desirable to provide the slots therein, as above described, so that there may be a desired circulation of air therethrough to prevent the accumulation of dead air and to allow the heat to escape upward."

If this cap were imperforated, the interior tube would fall within the description of the claims of the Ruppel patent. It does not seem that there would be invention in placing the lower diaphragm higher up. But how about the perforations in the cap? The evident fact is that the holes in the cap might be so small as to render the cap substantially closed, and to force all the air through the side walls of the tube, or they might be so large as to allow the rising air to pass through the cap in quantity too large for the advantage of the combustion chamber.

Jeavons, complainant's witness, testified:

"For its proper operation there should not be any appreciable volume of air passed through its top, as in such case rather combustion would occur immediately above it, and the heat from this combustion would tend to disassociate the carbon monoxide gas, and cause a yellow flame. Again, such heat would be evolved some distance below the cooking utensil, and it would not be so effective for the purpose of heating such utensil as in cases where the gas passes up and is consumed close to the bottom of said utensil. If the opening were a very small one, so that combustion resulting therefrom were very small, the device might work much the same as it does with the imperforated cap. If the opening through the cap were any appreciable size, it might not only rob the chambers at the upper end of the inner tube of the air that should be deflected outward into the rising gases, but it would induce a suction through its openings so that the gas rising from the combining chamber would flow inward to the chamber and meeting the air passing through the lower plate would burn in this chamber."

Mummery does not describe the size of the perforations in the cap, but they should be large enough "so that there may be a desired circulation of air therethrough to prevent the accumulation of dead air and to allow the heat to escape upward," and small enough "to deflect or hold down the air to cause its passage more efficiently through the foraminous walls of the combustion chambers." The specification would then mean, "Make the holes in the cap large enough to let off the dead air and heat, and small enough to dam back the air so that it will pass through the walls of the tube." Whether holes can be so adjusted as to let air

and heat escape, and yet keep air desirable for the combustion chamber from escaping at the cap, does not appear. However, it would seem that the perforations in the cap must be nicely related to the perforations in the diaphragm and side walls to get the desired balance, so that the right amount of dead air and the heat would pass out above, and a suitable amount of live air would take a lateral direction. Ruppel was not at the expense of perforating the cap, nor did he assume the task of deciding just how large holes would perform the office of letting out dead air and heat, and at the same time not let out live air that should escape elsewhere. He adopted a closed cap. If there is no advantage in this, why does the defendant adhere to the closed caps? Why does it not use the Blackford, Mummery, or similar structures? It is asserted by the learned counsel for the defendant in his written argument that the Ruppel upper chamber in the burner used, admitting air through its diaphragm, is in operation practically the equivalent of Morrill's burner, which has a solid plug in the upper end of the tube; the Ewert, 1887, burner, which has no cap, and an imperforated diaphragm at the bottom of the tube; and the Ewert & Mehling, 1890, burner, which has a closed cap, and no perforations in the upper end of the inner tube; and it is asserted, further, that actual demonstrations in this suit show that the function of these upper chambers is the same, that the result is the same, and that the Ruppel burner performs the same function with the same result, whether the diaphragm is open or closed, or whether its cap is retained or removed. It will be noticed that the Silver burner is not included in this statement. But several hours of observation of the Ruppel and Silver burners, side by side, shows no superiority on the part of the Silver, nor does the evidence disclose that it has practical advantage. The blue flame of one was not distinguishable from that of the other, either in color or steadiness, or other desirable characteristic. Yet it is urged that the Ruppel feeds no air from the upper chamber to the combustion chamber, and that the Silver does. Here is apparent perfection of operation in two burners, each constructed according to the claims, the only difference in the burners being that the chamber in one is higher up than in the other, and the openings in the diaphragms are differently located. If there was no better result from the chamber composed of the perforated diaphragm and closed cap spanning the walls of the tube in the upper portion thereof, the parties, it is thought, would use the Ewert & Mehling burner, thereby saving the expense of a diaphragm and of the perforations in the upper part of the tube; or the Ewert, 1887, and save the expense of a cap and the perforation of the diaphragm. And if the Morrill is the equal of any, at least the expense of the solid plug is saved. The fact is that the complainant and defendant herein are not battling for the right to use this upper chamber described by the Ruppel claims without full knowledge of its utility and commercial advantage. The evidence of a considered and settled commercial practice persuades more than the experiments of experts, made for the purposes of the action, necessarily brief in duration, and not put into the ordinary domestic uses for which the burners are designed.

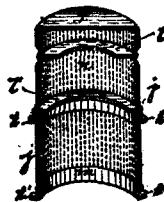
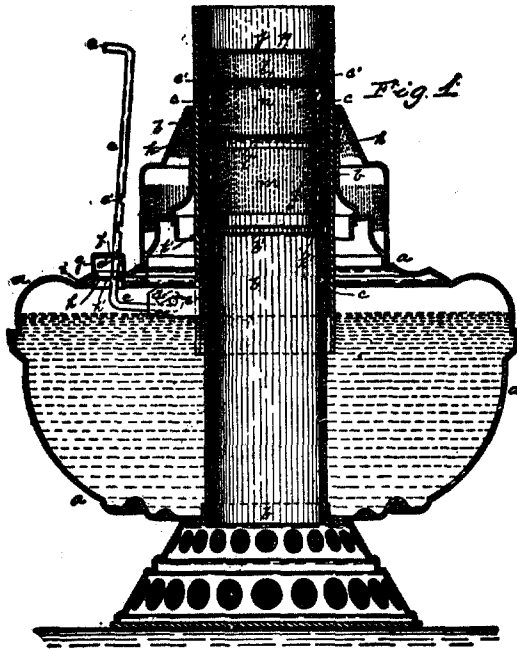
It now becomes necessary to give attention to the lamp devices.

In all of these a chimney is used, which takes the place of the outer tube. Hence such structures would not literally fall within the claims. But it is asserted that, if the chimney used with these lamp burners, thereby producing a luminous flame, be exchanged for the outer perforated tube, a blue flame burner will be evolved. Exhibits are produced to demonstrate this, and it is urged that there is no invention in putting a perforated tube in place of a chimney. The defendant's statement is that a perforated tube in the place of a chimney produces a blue flame burner, and that the function of an inner tube like that of Ruppel in the lamp is the same as if the lamp's chimney were exchanged for an outer perforated tube. The experiment in court with the Bohner burner, assuming that the exhibit followed the Bohner patent, did show a luminous white or yellow flame when the chimney was used and a blue flame when the outer perforated tube was used. The complainant's brief states that lamps with chimneys "burn vapor direct and feed air through flame spreaders to the flame. The invention in controversy does not have this mode of operation. Quite to the contrary, the invention in question is a gas-producing device, which first converts the vapor into a carbon monoxide gas in the combustion chamber, and then burns it as it issues therefrom. In these lamp patents the air is not fed to the vapor to convert it into a gas, but is fed to support an external combustion of the vapor direct." But it seems from complainant's own witness Smith that both in the lamp proper and blue flame burner the fuel is converted from hydrocarbon liquid to a vapor, then supplied with oxygen, and finally converted into carbon dioxide, or carbonic acid gas. But the absence of the outer tube causes the fuel thus converted to be burned in the chimney rather than above the combustion chamber. In the case of the blue flame burner the gas is made and is burned in the open air. In the case of the lamp, as Mr. Smith says, the "products of dissociation of hydro-carbon vapor, possibly containing free carbon, are heated to incandescence by the surface combustion, and thus impart the luminous qualities to such flame." Yet it seems by Mr. Smith's evidence already mentioned the hydro-carbon does at some stage of its consumption in the lamp become carbon dioxide. What, then, does the air entering the combustion chamber from the inner tube effect in the case of the lamp that it does not effect in the case of a burner? The outside tube admitting a large body of air seems to cause whatever difference there is, and that difference relates to the place where the converted fuel is consumed. It appears from the file wrapper that the question arose in the Patent Office, where three claims, which the inventor wished to add, were rejected by reference to the Jauch patent, No. 412,958. The examiner after such rejection, wrote:

"Perhaps, however, the applicant may show that the patent to Jauch is not anticipatory in character, for the reason that the air-checking diaphragms are in each case merged into a different genus, and have, therefore, unlike functions. What such functions are should be clearly indicated."

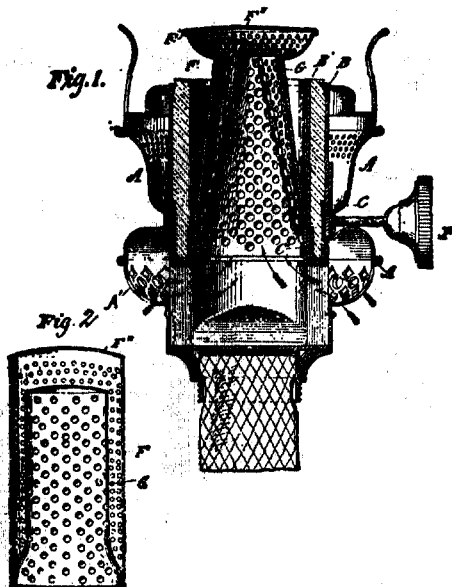
Nevertheless, the Patent Office, after the interference proceedings disclosed, allowed the present claims. But it is unnecessary to decide the question, for it is thought that the lamp burners do not anticipate.

The defendant's reference to the patents issued to Hoerle, Rhind, 1888, and Bohner, illustrate the prior art. In each case the chimney takes the place of an outer perforated tube. In Hoerle, shown below, there are two flanges, something like diaphragms, which differentiate it from the Ruppel in suit.





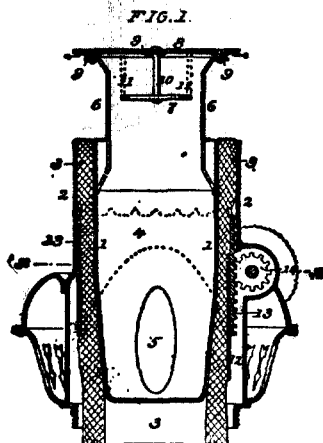
Rhind, 1888, patent is shown by figures:



A truncated cone is used in the inner tube, and the specification states:

"Not only is the air steadied by reason of this inner cone preventing the air from rushing directly through the perforations of the outer cone, but a still-air-chamber is provided between the cones F and G, and within this chamber the air is heated and expanded, and then supplied steadily to the flame throughout the whole lateral surface of the outer cone or thimble."

This structure neither resembles the Ruppel burner nor does it answer to the claims, for very much the same reasons given above for differentiating the Lannert & Jeavons, 1891, patent from the Ruppel in suit. The Bohner lamp is shown by Figure 1:



It shows a check plate of lesser diameter than that of the inner tube, to form a contracted annular passage to the upper portion of the distributor. The specification states that the disk acts as a "check to the upward draft of air, causing the same to be deflected outward at and near the base of the flame to cause a more perfect combustion at such point; the remainder of the air passing up around the check disk 7, and out through the perforations in the upper part of the skirt, to mix with the upper portion of the flame to complete the combustion." But the following sentence is significant:

"It is preferable, however, to discharge a large part of such air out in a radial horizontal direction through slits or passages left between the outwardly-flaring top of the skirt, 6 (inner tube), and the overhanging spreader plate or cap, 8, of the same."

This construction is shown in the diagram. This little device can be reshaped, the check plate amplified, the air chamber expanded and conformed to resemble the Ruppel burner, but the diagram and description in the specification do not bear much resemblance to the Ruppel patent.

It is impossible to discuss all of the varied propositions suggested by the defendant's counsel in his useful and lucid brief. They have been considered with care. The prior art, in some instances, both in lamps and blue flame burners, so nearly touches the Ruppel patent as to cause grave hesitation in ascribing to his structure the merit of invention. But carefully weighing all considerations, it is thought that the question should be decided that Ruppel did take a forward step in the art that is valuable and shows invention.

This brings the inquiry to the Jeavons patent. The claims involved, 22 and 23, require a structure containing (1) combustion tubes; (2) a plate between them around whose sides the air passes; (3) imperforated combustion walls above the plate; (4) either no cap or an open web or cap, "which spans over the space between the two tubes," through which holes alone the air above the plate can pass. The Silver structure shows a diaphragm with notches at the periphery, perforated walls above through which the air above the diaphragm must pass, because the chamber is closed by an imperforated cap. In view of these differences it is concluded that the defendant's structure does not infringe the Jeavons patent.

There should be a decree enjoining the defendant from infringing claims 6, 7, and 8 of the Ruppel letters, and that the defendant's structure does not infringe the Jeavons patent. Costs will be settled upon application.

**MERRIMAC MATTRESS MFG. CO. v. FELDMAN.**

(Circuit Court, D. Massachusetts. November 3, 1904.)

No. 1,744.

**1. PATENTS—ANTICIPATION—CRUDENESS OF ANTICIPATING STRUCTURE.**

The fact that a mechanical structure is crude does not prevent it from being an anticipation of one subsequently patented, where the inventive thought embodied is the same in both.

**2. SAME—ABANDONMENT.**

Where an unpatented mechanical invention was reduced to practice by the construction and use of the device, and its exhibition by the inventor to others, it cannot be abandoned so as to change its effect as an anticipation of a device subsequently patented by another.

**3. SAME.**

Anticipation is not avoided by the fact that the inventor of the anticipatory device, which he reduced to practice, did not realize its value, and so changed it before applying for a patent that the patented structure was not an anticipation.

**4. SAME—PRIORITY OF INVENTION—REDUCTION TO PRACTICE.**

The first to reduce an invention to practice, as shown by an actual construction produced in court, is usually held to be the inventor, as against another who merely says he had previously conceived the invention.

**5. SAME—ANTICIPATION—COUCH-BED.**

The Leighton patent, No. 667,916, for an interconvertible couch-bed, is void for anticipation by one Mallet, who conceived the invention and reduced it to practice by the construction of a couch-bed prior to its reduction to practice by the patentee.

In Equity. Suit for infringement of letters patent No. 667,916, for a couch-bed, granted to Eugene R. Leighton February 12, 1901. On final hearing.

Milton E. Robinson and James E. Young, for complainant.  
Roberts & Mitchell, for defendant.

HALE, District Judge. This suit is for infringement of claims 5, 6, 7, and 8 of letters patent of the United States, No. 667,916, issued February 12, 1901, to the complainant, on the invention of Eugene R. Leighton, for a new and useful improvement in couch-beds. The same claims of the patent have already been before this court in *Merrimac Mattress Manufacturing Company v. Brown*, 122 Fed. 87. In that case there was no argument by the defendant, but the court made a full examination of the matter brought before it in the record, and decided, upon a careful examination of the specification and claims, that there was sufficient in them to constitute invention. Anticipation was the leading defense upon which testimony was offered, but the testimony on this point was vague and unsatisfactory, and was not persuasive to the court. The claims now at issue are as follows:

"(5) An interconvertible couch-bed, comprising two complete interlocking laterally sliding sections, each having all of its parts, including the mattress support, permanently connected, the sections being relatively constructed, and arranged to permit their separation into two independent beds without dismantling either of them.

"(6) An interconvertible couch-bed, comprising two complete, interlocking sections, adapted to be nested one within the other, each section having side-bars, end-bars and legs, all permanently connected together, and each section being separable from the other into an independent bed.

"(7) An interconvertible couch-bed, comprising two complete, independent metallic beds, adapted to be arranged in interlocking relation with the legs of one bed between the side-bars of the other bed, and the end-bars of the first-mentioned bed above the side-bars of the second-mentioned bed, all without disconnecting any of the parts of either of said beds.

"(8) An interconvertible couch-bed, comprising two complete, independent beds, each having side-bars, legs, end-bars and a mattress stretched between said end-bars, all of said parts being permanently connected together, said beds being adapted to be arranged in telescoping interlocking relation, with the legs and the end-bars of one bed located respectively between the side-bars and the side-bar and the mattress of the other bed, whereby one bed may be moved laterally a limited distance relatively to the other bed, or may be completely separated therefrom, without dismantling any of the parts of either."

The object of the invention is shown by the specification to be:

"To provide an article which can be converted from a bed to a couch, and vice versa, without the employment of operating mechanism, or other power-transmitting devices, whereby said article may be greatly simplified in construction."

The inventor further describes his invention as follows:

"Referring to the drawings, it will be seen that the couch-beds are constructed in two sections, one of which telescopes within the other, and I shall refer to them as the 'main section,' and the 'sliding section,' respectively. \* \* \* As thus far described, the main frame is capable of use by itself without the addition of the sliding frame. The sliding frame is also capable of use by itself, and it may be disconnected from the main frame. \* \* \* By tilting the inner sides of the two sections, the sections may be separated without dismantling either of them; being each a complete bed without further additions. This is a new feature with me, for, as far as I am aware, I am the first to have provided an interconvertible couch-bed comprising two interlocking nesting sections, which may be separated without dismantling either of them; and each of which, when separated, forms an independent bed. \* \* \* From this description, it will be seen that the article described may be converted from a bed to a couch, and vice versa, by simply moving the sliding section laterally; and, as each section is supported independently of the other, little or no effort is required to move the sliding section upon its own casters. One of the wire mattresses is on a plane a little below the other, but the hair or cotton mattress which is placed upon them may be thicker upon one side than the other, to compensate for the difference in height of the two spring mattresses."

This case came on for final hearing before the court some months ago, and was reopened in order to introduce newly-discovered evidence relating to anticipation. That evidence is now before us. The defendant urges that one Adrian De Piniec-Mallet was the prior inventor, and that this priority is fatal to the patent. It is necessary for the court to consider this proposition in its aspect of fact and of law. Leighton reduced his invention to practice early in the fall of 1899, and afterwards embodied that invention in the patent in suit. It is claimed that Mallet reduced his invention to practice in October, 1898; but it is insisted by the complainant that the construction made by Mallet in 1898 was not identical with the invention of Leighton, that it was never in fact reduced to practice, and that the facts relating to it were not such as to make it available to the complainant against the patent

founded upon the Leighton invention. This renders it necessary to examine with care the evidence upon the subject. The testimony tends to show that Mallet and his wife kept a boarding house in the summer time at Bensonhurst, Long Island. Mallet testifies that in the spring of 1893 he conceived the entire invention involved in this patent. He says he found that if two mattresses or mattress frames of the ordinary wire fabric construction, one a little shorter and lower than the other, were placed alongside each other, the shorter could be inserted or nested in the larger, so that its wire fabric might slide between the wire fabric and the side rail of the larger. He produces sketches which he says he made in 1893 of the construction in question. The testimony tends to show that he disclosed his invention to certain persons in 1894 and 1895, and that in 1895 he made a model which he produces in court. This appears to be the model of an interconvertible couch-bed, comprising two complete, interlocking, laterally sliding sections. In October, 1898, Mallet took some of the cot frames which he had in his boarding house into his yard, and made an embodiment of his invention, which he has produced, and which we have now before us. This construction consists of a short cot, which is made to slide, legs and all, in between the mattress and side rail of a larger cot. The construction appears to be substantially an interconvertible couch-bed, comprising two "complete, interlocking, laterally sliding sections." After making this construction, Mallet testifies that he slept upon it as a single bed, and also tried it as a double bed. Frederick Tworger, a grocer, testifies that he saw Mallet complete the bed in his back yard in 1898; and he recognizes the exhibit, which is produced in court, as the one which he then saw. He says that he himself, in October, 1898, was shown by Mallet how the bed worked, and that he pulled it out, and closed it up, and tried the bed himself. He says substantially that Mallet admitted that the structure was crude, but, "if it was made out of metal, it would fit more closely." Louis Baer testifies that in the fall of 1898 he saw in Mallet's house the extensible couch-bed; that Mallet explained it to him, and told him how it worked; and that he had previously seen the model of the bed. Mrs. Marie Mitchell testifies that she visited the Mallets in the spring of 1899, just before Easter, and saw the bed as now in evidence; that Mallet explained to her the bed and its operation, and that she and her little girl slept upon it on the night of her visit to the Mallets in the spring of 1899, the little girl using the shorter of the two beds; that the beds were extended as a double bed. A housemaid named Nielson, who worked for Mallet in the spring of 1899, testifies that during that time she slept in the Mallet house on a part of the double cot bed which is now produced in court, and that another housemaid slept in the same room on the other section of the same bed. Isidor Goldsmith, a butcher, testifies that in the summer of 1899 he saw Mallet's couch-bed. He describes how Mallet showed him the combination of the two sections of the bed. Mrs. Mallet, the wife, testifies as to the construction by Mallet of the bed produced in court, and that it is now unchanged from its condition when it was made in 1898, except that it shows some age and marks from wear and tear. She corroborates Mallet in respect to the instance of Mrs. Mitchell and her daughter sleeping on the bed

in the spring of 1899, and as to its use as two single beds by the housemaids. She says that Mallet himself slept on the larger section for several weeks at one time, and she corroborates her husband, also, in reference to the making of certain of the sketches and the model. Other corroborative testimony is offered. Some of the evidence with regard to Mallet's mental processes from 1893 to 1895 relating to this invention, as indicated by his sketches and model, appears to us rather vague and unsatisfactory. But the court is satisfied from the evidence that Mallet made in the fall of 1898 the bed which is now before us, and which is substantially, although rudely constructed, an interconvertible couch-bed, comprising two complete, interlocking, laterally sliding sections. We are satisfied from the testimony that Mallet in October, 1898, reduced to practice his alleged invention, and that it is, in substance, the invention afterwards embodied in the Leighton patent in suit.

In the Brown Case we cited the Barbed Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, and Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821, and held, in pursuance of those authorities, that the burden of proof rests upon the party setting up an unpatented article as proving prior use, and that every reasonable doubt should be resolved against the party setting up such unpatented article. In the Brown Case the evidence of anticipation was from the recollection of witnesses about events of many years before, unaccompanied by the production in court of any distinctly anticipatory device. All the evidence was vague and unconvincing, and failed to persuade the court beyond a doubt. To the evidence in that case no more distinct antithesis can well be conceived than that presented in the case at bar. The bed constructed by Mallet is now before us, and the evidence satisfies us, beyond a reasonable doubt, that it is a reduction to practice of Mallet's invention. We think it brings the case distinctly within the rule in Coffin v. Ogden, to which we have referred. It is true that the construction made by Mallet in 1898 was crude, and very far from presenting mechanical perfection; but mechanical perfection is not necessary for a complete presentation and illustration of the thought of the inventor. In Daniel v. Renstein & Co. (C. C.) 131 Fed. 472—a case recently decided—Judge Archbald considers carefully a device anticipatory to the invention of the patent then before him. He says:

"It is contended, however, that the two packings are distinguished by the results, the one being highly efficient, and the other not at all so; \* \* \* but, as already intimated, the difference so established is one of degree, and not of mechanical structure, which alone is patentable."

On the question of what evidence courts have held sufficient to establish public use, he says:

"Prior knowledge and use by a single person has been held to be sufficient to negative novelty. \* \* \* It was not necessary that it should go into general use, or become a commercial factor, as suggested. \* \* \* I see no way for escaping the conclusion that it clearly anticipated that which is covered by the patent in suit, which it therefore deprives of its novelty."

In this matter we derive much instruction from Coffin v. Ogden, to which we have referred in the Brown Case, which is cited in the case to which we have just referred, and is the leading authority on this sub-

ject. That case presents strong similarity to the facts in the case at bar. The patent there before the court was granted to one Kirkham. The question presented to the court was whether the Kirkham patent had been anticipated. Kirkham made his invention in March, 1861. One Erbe in 1860 had made a lock, an exhibit of which was brought into court. He had made three such locks before he made the exhibit lock. A witness, who had been a locksmith more than eight years, testified that he went to Erbe's house, and was shown by Erbe one of the locks, and was told by him how the lock was used. He identified the exhibit lock as identical with the lock shown him by Erbe. Two other witnesses testified that Erbe had shown them a lock like the exhibit lock. There was no proof that Erbe had ever made any locks containing the invention in question, except those referred to in the testimony. The evidence disclosed that he had applied for a patent, and had failed to get it. Mr. Justice Swayne, in speaking for the Supreme Court, said:

"Here it is abundantly proved that the lock originally made by Erbe was complete and capable of working. The priority of Erbe's invention is clearly shown. It was known at the time to at least five persons, including Jones, and probably to many others in the shop where Erbe worked; and the lock was put in use, being applied to a door, as proved by Brossi. It was thus tested and shown to be successful. These facts bring the case made by the appellees within the severest legal tests which can be applied to them. The defense relied upon is fully made out."

The court held a device anticipatory, and that it had been reduced to practice, even though the inventor of that device had applied for a patent for it, and had been refused. In the case at bar, it appears that Mallet, after making his couch-beds in 1899, went to a patent solicitor with the model which appeared to him to be more complete in form than any other he had worked out, and that through his solicitor he obtained a patent substantially for arranging two wire mattresses in sliding relation; one wire fabric lying between the wire fabric and side rails of the other wire mattress frame. Mallet may have thought that the elaboration of his design which he brought to his solicitor presented an improvement upon the device which he had conceived for an interconvertible couch-bed, and which he had constructed in 1898. The bed which he patented had a headboard and footboard, and all the appurtenances which go to make up a bed structure. He shows, however, that he then had in mind his 1898 construction, by illustrating it in the mattress frames connected with his patented device. Those mattress frames were removable from the bed frames, which constituted merely supports for the mattress frames. The mattress frames could readily be laid upon the floor and used as an interconvertible couch-bed; the relation between the two being such that the side rail of the smaller mattress frame was inserted between the side rail of the larger mattress frame and its wire fabric, and then the wire of the smaller frame could slide under that of the larger frame. It is unnecessary to inquire whether Mallet was misled by his own idea that elaboration constituted improvement, or whether he was misled by a mistake of his solicitors in not clearly seeing the difference between simplicity of invention and that elaboration which sometimes dissolves simplicity. The court is not convinced by his testimony in regard to the procuring

of his patent, or by the further testimony offered by the complainant upon the same point, that the action of Mallet resulted in the abandonment of his invention. We are satisfied that Mallet reduced the invention to practice in 1898. After he had so reduced it to practice he could not abandon his invention, for he had already given it to the public. Giving the most unfavorable construction to Mallet's action in obtaining his patent, such action would show that he did not give himself full credit for the invention that he had made; that he did not realize its simplicity and scope, nor its possibilities. But it is for us to inquire, what did he really invent? and not, what did he think of the invention which he had made? In *Ideal Stopper Co. v. Crown Cork & Seal Co.* (C. C. A.) 131 Fed. 246, Judge Brawley says:

"We do not mean that Young's invention is necessarily limited to his own conception of its possibilities. Columbus would not be the less entitled to be considered to have discovered America, because when he set out on his voyage his object was not to discover a new continent, but a new route to an old one."

Mallet's construction in 1898 clearly showed identity of the inventive idea with the invention afterwards patented by Leighton. The evidence convinces us that he reduced that inventive idea to practice. The fact that after he had reduced it to practice he did not put it into the form of a patent, but did patent something else, cannot be held to have defeated his inventive idea, or to have effected the result of abandonment of that idea. In coming to this conclusion on the question of abandonment, we intend to give full force to the fact that Mallet's conduct in obtaining his patent, as well as his further conduct as shown by the testimony of the complainant, has probative value against him on the question of whether he really made the invention in 1898 which he claims that he made; but the fact of his making that invention is so clearly shown to us by the other testimony which we have already commented upon that we must decide in favor of his having made that invention, although there is testimony which is properly before us, and which is opposed to this conclusion.

We have no doubt that Leighton reduced the substantial invention of the patent in suit to practice early in the fall of 1899, soon after he removed into his Green street house. This was one year later than the construction by Mallet of his couch-beds, which we have held to be a reduction to practice of an invention identical in inventive thought to that of Leighton. But the complainant insists that the inventive thought of Leighton, which was developed into his invention, was as early as 1892, and before any inventive idea is claimed to have been in the mind of Mallet. The complainant claims further that Leighton reduced his invention to practice as early as 1895. In considering the Mallet invention, we have already proceeded without regard to the testimony relating to his previous inventive thought as far back as 1893, which culminated in the reduction to practice in 1898. It is difficult to follow the course of the human mind, unless the avenue is made clear by some actual act of the inventor, which may be brought clearly before the court, not only by testimony, but by an actual construction produced in court; and so it is usual in courts that the first who reduces to practice, not the first who says that he has conceived an invention, is the one who is held to be regarded as the inventor.



In this case there is considerable evidence of a previous inventive idea on the part of Leighton, even as early as 1892, and some evidence that there was a reduction to practice as early as 1895; but this testimony is not corroborated by actual constructions brought before us, and is not otherwise sustained in such a manner as to make it convincing to the court. The burden which rested upon the defendant in the first instance to show that Mallet's invention was made at an earlier date than that of the Leighton patent in suit is now transferred to the complainant, who, in order to prevail, must prove that the anticipation has been anticipated. In our opinion, no such proof has been furnished by the complainant. We, therefore, in the case of both Mallet and Leighton, place the time of the invention at the time of the actual reduction to practice. The result of this is that we are compelled to hold that Mallet made an invention identical in inventive thought to that of Leighton, and that he made this invention in the fall of 1898, about a year prior to the time of the actual invention by Leighton, which was embodied in the patent in suit. In this view of the case, it is unnecessary for us to examine further the testimony in regard to other anticipatory devices which have been brought before us, both in the patented and the unpatented art. It is unnecessary, too, to pass upon the other questions which have been raised by counsel, both orally and in their very able and exhaustive briefs. It is sufficient for the decision of the cause to say that, in our opinion, the invention of Leighton, embodied in the patent in suit, has been anticipated by Adrian De Piniec-Mallet.

The decree must be: Bill is dismissed, with costs.

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#### MUNICIPAL TELEGRAPH & STOCK CO. v. WARD, Collector.

(Circuit Court, N. D. New York. April 2, 1904.)

##### 1. INTERNAL REVENUE—WAR REVENUE ACT—TAX ON CONTRACTS FOR PURCHASE AND SALE OF STOCKS.

Plaintiff corporation was engaged in business as a stockbroker in conducting transactions respecting the purchase and sale of stocks to be settled with reference to the public market quotations of prices, within subdivision 3 of Schedule A of the War Revenue Act of July 13, 1898, c. 448, § 25, 30 Stat. 458, as amended by Act March 2, 1901, c. 806, § 8, 31 Stat. 943 [U. S. Comp. St. 1901, p. 2302]. Its business was transacted with numerous correspondents, on whose telegraphic orders it would report a purchase or sale, and forward the correspondent a memorandum such as is required by the statute. The correspondents were also dealing with customers, and their orders to plaintiff generally represented orders from their own customers, to whom they delivered a memorandum of each purchase or sale bearing a stamp as required by the act, but stating the transaction between the correspondent and the customer only. The customer was not named or known in the transaction between the correspondent and plaintiff. *Held*, that such transactions were transactions between principals, separate and distinct from those between the correspondents and their customers, and that plaintiff was subject to the tax on each memorandum given thereon.

Action to Recover Internal Revenue Taxes Paid.

John A. Delehanty, for complainant.

Taylor L. Arms, Asst. U. S. Atty., for defendant.

WALLACE, Circuit Judge. This is an action to recover the sum of \$16,696.17, with interest from October 15, 1902, paid by the plaintiff to the defendant, as collector of internal revenue, under protest, and which the plaintiff claims was illegally exacted. The defense is that the sum exacted was the amount of a tax and penalties accruing to the government from the plaintiff pursuant to the provisions of subdivision 3 of Schedule A of the War Revenue Act of June 13, 1898, c. 448, § 25, 30 Stat. 458, as amended by Act March 2, 1901, c. 806, § 8, 31 Stat. 943 [U. S. Comp. St. 1901, p. 2302].

Subdivision 3 imposes a stamp tax upon every person who or corporation which engages in the business of making contracts or transactions respecting the purchase or sale, or purchase and sale, of stocks, bonds, or other securities, contemplating that the same may be closed or settled with reference to the public market quotations of prices made upon any exchange upon which the securities are dealt in, "and without a bona fide transaction on such exchange," of 2 cents on each \$100 of the face value of all stocks or securities covered by each and all of such contracts or transactions; and it imposes the same tax upon every person who or corporation which shall conduct "what is commonly known as a bucket shop." It further requires every such person or corporation to deliver to the other party at the time of making the same a written memorandum containing a complete specification of the contract, to which the proper stamp shall be affixed before delivery.

Between July 24, 1901, and July 1, 1902, the plaintiff was a corporation engaged in the business of making contracts and transactions of the class described in subdivision 3; but, so far as appears by the proofs, it was not engaged in conducting a bucket shop. Its business of this character was transacted with numerous brokers, who were engaged in business similar to that of the plaintiff, or in conducting bucket shops, located in various parts of the country, called "correspondents," and the course of the business appears to have been this: Upon the order of one of these correspondents by telegram to buy or sell a specified security if the market quotations warranted the execution of the order, the plaintiff would notify him by telegram that it had bought or sold, as ordered; and on the same day would send him a memorandum such as the statute requires of this and all other purchases or sales made in execution of his orders during the day, and a statement of his debit and credit items in account. When the credit items exceeded the debit items, the plaintiff would send a check to the correspondent for the balance. If the debit items exceeded the credit items, the correspondent would be expected to deposit the balance on the next morning in a designated local bank to the credit of the plaintiff. Each transaction between the plaintiff and the correspondent was identified by a number assigned to it in the consecutive order of the dealings, and this was transcribed in the books of both. These correspondents were at the same time dealing with customers who desired to engage with them in similar contracts or transactions, and their orders to the plaintiff generally represented orders from their own customers to buy or sell securities. Upon receiving notice from the plaintiff that a given order had been filled, the correspondent would notify the customer, and, if the customer had paid to him the required "margin," would deliver to him a memorandum

such as the statute requires. He would also number this memorandum with the number which had been assigned to the transaction between himself and the plaintiff. The memorandum evidenced a transaction between the correspondent and the customer only. The customer was not named or known in the transaction between the correspondent and the plaintiff; and the memorandum delivered by the plaintiff to the correspondent evidenced a contract between them only. The commissions charged by the correspondents to their customers were a quarter of 1 per cent. on the par value of the securities covered by the contracts or transactions. The commissions charged by the plaintiff to the correspondents were one-half of that amount. The correspondents placed on the memorandums delivered to their customers the stamps required by subdivision 3, and canceled the stamps. The plaintiff did not stamp the memorandums of sales or purchases sent to its correspondents.

The tax in controversy was assessed by the defendant upon the transactions between the plaintiff and the correspondents which took place between July 24, 1901, and July 1, 1902. The plaintiff insists that the tax was paid by the stamps affixed by the correspondents upon the memorandums delivered by them to their customers. If this contention is correct, the plaintiff is entitled to recover; otherwise it has no cause of action. If the correspondents were agents of the plaintiff and of their customers, so that in each contract or transaction the plaintiff and the customers were the real principals, it is plain that the contract or transaction is subject to but one tax. It would be in law a single contract or transaction between the plaintiff and the customer, the correspondent being a mere intermediary, and not a dual one between the plaintiff and its correspondent on the one hand and the correspondent and its customer on the other. The evidence does not warrant this view of the relations between the correspondents, their customers, and the plaintiff. It indicates that the correspondents were principals in their transactions with their customers upon the one hand and with the plaintiff upon the other; that the plaintiff dealt with them as principals, and neither knew nor cared to know any third party in their transactions with them; and that the plaintiff relied exclusively upon the responsibility of the correspondents in its dealings with them, although it was aware of their relations with customers. In a limited sense the correspondents were agents for the customers, because they were expected to execute orders to enter into contracts of purchase and sale given to them by the customers. In no sense were the correspondents agents of the plaintiff. They stood in no fiduciary relation to the plaintiff. They had no duties to perform for the plaintiff. They were not employed or paid by the plaintiff, their relations were none other than that of principal dealing with principal. When they made a contract to buy or sell with the plaintiff, they were at liberty to treat the contract as their own, and the plaintiff understood that they were at liberty to do so. In paying the tax by stamping the memorandums delivered to their customers the correspondents were merely paying their own tax upon their own transactions. The facts materially distinguish the case from that in *United States v. Clawson* (D. C.) 119 Fed. 994, which is relied upon by the plaintiff.

The conclusion is that the transactions between the correspondents and the plaintiff were distinct and independent transactions, upon which the plaintiff was required by the statute to pay the tax.

Judgment is accordingly ordered for the defendant.

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In re IMPERIAL CORPORATION.

(District Court, S. D. New York. October 15, 1904.)

1. **BANKRUPTCY—CORPORATIONS—SETTING ASIDE DEFAULT.**

Where a corporation against which a petition in bankruptcy has been filed makes default, an application to be relieved therefrom and to be allowed to defend should be made to the District Court.

2. **SAME—COLLATERAL PROCEEDING—PARTIES.**

Where it is necessary to reform a contract in order to sustain a petition in bankruptcy against a corporation, the corporation should be made a party to the proceeding, notwithstanding its default as to the petition, which did not ask such reformation, or the assent of its board of directors to the bankruptcy.

3. **SAME—EVIDENCE TO SUSTAIN ADJUDICATION.**

An adjudication of bankruptcy against a corporation *held* warranted by the evidence.

In Bankruptcy.

Frank L. Crocker, for petitioning creditors.

Waldo G. Morse, for answering creditors.

THOMAS, District Judge. The special commissioner finds that the Imperial Corporation "did duly pass a resolution by its board of directors, admitting its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, and authorizing its secretary to so advise any creditor in writing, and that the secretary did so advise the petitioning creditors." It may be that the corporation, at the instance of a new board of directors, should not have been allowed to defend, provided the above resolution was duly passed, but whether it was duly passed is the very fact which the new directory of the corporation desired to contest. But the corporation was in default, and the referee properly held that the application for relief therefrom should be made to the court. There is, however, a very substantial difference between taking the corporation's default, for the purpose of adjudicating it a bankrupt, and proceeding to reform a contract without giving the corporation an opportunity to appear and defend. Hence, if it were necessary to reform the contract in order to sustain the petition, it would be necessary to remit the matter to the referee, and allow the corporation to be made a party to the proceeding to reform the contract. The petition did not ask for a reformation of the contract, but for an adjudication in bankruptcy. The fact that the corporation, by its default and the previous action of its board of directors, assented to the bankruptcy, by no means established its willingness that so important a contract should be reformed. It should be observed that the creditors defending do not appear to be the creditors of the Imperial Corporation, but of Mr. Lieb, who made the contract with the committee of the old

corporation. Evidence to the effect that the Imperial Corporation assumed Mr. Lieb's obligation to pay the debts of the Magnetic Piano Company may exist, but it was not called to the attention of the court. Unless there be such assumption, the persons defending in this proceeding are without standing, but the conclusion reached renders this inquiry unimportant. The evidence shows that Lieb was a creditor of the Imperial Corporation for salary. It is understood that, aside from this, he had paid debts and made advancements amounting to \$25,000 or over. This fulfills the seventh paragraph of the second contract. But in the fourth paragraph Lieb agrees "that he will purchase from the new company not less than five hundred (500) shares of its preferred stock within eighteen (18) months from the date hereof." The contention of the answering creditors is that it was Lieb's duty not only to purchase the stock, but also to pay in \$25,000 in addition. He did take the stock, and he took it by virtue of the money that he paid pursuant to the seventh paragraph. It will be noticed that under the agreement Lieb took nothing except the stock that he was to receive upon payment therefor. If he agreed to pay \$25,000 in addition under the seventh paragraph, it was without stipulation that he should receive anything in return therefor, and was a mere gratuity to the company. When he undertook to pay the indebtedness of the Magnetic Piano Company, and advanced money in addition for the development of the new company, such payment, in the absence of any provision for repaying or any stipulation therefor, must be regarded as a mere loan to the company, which he could justly credit upon his indebtedness for the stock which he agreed to take under the fourth paragraph. This is the meaning of the second paragraph, and the intention of the parties thereto. Upon this construction of the contract it is unnecessary to reform it, and the finding of the special commissioner, that the corporation should be adjudicated a bankrupt, is confirmed.

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Ex parte TOWNSEND.

(District Court, D. Nebraska. November 11, 1904.)

**1. COURTS-MARTIAL—REVIEW OF JUDGMENT BY CIVIL COURTS.**

The judgment of a court-martial regularly organized convicting and sentencing a soldier for desertion, which judgment has been confirmed as provided in the articles of war, is not subject to review by a civil court in habeas corpus proceedings on the ground that the prosecution was barred by limitation under the 103d article of war, such defense being one to the merits to be determined by the court-martial, and not affecting its jurisdiction.

Application by Richard Townsend for a writ of habeas corpus.

Charles G. McDonald, for petitioner.

Irving F. Baxter, U. S. Atty., and Wm. G. Doane (Captain, Acting Judge Advocate U. S. Army), for respondent.

MUNGER, District Judge. Under the facts in this case it appears that petitioner, Richard Townsend, enlisted as a soldier in the United States army on May 4, 1898, for a term of three years; that he deserted

said service on the 8th of January, 1899; that he was apprehended and taken in custody by the military authorities on March 4, 1904, and tried before a military court-martial duly convened at Ft. Crook, Neb., on the 16th day of June, 1904. Before the court-martial said Townsend pleaded not guilty, and entered the further plea of the statute of limitations provided by the 103d article of war. He was duly convicted by the court-martial, and sentenced to be dishonorably discharged and confined at hard labor for a period of two years at Ft. Crook, Neb., which conviction and sentence was duly approved by the reviewing officer. It appears that the protocol of peace between the United States and Spain was signed in August, 1898, the treaty of peace signed in December, 1898, and ratified by the two countries in April, 1899. He petitions for his release upon writ of habeas corpus.

The Supreme Court, speaking with reference to military court-martials, have said:

"Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction; and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." *Carter v. Roberts*, 177 U. S. 496-498, 20 Sup. Ct. 713, 44 L. Ed. 861; *Carter v. McClaughry*, 183 U. S. 365-380, 22 Sup. Ct. 181, 46 L. Ed. 236.

The only inquiry, then, that can be made in this case is, first, did the court-martial have jurisdiction to hear and determine the offense charged? and, second, was the punishment imposed within its powers? That a military court-martial, when properly organized, has exclusive jurisdiction of the military offense of desertion, is not disputed; nor is it contended that the military court was not properly organized, and that its judgment was not properly examined and approved by the reviewing authority, as provided by the articles of war. The only contention is that, as the facts show that the statute of limitations provided by the 103d article of war was applicable to relieve petitioner from punishment by the court-martial for the military offense of desertion, that such court was without jurisdiction to impose any punishment. The 103d article of war is as follows:

"No person shall be tried or punished by a court martial for desertion in time of peace and not in the face of the enemy, committed more than two years before the arraignment of such person for such offense, unless he shall have meanwhile absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation; Provided, that said limitation shall not begin until the end of the term for which said person was mustered into the service."

It is to be borne in mind that jurisdiction to hear and determine a cause and the exercise of such jurisdiction are very different matters. The plea of the statute of limitations does not challenge the jurisdiction of the court to hear and determine the matter, but is a plea to the merits, and a matter to be determined in the exercise of jurisdiction. *U. S. v. Cook*, 17 Wall. 168, 21 L. Ed. 538; *In re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596; *Johnson v. United States*, 3 McLean, 89, Fed. Cas. No. 7,418; *In re White (C. C.)* 17 Fed. 723; *In re Davison (C. C.)* 21 Fed. 618. The 103d article of war does not furnish an absolute

bar to a prosecution for desertion after two years from the end of the term for which the person was mustered into the service. It operates only upon condition that such desertion was in time of peace, and not in the face of the enemy, and upon the further condition that the party has remained within the United States for the period of two years between the end of the term of such enlistment and the arraignment. Those conditions present questions of fact which it was the province of the court-martial to hear and determine in the exercise of its jurisdiction, and its finding and judgment are not subject to collateral attack. In re Brodie (C. C. A.) 128 Fed. 665-672. Were the law otherwise than as before stated, I do not think petitioner entitled to the benefit of the statute of limitations, as, in my opinion, his offense of desertion was not committed in time of peace. It is true, the treaty of peace between the United States and Spain had been signed at the time he deserted, but it was not ratified by the two countries until subsequent. A treaty of peace does not terminate war; it exists as to individual rights until such treaty is ratified. Ex parte Ortiz (C. C.) 100 Fed. 955; Hijo v. United States, 194 U. S. 315-323, 24 Sup. Ct. 727, 48 L. Ed. 994.

The writ is discharged.

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#### MANHATTAN WEB CO. v. AQUIDNECK NAT. BANK.

(Circuit Court, D. Rhode Island. November 10, 1904.)

No. 2,715.

1. CORPORATIONS—USE OF FUNDS BY TREASURER FOR PRIVATE PURPOSES—PRESUMPTION OF AUTHORITY.

Where the treasurer of a corporation draws a check in its name, which he uses in payment of his individual notes, in the absence of circumstances giving rise to a reasonable inference of authority to do so the payee is put upon inquiry, and charged with notice of all the rights of the corporation, there being no presumption of authority to use its funds for such purpose from the mere fact that they are so used.

2. SAME—PAYMENT OF NOTE OF THIRD PARTY.

The use of the funds of a corporation by its treasurer in the payment of notes of a third person is not beyond the apparent scope of his authority so as to entitle the corporation to recover the money, where it was accepted in good faith, without notice of any want of authority, and especially where the relation between the maker of the notes and the corporation was such as to warrant the belief that the payment was authorized.

3. SAME—RECOVERY OF UNAUTHORIZED PAYMENT—ESTOPPEL.

Where a bank which held individual notes of the treasurer of a corporation received a check of the corporation signed by him as treasurer, with directions to apply the proceeds in payment of the notes, and did so, surrendering the notes with its rights against indorsers and collateral security which it held, without any inquiry as to whether the payment was authorized by the corporation, which would have disclosed that it was not, the corporation is not estopped from recovering the money by the fact that no demand therefor was made for four years, although the check was entered on its passbook, and was itself returned by the bank, with other canceled checks, soon after the transaction.

At Law. On defendant's motion for a new trial.

Edwards & Angell and Wm. R. Martin, for plaintiff.  
Wm. P. Sheffield, Jr., for defendant.

BROWN, District Judge. The Manhattan Web Company, a corporation of New Jersey, was a depositor in the defendant bank. Its treasurer, E. Read Goodridge, drew against its account a check for \$7,750, dated February 20, 1900, payable to the order of E. Read Goodridge, and signed "Manhattan Web Co., E. Read Goodridge, Treasurer." This check, indorsed, "Pay Aquidneck Nat. Bank or order E. Read Goodridge," was sent by Goodridge to Hopkins, cashier of the bank, in a letter directing the application of the check to the payment of six notes then held by the bank. The bank followed instructions, and charged the check against the plaintiff's account. Four of these notes, amounting to \$5,150, were notes of E. Read Goodridge for his personal indebtedness to the bank. Two of the notes were signed, "Manhattan Web Co., E. Read Goodridge, Treas.," and were indorsed, "Manhattan Web Co., E. Read Goodridge, Treas.," "H. L. R. Goodridge," and "E. Read Goodridge." These two notes were dated, respectively, November 7 and November 20, 1899. The plaintiff offered evidence to the effect that these two notes were made by the Manhattan Web Company of New York, and were not notes of the plaintiff, the Manhattan Web Company of New Jersey. Upon a trial with a jury a verdict was rendered against the bank for the full amount of \$7,750. The bank now petitions for a new trial.

The plaintiff contends that it is well settled as a matter of law that, where an agent draws a corporation note or check payable to himself, and uses it to pay his individual debts or debts of third parties, the payee takes with notice of the fraud, and the burden is cast upon him to establish by proof that the act was authorized or ratified by the corporation; citing the following cases: *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; *Campbell v. Manufacturers' National Bank*, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; *Gale v. Chase National Bank*, 104 Fed. 214, 43 C. C. A. 496; *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; *Randall v. R. I. L. Co.*, 20 R. I. 625, 40 Atl. 763; *New York I. Mine v. First National Bank*, 39 Mich. 644; *Reynolds El. Co. v. Merchants' National Bank*, 55 App. Div. 1, 67 N. Y. Supp. 397; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234. While there is a question whether this rule is not too broadly stated, since perhaps it would not be an unusual business transaction for a treasurer to draw corporate funds for his own salary, and to deposit them in his own account subject to check for his private bills, yet the cases cited are at least sufficient to justify the propositions that, where a treasurer of a corporation draws and uses its funds for private purposes, in the absence of circumstances giving rise to a reasonable inference of authority to do so, the bank is put upon inquiry; and that a presumption of a treasurer's authority to apply corporate funds to his private purposes does not arise from the mere fact that he does so apply them.

As to the individual notes of Goodridge, there apparently was no fact, additional to the assumption of authority by the treasurer, to give rise to any fair inference of special authority to use the funds of the corporation to pay his individual notes.



As to the application of the corporate funds to the payment of the notes of the Manhattan Web Company of New York a very different question arises. This was not, on its face, an application of the funds to the treasurer's private use; and I think it cannot be said, as a matter of law, that the payment of a note of a third person is *prima facie* illegal, or apparently without the scope of the authority of a treasurer conducting the business of a corporation. Even if the bank officers knew that the Manhattan Web Company of New Jersey and the Manhattan Web Company of New York were distinct corporations, and were ignorant of their relations, they were not bound to inquire as to the special authority of a treasurer having general authority over the funds. In the absence of notice that he was appropriating the funds to his own or to unauthorized purposes, they might fairly assume his authority to direct the payment of money to a third person. As a matter of evidence, however, the similarity of the names, officers, and stockholders of the two corporations, and information that one was about to succeed the other, would bring this branch of the case within the doctrine of *Dike v. Drexel*, 11 App. Div. 77, 42 N. Y. Supp. 979, affirmed 155 N. Y. 637, 49 N. E. 1096, cited in *Rochester & C. T. R. Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790. I am of the opinion that the evidence did not warrant a finding that there was apparently no authority to pay the notes of the Manhattan Web Company of New York, and that this was *prima facie* illegal.

The defendant relies upon the fact that after paying the check of February 20, 1900, for \$7,750, the bank, on April 2, 1900, made up the passbook of the plaintiff, showing the withdrawal, and sent it, with the check vouchers, to the plaintiff, and that it was retained without objection until 1904, when suit was brought. It is contended that the plaintiff failed in its duty of reasonable diligence to examine its account and to give notice of irregularities within a reasonable time; citing *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. The applicability of this doctrine to the present case is very doubtful. The bank knew at the outset that money was to be used to pay Goodridge's individual debts. Without inquiry it at once surrendered its rights against indorsers of the old notes and its collateral security as well. Knowing the facts, it could not complain because it was not informed of them by the plaintiff. The bank did what was *prima facie* unlawful—surrendered its security—and then communicated the fact through the passbook and vouchers. There is a clear distinction between a case where a bank unwittingly has taken a forged check and the depositor has failed to give the bank timely information of the forgery, thus acting negligently, and preventing the bank from taking steps for its protection, and the present case. In *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 112, 6 Sup. Ct. 657, 663, 29 L. Ed. 811, it was said:

"Of course, if the defendant's officers, before paying the altered checks, could, by proper care and skill, have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of the account."

This is applicable to the present case. The bank knew the facts, and knowingly gave up its securities. This either cut it off from all recourse against the original parties to the old notes, or it could at will seek to

cancel the transaction. If it chose to wait, in the hope that the plaintiff would not object, its delay in proceeding against the original indorsers and original collateral is voluntary, and not caused by neglect of any duty of the plaintiff.

While the finding of the jury is substantially correct as to the sum of \$5,150, the amount of Goodridge's individual notes, I am of the opinion that the instructions as to the notes of the Manhattan Web Company of New York were not sufficiently favorable to the defendant, and that the verdict as to those notes, amounting to \$2,600, is against the evidence.

Petition for a new trial granted, unless the plaintiff shall within 10 days file a remittitur as to \$2,600. If such remittitur is filed, the plaintiff may take judgment for \$5,150.

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In re CHASE.

(District Court, D. Massachusetts. November 21, 1904.)

No. 2,719.

**1. BANKRUPTCY—STATE COURTS—ACTION BY TRUSTEE—ACCOUNTING—MONEY PAID—RECOVERY.**

An occupant of mortgaged real estate alleged to belong to a bankrupt cannot recover from the bankrupt's trustee a sum of money which she paid under a final decree in a suit against her in the state court for an accounting of rents and profits.

**2. SAME—SET-OFF.**

Where the wife of a bankrupt was in possession of certain real estate which the bankrupt had conveyed subject to certain mortgages, one of which was to his son for the benefit of his wife, and in a proceeding by the bankrupt's trustee in the state court such mortgage was held valid, she was entitled to credit for interest paid on such mortgage under the terms of a lease executed to her by her husband's grantee, whether she be deemed the equitable owner of the mortgage to the son or in possession as a fraudulent vendee.

**In Bankruptcy**

Harry J. Jaquith, for petitioners Chase and others.

Richard D. Ware, for trustee.

LOWELL, District Judge. The bankrupt owned a house on Chestnut street, Boston, upon which were three valid mortgages for \$25,000. The first and second are not here in question. The third—of \$10,000—was held by his son Charles for the benefit of the bankrupt's wife. The property was worth considerably less than \$25,000. Before bankruptcy the bankrupt conveyed his equity to one White, who gave to Mrs. Chase a lease at will of the premises, with the agreement that she should pay taxes and interest on the mortgages. The bankrupt's conveyance was made without consideration, to escape attachment, and in fraud of creditors. After bankruptcy, the trustee brought a bill in equity in the state court against White for a reconveyance, and against White and Mrs. Chase for an accounting of rents and profits; also against Charles Chase to set aside the third mortgage, and against other persons for

other purposes. As to Charles Chase, the bill was dismissed, with costs, and the court thus determined that the third mortgage was valid. As against White, there was an interlocutory decree for reconveyance; and as against White and Mrs. Chase a decree for rent, estimated at \$1,500 a year, but subject to the amount actually paid by Mrs. Chase for taxes, interest, and necessary repairs. The account covered the period between the adjudication in bankruptcy and February 12, 1902, the date of the interlocutory decree. The master found \$869.29 due the trustee in bankruptcy, and his report was confirmed on appeal to the Supreme Court. The sum thus decreed was duly paid by the respondents. Thereafter Mrs. Chase brought a petition for an accounting in the court of bankruptcy, and Charles Chase filed a petition, as holder of the third mortgage, to establish a lien upon the rents and profits accrued since bankruptcy, and in the hands of the trustee. The referee found upon an accounting that Mrs. Chase owed the trustee \$606.59, and dismissed the petition of Charles Chase. Mrs. Chase and Charles Chase have appealed to me.

Mrs. Chase cannot recover back from the trustee any sum which she has paid under the decree of the state court. The litigation there ended in a final decree, which cannot be reopened here. In the new accounting for the period after February 12, 1902, it seems that Mrs. Chase should receive allowance for \$1,600, four years' interest on the third mortgage from 1897 to 1902, the sum having been paid by her to Charles Chase on March 4, 1902. This mortgage was a valid charge on the property, and Mrs. Chase's payment has exonerated the estate in the hands of the trustee. The sum she thus paid came back to her from her trustee, but this fact seems to me immaterial. If Mrs. Chase and her trustee are deemed in equity the same person, then equity must recognize that Mrs. Chase's rights as mortgagee are superior to those of the trustee in bankruptcy, and that, if he wishes to take the property, he must redeem it from her claim. If, on the other hand, he may treat her as a fraudulent vendee in possession, without regard to her rights under the mortgage, then her payment to the mortgagee must be treated as payment to a stranger, and so she becomes entitled to allowance therefor. The item was excluded from consideration in the suit in the state court, apparently because the payment was made after February 12th, the date selected for the end of the accounting in that suit. Trustee's counsel contended that no allowance of any sort should be made to Mrs. Chase, because her possession of the estate was that of a fraudulent vendee. See *Holland v. Cruft*, 20 Pick. 321; *Davis v. Leopold*, 87 N. Y. 620. But these proceedings are in their nature equitable, and not all so-called frauds are treated alike by a court of equity. The state court held that the bankrupt's conveyance to White was so fraudulent as to be voidable by the trustee, and this court is not disposed to disagree, even if the matter be not *res judicata*; but in dealing with Mrs. Chase we must bear in mind that her trustee might have foreclosed before bankruptcy, and thus have brought about an honest and lawful occupation by Mrs. Chase, and an effectual and lawful deprivation of her husband's creditors, instead of the fraudulent occupation and deprivation which actually took place. The creditors seem

to have lost nothing of real value which rightfully belonged to them, or of which they might not have been equitably deprived by proceedings of another sort. Acting on these considerations, the state court allowed Mrs. Chase to offset against her liability for rent the amount she actually paid for taxes, interest, and repairs, and this court adopts the same method of accounting. If all technical considerations are disregarded in order to do equity, Mrs. Chase is thus, in effect, given the use of property which, in effect, really belonged to her. In this respect the referee's judgment is reversed, and there must be an order declaring that there is nothing due either to or by Mrs. Chase.

In his petition Charles Chase seeks to recover the sum of \$869.29, received by the trustee in bankruptcy under the decree of the state court as rents and profits accrued before February 12, 1902, the date selected for the end of the accounting in that suit. He urges that there was no real equity of redemption in the trustee, as the three mortgages amounted to a sum much larger than the value of the property. He urges, further, that at the instance of the trustee he was prevented by the state court from enforcing his rights as mortgagee, and therefore should be allowed by this court the net rents and profits accruing during the time he was thus hindered. Ordinarily the mortgagor is entitled to rents and profits accrued up to the time that the mortgagee enters, or brings his right of entry or his bill to foreclose, and this right inheres in a trustee in bankruptcy. *In re Dole* (D. C.) 110 Fed. 926; *In re Bennett*, Fed. Cas. No. 1,313; *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314. There may be exceptional cases where a court of bankruptcy, proceeding upon equitable considerations, will treat some informal attempt by the mortgagee to obtain possession of the mortgaged property as the equivalent of a bill in equity and the appointment of a receiver; but here the mortgagee took no action whatever for a year after the date of bankruptcy, and when he assented to an agreement not to foreclose, so as to avoid the issuance of the injunction against him, he took no steps to preserve his rights to the accruing rents and profits pending the injunction. The best answer to his contention, however, is found in the fact that he has already been paid by the mortgagor the interest on his mortgage which he seeks to recover from the trustee in bankruptcy. It is true that this payment of interest was made by a person holding the double relation of mortgagor and cestui que trust under the mortgage, and that there is a certain hardship in requiring this person to pay rent for the use of the premises as tenant at will to one whose equity of redemption turned out to be valueless; but, upon the whole, though with some doubt, I do not think that this injustice can be righted by a court of equity under the rules of equity which govern the court of bankruptcy. The petition of Charles M. Chase to recover from the trustee in bankruptcy is therefore dismissed, and the order hitherto entered in the case is modified accordingly.

In re WOODS.

(District Court, D. Pennsylvania. October 28, 1904.)

No. 319.

1. **BANKRUPTCY—PROVABLE CLAIMS.**

Where the father of a bankrupt, to whom she was indebted, died after her adjudication, the right of his executors to prove the full indebtedness against her estate in bankruptcy is not affected by the fact that by his will he left her a share of his estate, from which any indebtedness due from her was directed to be deducted.

2. **SAME—BEQUEST ACCRUING AFTER BANKRUPTCY—PROVISION FOR DEDUCTION OF INDEBTEDNESS THEREFROM.**

Where a bankrupt, subsequent to the filing of an involuntary petition and an adjudication thereon, fell heir by the death of her father to a certain interest in his estate, which he left her by will, providing, however, for the deduction of her indebtedness to him therefrom, she is entitled to the benefit of such bequest in full, so far as her general creditors are concerned, subject only to the contingency of not obtaining a discharge, whatever right to retain her indebtedness out of her interest may exist in favor of her father's executors.

In Bankruptcy. On exceptions to report of M. H. Taggart, referee, sur motion to expunge claim.

W. K. West, for exceptions.

Edward S. Gearhart, opposed.

ARCHBALD, District Judge. The respondent, Emma A. Woods, was thrown into bankruptcy on the petition of creditors June 10, 1903, and on June 15th by her voluntary confession an adjudication was made against her. Seven days later, on June 22d, her father, Christian Laubach, to whom she was largely indebted, died, leaving a will by which he gave her one-fifth interest in his estate. The indebtedness of Mrs. Woods to her father amounted at the time of her bankruptcy to some \$5,500, and represented money advanced and obligations incurred on behalf of her husband and herself. This indebtedness has been proved in full by the executors, but it is contended by the excepting creditors that it should be reduced by the amount which is coming to Mrs. Woods from the estate, and the present motion is made to compel this.

By his will the testator directed the immediate conversion of his personal and certain of his real estate, for the purpose of paying his debts, but provided, with regard to what was over and above that, that it should be invested and managed by his executors for the term of 10 years before being distributed. At that time, after payment of certain legacies to two of his grandchildren, the residue was directed to be divided among his five children; his daughter Mrs. Woods, the same as the rest, being given "one full equal fifth part or share thereof," after deducting therefrom, however, any indebtedness that either she or her husband might then owe him. While distribution is deferred for the period mentioned, the interest of each child is undoubtedly a vested one; and it is conceded for the purpose of the argument that if the estate were settled now the share of each would amount to \$3,000.

It is very clear, and, indeed, it is not otherwise contended, that the interest of Mrs Woods under the will of her father, whatever its character or extent, having fallen to her after the filing of the petition and the entry of the adjudication, forms no part of her estate in bankruptcy, and the trustee acquires no title thereto. *Brandenberg*, §§ 1152-1154; *Collier* (4th Ed.) 509. The position taken with regard to it, however, is that by reason of the provision for the deduction of her indebtedness from her share the executors to that extent have in their hands a fund which they are bound to apply before coming in upon the bankrupt estate. But from whatever side we look at it this cannot be sustained. In the first place it is not a fact that the executors have anything in their hands at this time which they could appropriate to the reduction of the claim. Distribution, as we have seen, is not to be made for 10 years, and they have no right to anticipate that event. Moreover, notwithstanding the estimated value of Mrs. Woods' share, if there was to be an immediate settlement of the estate, no one can predict what will be realized from it after so long an interval, and those interested cannot be compelled to take the chance that there will be no change.

But, aside from this, and assuming that the share of Mrs. Woods was immediately available, the result must be the same. The executors stand in the shoes of the testator, and succeed to his rights as they were at the time the petition was filed, by which he was entitled to a dividend on the whole indebtedness then due. It will not be contended, so far as he was concerned, that this right was affected by his contemplated gratuity to his daughter, and it is difficult to see upon what principle it can be abridged as to his executors, now that this has been substantiated by his death. The provision by which the indebtedness of his daughter is to be charged up against her share was not made a condition of the bequest for his own security, but merely to put his several children on an equality, considering what he had previously done for each. It was not intended, as we may assume, for the benefit of her creditors, and it certainly cannot be asserted by them to the prejudice of his estate.

Neither are the rights of Mrs. Woods to be lost sight of in the discussion. Having surrendered her estate to her creditors, under compulsion of the law, she is entitled to the benefit of this bequest, such as it is, unaffected by the past, unless, of course, she fails to secure a discharge, a contingency which is not suggested. It may be, notwithstanding the present proceedings, that when the time comes she will still have to face the indebtedness to her father, and have it deducted from her inheritance according to the terms of the will, not having been obliterated by bankruptcy, so as to defeat the right of retainer, as held by some of the cases (*Wyckoff v. Perrine's Ex'rs*, 37 N. J. Eq. 118; *Courtenay v. Williams*, 3 Hare, 539; *Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452; *Garrett v. Pierson*, 29 Iowa, 304); although there are others in which a more liberal doctrine prevails (*Milne's Appeal*, 99 Pa. 483; *Allen v. Edwards*, 136 Mass. 138; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201). But, however that question may be ultimately decided, it is not to be hampered by anything which may be done here. Not only, therefore, is not her expectancy to be used to cancel her indebtedness in the interest of creditors, but she is entitled, on the contrary, to have

that indebtedness reduced, if not extinguished, by such dividends as may be realized in these proceedings. Only by this means, as between herself and her creditors, will the latter be given their full effect.

The exceptions are overruled, and the report of the referee is confirmed.

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In re GENERAL METALS CO.

(District Court, Southern District of New York. November 3, 1904.)

1. **BANKRUPTCY—TRANSFER OF CASE—CONVENIENCE OF PARTIES.**

The business of a New York corporation, having an office in New York City, where the most of its financial business was done and some of its supplies purchased, was the operation of a smelter in Colorado, which cost \$750,000 and employed about 150 men. Petitions in bankruptcy were filed against it in both districts; that in New York, which was first filed, being followed by an adjudication. There were creditors in both New York and Colorado and in other states. Many of the New York claims, which were largest in amount, were held by persons interested in the company as stockholders and directors. *Held*, on evidence showing that the more important questions likely to arise could probably be most conveniently litigated in Colorado, that the case should be transferred to that district.

**In Bankruptcy.** On motion to transfer case to another district.

Lunt, Brooks & Wilcox and Hall, Babbitt & Thayer, for the motion.  
Philbin, Beekman & Menken, opposed.

**HOLT**, District Judge. This is a motion to transfer the case to the United States District Court for the District of Colorado. The bankrupt is a corporation organized under the law of New York. It was engaged in the business of reducing gold ores into bullion at Colorado City, Colo. Two petitions in involuntary bankruptcy have been filed against it, one in this district on September 21, 1904, and one in Colorado on September 24, 1904. A receiver was appointed by this court, and a marshal directed to take possession of the assets by the court in Colorado. An adjudication in bankruptcy has been made in this court. It does not appear whether one has been made in Colorado. The company operated near Colorado City a large reduction mill and plant, which cost about \$750,000. It employed at the mill a force of about 150 men. It had an office in the city of New York, at which much of the financial business of the company was done, and at which a part of its supplies were purchased. It has about 50 New York creditors, holding claims for about \$300,000. It has about 210 Colorado creditors, of whom about 150 are employes. The total claims of the Colorado creditors amount to about \$214,000. There are 17 creditors situated neither in New York nor Colorado, having claims aggregating about \$45,000. Most of these are in western cities, among others Salt Lake City, Chicago, Cleveland, Columbus, St. Louis, Milwaukee, and Kansas City. One New York creditor, having a claim for \$50,000, prefers to have the case administered in Colorado. Various important questions are likely to arise and be the subject of litigation, in some of which most of the witnesses reside in New York City and in others in Colorado. I think the more important of these

questions are probably those which can be most conveniently litigated in Colorado. Many of the New York creditors having claims for money loaned are interested in the company as stockholders or directors, while most of the western creditors are not connected with the company. Under these circumstances, although neither district affords any very conspicuously superior advantages over the other as a place for the administration of the estate, I think, upon the whole, that the greatest convenience of the parties in interest will be subserved by having this estate administered in Colorado.

The motion is therefore granted, the case transferred from this district to the district in Colorado, the proceedings in the two courts consolidated, and the order appointing the receiver vacated upon his accounting. The order should be settled on notice.

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### STATE OF VIRGINIA v. FELTS.

(Circuit Court, W. D. Virginia. September 1, 1904.)

#### 1. REMOVAL OF CAUSES—PROSECUTION OF UNITED STATES OFFICER—PROCEDURE.

A petition for the removal of a criminal prosecution commenced in a state court against a revenue officer of the United States, under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], need not be filed until after the indictment of the defendant, where an indictment is required by the state law, until which time the prosecution has not been "commenced" within the meaning of the statute. Such petition need not contain allegations of local prejudice.

#### 2. SAME—TIME AND PLACE OF FILING PETITION.

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], which authorizes a revenue officer against whom a prosecution has been commenced in a state court on account of an act done under color of his office to remove the cause, "at any time before the trial thereof," into the "Circuit Court next to be holden in the district," does not require the petition for removal to be filed at the place where the next session of the Circuit Court is to be held after indictment, where there are several places of holding court in the district, but it may be filed, at any time before trial, at the place where the next term thereafter is to be held. And such requirement is directory only, and the filing of the petition in the clerk's office at a different place is not ground for remanding the cause to the state court.

#### 3. SAME—WRIT TO BE ISSUED.

Where the prosecution in such case has been commenced by *capias* or other process of arrest, the federal court, on the filing of the petition for removal, issues a writ of habeas corpus cum causa, which, in case the defendant has given bail, may be addressed to the marshal, a duplicate to be served upon the clerk of the state court. It is the duty of the petitioner, and not of the state, to procure the indictment and proceedings of the state court; and where the clerk has been tendered his proper fees therefor, and fails or refuses to furnish a certified copy of the record, a writ of *certiorari* should issue from the federal court, or the record may be supplied by affidavit, as provided in Rev. St. § 645 [U. S. Comp. St. 1901, p. 523], which course may also be taken when the petitioner is unable to pay the clerk's fees.

#### 4. SAME—JURISDICTION—RAISING AND TRIAL OF ISSUE.

A petition for removal sufficient on its face gives the federal court jurisdiction only *prima facie* to try the case on its merits, and the truth of its essential allegations may be put in issue by any appropriate plead-



ing, the filing of a plea to the jurisdiction being the better practice. The issue should be tried by the jury, subject to the right of the court to direct a verdict thereon when proper, and the burden of proof on the issue rests on the petitioner.

**5. SAME—TRIAL OF DEFENDANT IN FEDERAL COURT.**

On the trial of a defendant in a criminal prosecution who has removed the case into the federal court under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], no procedure is prescribed by the statute; but the offense charged being against the state law, and prosecuted by the state, the state practice should be followed in substantive matters, at least in felony cases, such as in the impaneling and charging of the jury, the number of challenges allowed, in determining the competency of witnesses, and in confining the jurors during the trial, where that is required by the law of the state.

**6. SAME—FAILURE OF STATE TO PROSECUTE.**

Where the state fails or refuses to prosecute in such a cause after its removal, the proper course is for the court to impanel a jury and direct a verdict of not guilty.

**7. SAME—WITNESS FEES.**

The court having no power to order the payment of witness fees, except in cases to which the United States is a party, special authority to the marshal to pay the fees of defendant's witnesses must be asked from the department of justice, if the defendant's witnesses are to be paid by the government.

**8. SAME—EXECUTION OF SENTENCE.**

Where a defendant in a criminal prosecution removed into the federal court under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], is convicted and sentenced in that court in accordance with the state law, either to be executed or imprisoned, he should be delivered to the proper officer of the state for the execution of the sentence; if a fine is imposed, which is paid, it should be transmitted to the clerk of the court from which the cause was removed.

Wm. A. Anderson, Atty. Gen., H. M. Heuser, Commonwealth's Atty., and R. Lee Trinkle, for the State.

Thos. L. Moore, U. S. Atty., J. C. Blair, Asst. U. S. Atty., A. A. Campbell, W. S. Poage, H. M. Ford, and Lee & Howard, for defendant.

**McDOWELL**, District Judge. T. L. Felts, having been indicted in the county court of Wythe county, Va., on a charge of murdering one Vaughn, and wounding with intent to kill one Alford, a petition for removal under section 643, Rev. St. U. S. [U. S. Comp. St. 1901, p. 521], was filed in the office of the clerk of the United States Circuit Court at Lynchburg, Va., on May 28, 1901. The petition, which was duly verified and certified by counsel, sets forth, in so far as is now material, that the petitioner was at the time of the occurrence a deputy United States marshal; that being in the town of Wytheville, Va., on official duty, he learned that two persons for whom he had warrants charging offenses against federal revenue statutes could probably be found at the town of Max Meadows; he thereupon boarded a train at Wytheville, which would take him to Max Meadows, for the purpose of attempting to arrest the persons for whom he had the warrants; that he found on the train the aforesaid Vaughn and Alford, who, on account of the previous acts of the said Felts in connection with his duties as deputy marshal, had conspired to murder the said petitioner; that while on the train he was viciously attacked by the said persons, and in defending himself against the said assault he found it necessary

to shoot and kill the said Vaughn and to wound the said Alford. It is further stated "that, in consequence of said assault and interference on the part of said Vaughn and Alford, he was hindered and prevented from discharging his duty as said officer, as required by the process aforesaid."

At the last term of the court at Lynchburg a motion to remand to the state court was made, based on the fact that the petition should have been filed in the office of the clerk of this court at Harrisonburg, where a term of court was held in June, 1901, and also on the ground that no right of removal is shown by the petition.

It is unnecessary here to discuss the last question, as the opinion in the case of *Virginia v. De Hart* (C. C.) 119 Fed. 626, shows sufficiently my reason for overruling the motion so far as it is based on this ground. The other question will be discussed briefly hereinafter.

Nothing further was done than to overrule the motion to remand at the last term, and as numerous questions arising under section 643, Rev. St. [U. S. Comp. St. 1901, p. 521], will probably be raised in this case at the approaching term, I have prepared the following opinion touching the practice in such cases, confined mainly to criminal prosecutions for indictable offenses, which, however, is merely tentative. Nothing herein is intended as the expression of an unalterable opinion, as this paper is prepared in advance of argument, and chiefly for the purpose of directing the attention of counsel to some of the nicer questions which will probably arise.

#### The Petition.

It is first to be noted that a criminal prosecution has not been "commenced" in a state court until the accused has been indicted. *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; *Georgia v. O'Grady*, Fed. Cas. No. 5,352, 3 Woods, 496; *Pennsylvania v. Artman*, Fed. Cas. No. 10,952, 3 Grant, Cas. 436. It is otherwise where the offense can be tried without an indictment. *Com. v. Bingham* (C. C.) 88 Fed. 561; *Georgia v. Port* (C. C.) 3 Fed. 117.

The essentials of the petition are so fully set forth in the statute that nothing need be said in this respect further than that the long and labored allegations of the existence of local prejudice against the petitioner usually found in such petitions are not essential.

In connection with section 643 [U. S. Comp. St. 1901, p. 521] should be read section 645, Rev. St. [U. S. Comp. St. 1901, p. 523], which was a part of Act March 2, 1833, c. 57, § 4 (4 Stat. 634), from which in large measure section 643 was taken. See, also, Act July 13, 1866, c. 184 (14 Stat. 171); Act Feb. 28, 1871, c. 99 (16 Stat. 439); and Act Sept. 24, 1789, c. 20 (1 Stat. 79); Act Feb. 4, 1815, c. 31 (3 Stat. 198).

#### At What Court to be Filed.

In this district, as in nearly all others, there are several places at which the Circuit Court holds sessions. The petition must allege that the petitioner has been indicted in the state court; but I do not think the provision that "the prosecution may be removed for trial into the circuit court next to be holden" forbids the filing of the petition in the office of the clerk of the Circuit Court at some other place of session in the district than the one at which a session is to be held next after

the finding of the indictment. It is conceivable that a federal revenue officer, indicted in a state court for an act done under color of his office, may allow several terms of the federal Circuit Court of the district to pass, either in ignorance of his right of removal, or under the belief that he can secure an impartial trial in the state court. If, however, subsequently, and before trial in the state court, he is advised of his right to remove, or comes to believe that local prejudice exists which will bias the state court against him, he should then have the right to file his petition and have the cause removed. Otherwise we do not give full weight to the words of the statute, "at any time before trial," and the purpose of the statute would be to some extent defeated. Again, the term of the Circuit Court "next to be holden" might commence so soon after the finding of the indictment that the preparation of the petition and certificate would be impossible. I think the statute in this respect is merely directory. When the petition and certificate have been prepared, the choice of the several clerks' offices of the federal Circuit Court in which the papers are to be filed is that one at the place where the next session of the Circuit Court is to be held. But a failure to follow this directory provision of the statute would not justify remanding the cause to the state court. In case the petition were filed at a place where no session of the court is to be held for a considerable time, the cause could, on motion, be transferred to a place where a session is to be sooner held or where the court is then in session.

#### The Writ to be Issued.

It will be observed that the statute makes no provision, where the prosecution is commenced by a *capias* or process of arrest, for any other writ than that of *habeas corpus cum causa*. This writ, where, as is usually the case, the petitioner has given bail and is not in actual custody, is not well adapted to the purpose in view. It is adapted to be addressed to the person who has the petitioner in his custody, and commands such person to bring the body of the petitioner before the court whose clerk issues it, and make known the cause of his caption and detention. A not unusual practice, where the petitioner is not in actual custody, is to address the writ to the marshal of the federal district, and issue a duplicate, which is served on, or left at the office of, the clerk of the state court in which the indictment is pending.

No provision is made for the issue of a writ of *certiorari* in a case commenced by *capias* or other process of arrest. As a rule the clerk of the state court, obeying so far as he can the command of the writ of *habeas corpus cum causa*, sends to the federal court the original bill of indictment (which should be identified by proper certificate of the state court clerk), or certifies a copy thereof, along with a copy of the orders, if any, made by the state court in connection therewith. If, however, the clerk of the state court fails or refuses to do either (and unless his proper fees are paid or tendered him he can, I think, rightfully so refuse), the course to be pursued is set out in section 645, Rev. St. [U. S. Comp. St. 1901, p. 523].

It has been mooted whether it is the duty of the state or of the petitioner to procure the indictment and proceedings of the state court. I do not think this is the duty of the state. It suffers the removal in

invitum. It is in the attitude of protesting that the trial should be had in its own court. As the state does not desire the trial to be had in the federal court, and as that court cannot try the case until the indictment has been procured (or until it has been supplied by affidavit or otherwise), it follows that the duty of procuring or supplying the indictment does not rest on the state, but on the petitioner.

Where the petitioner has paid or tendered to the clerk of the state court his proper fees, and the clerk fails or refuses to furnish a properly certified copy of the record, I think a writ of certiorari should issue. This has been done in some cases (*Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *State v. Sullivan* [C. C.] 50 Fed. 593), and the mere absence of an express provision in section 643 allowing such a writ to issue does not justify a refusal to issue it. Section 645 is authority for supplying the record either by affidavit "or otherwise."

The case of a pauper petitioner might present some difficulties. Neither the state statute (section 3538, Code 1887 [2 Code 1904, p. 1890]), nor the federal statute (Act July 20, 1892, c. 209, 27 Stat. 252; 1 U. S. Comp. St. 1901, p. 707), covers the case. If the petitioner were unable to pay the fees of the state clerk, perhaps the best course would be to supply the contents of the indictment by affidavit.

#### What Record Necessary.

I am inclined to the opinion that the indictment is the only record necessary to be procured, but do not now wish to express a decided opinion on this question.

It seems a matter of small moment whether the original bill of indictment or a certified copy be sent up. If the original is sent here, it should properly be identified by a certificate of its authenticity attached to it; but if the court be satisfied in any manner of the genuineness of the document, it will be sufficient.

#### Contesting the Jurisdiction.

Where an objection to the jurisdiction of the federal court appears on the face of the removal papers, the point is raised by a motion to remand. But when the party resisting the removal desires to contest the truth of some essential jurisdictional fact, an interesting question has been raised as to the proper procedure. In passing I may say that the contention that the petition, if good on its face, gives the federal court jurisdiction to try the cause on its merits, is not sound. A petition that is good on its face gives this court only a prima facie right to try the cause on its merits. Many cases to be hereinafter mentioned lead to this conclusion, and in *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648, it is said:

"But the act of Congress authorizes the removal of any cause where the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer. It makes such a claim a basis for the assumption of federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded."

To my mind it is a condition precedent to the right of the federal court to try the case on its merits that it be made to appear that the essential allegations of the petition for removal are true.

Some diversity of opinion exists as to the proper method of putting in issue the truth of the allegations in the petition, and as to the time and method of deciding such issue. In some circuits it is held that such an issue can be raised only by a plea in abatement to the jurisdiction, while in others any method, no matter how informal, by which the jurisdictional facts are traversed, is held sufficient. In *Curnow v. Phoenix Ins. Co.* (C. C.) 44 Fed. 305, a removal on the ground of diverse citizenship, Judge Simonton directed that a motion to remand be treated as a traverse of the petition to remove.

While a plea to the jurisdiction is not necessary, for the court will sua sponte remand the case if after the evidence is in it appears that it has not jurisdiction, yet the better practice is to file such a plea.

Such a plea, with replication, raises an issue of fact. The proper method of deciding such issue is also in some doubt. There is some authority tending to sustain the contention that the court should try this issue without the intervention of a jury. *Smith v. Railroad Co.* (C. C.) 30 Fed. 723; *Eaton v. Calhoun* (C. C.) 15 Fed. 158; *Clarkhuff v. Railroad Co.* (C. C.) 26 Fed. 468; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 694. The weight of authority, however, seems to sustain the view that the jury should try the issue. *Chic. R. Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. 632, 29 L. Ed. 837; *Imperial Co. v. Wyman* (C. C.) 38 Fed. 576-578, 3 L. R. A. 503; *Gribble v. Pioneer Press Co.* (C. C.) 15 Fed. 689; *Dennistoun v. Draper*, 5 Blatchf. 336, Fed. Cas. No. 3,804; *Wells Co. v. Avon Mills* (C. C.) 118 Fed. 193. These are not cases arising under section 643, but they are decisions of analogous questions under other statutes.

Whether or not Congress intended, when enacting section 643 or its prototypes, that the older statute, now section 648 [U. S. Comp. St. 1901, p. 321], requiring certain issues of fact to be tried by jury, should govern the practice in removals under section 643, when the issue is as to the jurisdiction, is possibly open to some doubt. I have not been able to find any authority bearing directly on this question, but I am inclined to the opinion that such an issue should be submitted to the jury, subject to the right of the court to direct a verdict on this issue when proper. *Imperial Co. v. Wyman* (C. C.) 38 Fed. 578.

When the issue as to jurisdiction is to be tried is also a question of some difficulty. Some authorities hold that a question of jurisdiction should be decided in advance of the trial on the merits. *Jones v. Oceanic Co.*, 11 Blatchf. 406, Fed. Cas. No. 7,485; *Clarkhuff v. R. R. Co.* (C. C.) 26 Fed. 468. But in others the jurisdictional issue has been submitted at the same time as the issue on the merits. *Wells v. Avon Mills* (C. C.) 118 Fed. 193; *Imperial Co. v. Wyman* (C. C.) 38 Fed. 578. See, also, *Wood v. Matthews*, 2 Blatchf. 370, Fed. Cas. No. 17,955; *Dennistoun v. Draper*, 5 Blatchf. 336, Fed. Cas. No. 3,804. It is somewhat illogical to swear the jury to try the case on its merits while a serious contention that the court has no jurisdiction remains undecided. But the short time between the different terms of the Circuit Court in this district, and the demands on the time at the disposal of the judges of that court, present practical objections to holding what may be in effect two trials of the same cause of such weight that I think it proper to hold that both issues may be tried at the same time. To be

sure, this course loses sight of the singleness of issue so much sought for in the common-law system of pleading, and the questions before the jury are somewhat confused by the fact that each party has the affirmative of one issue and the negative of the other. But these objections are not insuperable. As to the first it will be remembered that a Virginia statute allows a defendant in civil cases to file as many pleas as he desires, and frequently in jury trials there are several issues laid before the jury at the same time. In Whart. Cr. Pl. & Pr. (9th Ed.) § 488, it is laid down that when a defendant in a criminal case pleads not guilty, and also at the same time pleads autrefois acquit, there must be a verdict on each plea. The confusion engendered by the fact that the parties have not one the affirmative and the other the negative of both issues is, I think, more imaginary than real. In all ordinary cases the issue as to jurisdiction will be easily decided. And an instruction by the court that the jury will not return a verdict on the issue of guilty or not guilty if they find that the court has not jurisdiction will tend to reduce such confusion of thought as may exist.

In a very large majority of ejectment cases in this district there are at least two distinct issues submitted to the jury. One is whether or not the plaintiff's title papers, when properly located, cover the land in dispute. Another is whether or not the defendant has had the requisite adversary possession to bar the plaintiff's right of recovery. The affirmative of the first issue is held by the plaintiff, while the affirmative of the second is held by the defendant. More instances might be given of several issues, where neither side has the affirmative of all the issues. Thus, in the action of debt, where there are pleas of nil debet and of set-off.

#### When Plea to Jurisdiction Should be Filed.

Ordinarily in courts of general jurisdiction pleas in abatement are not favored, and must be filed at an early stage in the proceedings. The federal courts are, in some sense, of limited jurisdiction, and will remand a removed cause at any stage of the case if it appears that the court has not jurisdiction. It follows that the ordinary technical rules as to the time of filing pleas in abatement do not apply in removal cases. If offered too late to have the issue tried by the jury, the effect can be obtained by a motion to remand, which the court can pass upon after hearing the evidence.

#### Burden of Proof.

On the issue raised by plea to the jurisdiction the burden of proof is on the petitioner. 18 Ency. Pl. & Pr. 374; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Kansas City R. Co. v. Daughtry, 138 U. S. 303, 11 Sup. Ct. 306, 34 L. Ed. 963.

#### The Trial.

In the dissenting opinion of Mr. Justice Clifford in Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, after mentioning many of the difficulties presented by a trial under section 643, he says:

"\* \* \* The provision is a mere jumble of federal law, common law, and state law, \* \* \* which, in legal effect, amounts to no more than a

direction to a judge sitting in such a criminal trial to conduct the same as well as he can. \* \* \*

This language was used in 1879, and, as Congress has not seen fit to prescribe the procedure in such trials, it is the duty of the federal courts to devise such rules of procedure as will best do justice to both parties. As the trial is for an alleged offense against a state law, prosecuted by the state, it follows that in the most material respects the state law should be followed. Just where to abandon the state practice and follow the federal practice will present some nice questions. In the opinion of the majority in *Tennessee v. Davis*, supra, it is said:

"The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. \* \* \* Even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own form of proceeding."

I construe this as a direction to adopt the state law in all respects except as to mere matters of procedure. For instance, the order of the introduction of evidence, the regulation of the arguments by counsel to the jury, and the right to direct verdicts in proper cases, seem to me mere questions of practice, to be regulated by the rules prevailing in the federal court. In the federal courts the juries find only that the defendant is guilty or not guilty, and the court fixes the punishment. Under the state law it is the duty of the jury in many cases, on finding a defendant guilty, to fix the punishment. This seems to me to be a substantive right, and not a mere matter of practice, and I incline to the opinion that the state law in this respect should be followed.

#### Obtaining the Jury.

Under section 800, Rev. St. U. S. [U. S. Comp. St. 1901, p. 623], the juries in the federal courts are obtained practically under the state law. In misdemeanor cases no reason now suggests itself why one of the regular panels, subject to examination on voir dire (Code 1887, §§ 3154, 4048 [2 Code 1904, pp. 1664, 4048]), should not be used. In felony cases a special venire is issued. Code 1887, § 4018 [2 Code 1904, p. 2115], as amended Acts 1902-04, p. 882, c. 553, and section 4019 et seq., Code 1887 [2 Code 1904, p. 2115], regulate the procedure for obtaining the jury. When sixteen veniremen have been obtained, the next step is to arraign the defendant. In some states it is held that a defendant may waive this formality. And I am inclined to think that it may be waived in any federal court. *U. S. v. Mollay* (C. C.) 31 Fed. 19. The arraignment in this state consists merely in reading the indictment to the defendant by the clerk, and thereafter asking him if he is guilty or not guilty. After the arraignment the sixteen veniremen are sworn on voir dire "to answer truly such questions as may be propounded," and are examined by the judge, or counsel, or both, touching relationship to the defendant, interest, partiality, etc.

During or immediately after this examination either side may challenge for cause, without restriction as to number. Such challenges are forthwith tried by the court. If the panel be reduced, other veniremen are secured, either by issue of a further venire facias, or from the by-

standers, until a panel of sixteen free from legal objection has been obtained. This list is then submitted to the counsel for the defendant, who may strike therefrom any four names. If the defense declines to strike off names, or less than four names, the procedure is regulated by section 4023, Code 1887 [2 Code 1904, p. 2121].

The twelve jurors for service having been ascertained, the clerk reads to the jury the indictment, swears the jury, and delivers to them a charge advising them of the punishment they may inflict. A form, which has been in general use in this state in murder trials, reads as follows:

"Charge to Jury, Given by the Clerk.

"You are to inquire whether the prisoner be guilty or not guilty as charged in the indictment.

"If you find him guilty, you are then further to inquire whether it be murder in the first or in the second degree.

"If you find him guilty of murder in the first degree, say so and no more: the law fixes the punishment.

"But if you find him guilty of murder in the second degree, say that; and then you are to ascertain the term of his imprisonment in the penitentiary, so as such term be not less than 5 nor more than 18 years.

"If you find him not guilty either of murder in the first or second degree, you may find him guilty of voluntary manslaughter, and, if so, then you are further to ascertain the term of his imprisonment in the penitentiary, so that such term be not less than 1 nor more than 5 years.

"Not finding him guilty of murder in the first or second degree or of voluntary manslaughter, you may yet find him guilty of involuntary manslaughter.

"And if you find him guilty only of involuntary manslaughter, you may impose a fine of not less than \$5, or you may imprison him in jail, in your discretion, or you may impose both fine and imprisonment in jail.

"Or failing to find him guilty either of murder in the first or second degree or of voluntary or involuntary manslaughter, you may yet find him guilty of an assault, and for the assault impose on him a fine not less than \$5.00, or you may both imprison him in jail and fine him, the term of imprisonment to be as you may determine.

"If you find him not guilty, say so and no more."

Challenges.

It was held in *Georgia v. O'Grady*, Fed. Cas. No. 5,352, 3 Woods, 496, 24 Int. Rev. Rec. 5, that the number of peremptory challenges is governed by the federal and not by the state law. I find no other authority to this effect, except that the above case is followed in 18 Ency. Pl. & Pr. p. 184. The federal statute (Rev. St. § 819 [U. S. Comp. St. 1901, p. 629]), in so far as it relates to challenges in capital and other felony cases, clearly applies only in cases in which the United States is the prosecutor. The remainder of the section may possibly apply in misdemeanor cases; but I incline to the view that the right of challenge is to be regarded as a substantive right, governed by the state law.

Competency of Witnesses.

It has been held that in criminal trials in the federal courts the competency of witnesses is governed, except so far as changed by federal statutes, by the rules of the common law in force in the state where the trial is held, in 1789. *U. S. v. Reid*, 12 How. 361, 13 L. Ed. 1023; *Graves v. U. S.*, 150 U. S. 120, 14 Sup. Ct. 40, 37 L. Ed. 1021; *U. S. v. Jones* (D. C.) 32 Fed. 569; *U. S. v. Logan* (C. C.) 45 Fed. 872;



*Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. These were cases in which the defendants were tried for offenses against the United States. In the class of cases now under discussion the competency of witnesses should, I think, be governed by the present state law. Consequently the comparatively recent Virginia statute, allowing a wife to testify in behalf of her husband, for instance, would in a removal case be followed.

#### Directing Verdict.

Where the issue of fact as to the jurisdiction has been submitted to the jury, I entertain no doubt of the right of the judge, in a proper case, to direct the jury to find a verdict on this issue either way. So, too, on the issue of guilty or not guilty, I am of opinion that the court can direct a verdict of not guilty. The power to direct verdicts is one of the inherent powers of the federal courts, most frequently used to prevent waste of their much-demanded time, which is not necessarily surrendered simply because an offense against the state is being tried. All the reasons for the exercise of this power in other cases apply in these removed cases.

#### Confinement of the Jury.

In felony trials in the courts of this state, where the punishment may be death or confinement in the penitentiary for 10 years or more, it is a fixed rule of law that the jury must during the recesses of the court be kept separate, under the charge of the sheriff. *Philip's Case*, 19 Grat. 485, 540, and cases infra. The jury and the officers are boarded and lodged at some convenient house, and the officers are sworn not to speak to the jurors, nor to allow any one else to speak to them, relative to the trial. *Barnes' Case*, 92 Va. 806, 23 S. E. 784. It is not necessary to thus confine the jury until they have been sworn to try the issue (*Toel's Case*, 11 Leigh, 714; *Epes' Case*, 5 Grat. 681; *Curtis v. Com.*, 87 Va. 595, 13 S. E. 73), nor until some evidence has been introduced (*Martin v. Com.*, 2 Leigh, 746 [807]). But when adjourned, after having been sworn and after having heard some evidence, it is reversible error if they be not confined. And the record must affirmatively show the fact, though it need not show that the bailiff was sworn. *Barnes' Case*, 92 Va. 794, 23 S. E. 784. This is, I think, not a mere matter of procedure, but a right of the parties, which must be allowed in trials removed to the Circuit Court under section 643. While I regard the practice of confining the jury as a relic of the Dark Ages, entailing frequently great and unnecessary hardship on the jurors, yet it is a rule of the state law which should be followed until the Legislature sees fit to abolish it.

In the book of "Instructions to United States Marshals, Attorneys, Clerks, and Commissioners: January 1, 1899," issued by the Department of Justice, at page 97, § 639, it is said:

"Meals and lodging for jurors, and bailiffs in charge of jurors, can only be allowed in government cases and when ordered by the court. The department has received numerous inquiries from marshals asking what they shall do in cases where the court orders them to furnish meals to jurors in cases to which the United States is not a party. The department cannot authorize such payments, as there is no available appropriation from which they may be made."

See, also, Edition of 1904, § 871. The marshal is the disbursing officer of the government. Usually he makes all disbursements at his own risk. With the single exception, so far as I am advised, of the fees of jurors and witnesses in cases in which the United States is a party (section 855, Rev. St. [U. S. Comp. St. 1901, p. 657]), the court has no power to authorize, and consequently none to direct, disbursements by the marshal. In view of the awkward dilemma here presented, the only course that presents itself is to have the marshal ask the attorney general for advance authority to cover the cost of meals and lodgings of jurors and bailiffs in all necessary cases removed under section 643. I think such authority is never refused, notwithstanding the foregoing dictum in the book of instructions.

#### If State Authorities Refuse to Prosecute.

In *State v. Emerson* (C. C.) 8 Fed. 411, the state officials refused to prosecute. The court had the jury sworn, and directed a verdict of not guilty. This seems to me to be the proper course to pursue in such cases. The offense alleged is one against the state laws, to be prosecuted by the state authorities, and defended by the United States attorney. If, after reasonable opportunity to prosecute, the state officers decline or fail so to do, it is clear that the defendant should not be left under the charge without trial. And since there is no prosecutor, the proper course is to direct a verdict of acquittal.

#### Costs.

As heretofore observed, the federal court has no authority to order the payment of witness fees except in cases in which the federal government is a party. Consequently the court cannot make any order as to the payment of the witnesses for either side. In many cases, under special authority from the department of justice, the marshal pays the witnesses of the defendant. This authority is seldom withheld. In rare instances like authority has been given the marshal to pay the witnesses summoned for the state, though I fail to see why the state should not herself in the first instance pay her costs in these removed prosecutions.

#### Execution of Sentence.

Inasmuch as the defendant is prosecuted for an offense against the state law, it follows, in cases of conviction, that the state should execute the sentence. If the verdict and sentence be that the defendant be hanged, the order should direct that he be delivered to the sheriff of the county from which the case came for execution of sentence. If the sentence be imprisonment, the order should direct the marshal to deliver the defendant to the sheriff for transportation to jail or the state penitentiary, as the case may be. If the state authorities decline to receive the convict, an order should be made directing the marshal to liberate him. I perceive no reason why the federal government should execute such sentences.

If the jury merely imposes a fine on the defendant, and it is not paid, he should, I think, be delivered to the sheriff of the proper county. If the fine should be forthwith paid by the defendant, I think the clerk of this court should receive it, and pay the sum to the clerk of the court

from which the prosecution was removed; reserving, however, so much of the sum as represents the costs in the federal court, if the costs be adjudged against the defendant.

The following authorities may be advantageously consulted concerning the questions hereinabove considered: *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Davis v. South Carolina*, 107 U. S. 597, 27 L. Ed. 574; *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; *Chic. R. Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. 632, 29 L. Ed. 837; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Kansas City R. Co. v. Daughtry*, 138 U. S. 303, 11 Sup. Ct. 306, 34 L. Ed. 963; *Abranches v. Schell*, Fed. Cas. No. 21, 4 Blatchf. 256; *Dennistoun v. Draper*, Fed. Cas. No. 3,804, 5 Blatchf. 336; *Findley v. Satterfield*, Fed. Cas. No. 4,792, 3 Woods, 504; *Fisk v. Union Pac. R. Co.*, Fed. Cas. No. 4,827, 6 Blatchf. 362; *Galvin v. Boutwell*, Fed. Cas. No. 5,207, 9 Blatchf. 470; *Georgia v. O'Grady*, Fed. Cas. No. 5,352, 3 Woods, 496, 24 Int. Rev. Rec. 5; *Murray v. Patrie*, Fed. Cas. No. 9,967, 5 Blatchf. 343; *State v. Port (C. C.)* 3 Fed. 117; *Hoyt v. Wright (C. C.)* 4 Fed. 168; *Mackaye v. Mallory (C. C.)* 6 Fed. 750, 751; *Georgia v. Bolton (C. C.)* 11 Fed. 217; *Eaton v. Calhoun (C. C.)* 15 Fed. 155; *Gribble v. Pioneer Co. (C. C.)* 15 Fed. 689; *State v. Fletcher (C. C.)* 22 Fed. 776; *Clarkhuff v. Wisc. R. Co. (C. C.)* 26 Fed. 465; *Kessinger v. Hinkhouse (C. C.)* 27 Fed. 884; *Smith v. Chic. R. Co. (C. C.)* 30 Fed. 722; *Anderson v. Appleton (C. C.)* 32 Fed. 857; *Imperial Co. v. Wyman (C. C.)* 38 Fed. 574, 3 L. R. A. 503; *North Carolina v. Kirkpatrick (C. C.)* 42 Fed. 689; *Curnow v. Phoenix Co. (C. C.)* 44 Fed. 305; *Goodnow v. Litchfield (C. C.)* 47 Fed. 754; *State v. Sullivan (C. C.)* 50 Fed. 593; *Carico v. Wilmore (D. C.)* 51 Fed. 196, 200; *Com. v. Bingham (C. C.)* 88 Fed. 561; 18 Ency. Pl. & Pr. 181, 372, et seq.

### HONEYMAN v. COLORADO FUEL & IRON CO.

(Circuit Court, E. D. New York. November 14, 1904.)

#### 1. FOREIGN CORPORATIONS—VALIDITY OF SERVICE UNDER NEW YORK LAW.

A plaintiff exercised due diligence to obtain service of summons and complaint on the officers of a foreign corporation defendant, so as to authorize service on a director under the laws of New York, where before making service on the director he called at the office of the secretary, and was told by the clerk in charge that neither the secretary nor any other officer of the company was within the state, and was given by such clerk the names of resident directors on whom the service might be made.

#### 2. SAME—DOING BUSINESS IN STATE—MEETINGS OF DIRECTORS.

Where a corporation incorporated in another state, where the business for which it was organized is carried on, has no office in New York, except for the registration of transfers of stock, the facts that its directors have met there, as permitted by a by-law, at the office of one of their number, and that it keeps a bank account there, do not constitute

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¶ 1. Service of process on foreign corporations, see note to *Eldred v. Palace Car Co.*, 45 C. C. A. 3.

¶ 2. Foreign corporations doing business in state, see note to *Wagner v. J. & G. Meakin, Limited*, 33 C. C. A. 585.

a doing of business in the state which renders it subject to suit therein; it not being shown what business was transacted at the New York meetings, nor how long since any such meeting was held.

### On Motion to Set Aside Service.

Frederic B. McNish, for complainant.

Howland, Murray & Prentice (Henry E. Howland and Samuel Untermyer, of counsel), for defendant.

THOMAS, District Judge. The complainant, residing in the city of New York, on October 11, 1904, caused the summons, with the complaint, in an action begun in the Supreme Court of the state of New York, to be served on Edwin Hawley, residing and being in said state, and who was at the time a director of the Colorado Fuel & Iron Company, a corporation organized under the laws of Colorado. The defendant removed the action to this court, and now moves to set aside the service upon the ground (1) That service upon Hawley, director, was void, as due diligence is not shown to have been used to serve either Cary, the assistant secretary, or Prentice, the vice president, of the defendant, both residing and having severally a place of business in the city of New York; (2) that the defendant was not at the time of such service doing business within the state.

Complainant's solicitor deposes that he—

"Called at the office of Cary, and was informed by the clerk in charge that all of the officers of the said defendant company were without the state of New York; that deponent informed said clerk that he had a summons to serve upon the said corporation, and was informed by said clerk that it would be impossible for such service to be made, and said clerk gave deponent the names of several directors who could be found in the city of New York, upon whom such process might be served."

The defendant meets this only by showing by the evidence of Cary that at the time he was within the state of New York, and—

"Continuously remained at the said office on every business day during all business hours, except between July 22 and August 8, 1904; that he has not refused to see any person calling at the office, or denied admission to any one desiring to serve process on him, nor has this official evaded service of process in any way whatever; and that at any time during the year last past, except for the period of two weeks, above mentioned, process might have been served upon this affiant at his office aforesaid within business hours."

This denial does not meet the plaintiff's statement that he called at Cary's office, and was informed by the clerk that no officers were within the state, that the summons could not be served, and gave him the names of directors. The complainant was at the disposition of the person found on duty in Cary's office, and was authorized to adopt and to act upon statements received, as he did by finding and serving upon Hawley.

The next question is whether defendant was at the time doing business in the state of New York. The complainant urges that it was so doing business, because (1) it had in the city of New York an office, officer, and facilities for registering stock; (2) it kept a bank account in New York; (3) the directors met in New York for the performance

of duties; (4) certain transactions relating to capital were in progress in such state.

In 1896 the Central Trust Company of New York filed a bill against the Colorado Fuel & Iron Company in the Circuit Court of the United States for the Southern District of New York, and service of process was made upon defendant's president in the city of New York. Upon motion to set aside the service, it appeared that the company had no office in New York, although the contrary was alleged, except for the registration of the transfers of stock, and that it had a bank account in the city, upon which checks were drawn by officers out of the state. It was shown by defendant that its directors never met in this state, and that it did no business in the state, other than above stated. Judge Lacombe set aside the service. That ruling must be adopted, so far as it applies to the facts now present. The directors sometimes meet in New York, although all save two reside in Colorado. The president of the defendant gives evidence:

"That the directors of said Colorado Fuel & Iron Company sometimes meet in New York City for personal convenience, under a by-law which was originally adopted when the company had a general office in New York, several years ago. That the place of meeting of said board is a private office of a member of the board, and that all the officers of said company reside in Colorado, except one vice president, who resides in New York City, and is a member of the board of directors because he frequently acts as advising counsel."

The complainant, Honeyman, gives evidence:

"That deponent is informed and believes that a large majority of the directors of the said defendant company reside at the city of New York. That deponent knows that many meetings of the said board of directors are had in the city of New York, and believes that practically all the meetings of the said directors are had in the city of New York."

Complainant's attorney, McNish, states:

"That a large majority of the directors of the said defendant corporation reside in or near the city of New York, and that practically all of the meetings of the board of directors of the said defendant corporation are held within the city, county, and state of New York."

The evidence of McNish is upon information and belief. No witness states from actual knowledge what business was transacted at such meetings, and, in the absence of specific evidence, the court cannot conjecture whether the business was of such a nature as to necessitate the conclusion that the defendant was doing business in the state at the time the service was made upon Mr. Hawley. When did the board of directors last meet in New York? Was it a day or a week or a year or years previous to the service of the summons upon the director? What was the subject of their deliberations at such last meeting? Was any resolution then passed, and, if so, what was its subject, and could it be held to involve the transaction of business in the state of New York? These and other important questions are not answered. The mere fact that the directors occasionally meet in New York, without further advice as to what action was taken, gives no information upon which a conclusion can be predicated that the corporation was doing business in the state of New York. In the case of *People v. Equitable Trust Co.*, 96 N. Y. 387, Judge Earl, expressly stating that the question did not

arise, made the following suggestion concerning the meaning of the words "doing business in this state":

"Does it mean occasional or incidental corporate business, or continuous business substantially through the year? Does a corporation that keeps an office in this state merely for the record and transfer of its stock, while it does the business for which it was chartered elsewhere, do its corporate business within this state, within the meaning of the statute? Does a corporation which has an office in this state, from which its officers give some directions for the management of its corporate business, all of which is done, elsewhere, carry on its corporate business in this state, any more than an individual carries on his business in this state who is engaged in the business of building a railroad in another state, over which he exercises some control by correspondence from his home here?"

In *People v. Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155, Judge Earl again says:

"We cannot construe the words 'doing business in this state' to mean the whole business of the corporation within this state; and while we are not prepared to hold that an occasional business transaction—that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done—would bring a corporation within this act, yet when, as in this case, all these things are done, and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act, as one 'doing business in this state.'"

In *People ex rel. Dives-Pelican Co. v. Feitner* (First Dept., 1902) 77 App. Div. 189, 78 N. Y. Supp. 1017, the court said:

"This corporation was not doing business in the state of New York in the sense in which that term is used in the statute. The fact that it had an office here, and was authorized to do business, did not make it 'doing business.' The office which it had here was used simply for the purpose of enabling the directors to meet in it and declare dividends upon its preferred stock, and the cash on hand and money in bank are for the purpose of paying such dividends when declared. This is all the business it did in the state of New York, and this clearly did not bring it within the statutes making it liable to taxation."

The complainant further alleges that the company is doing business in New York, and presents papers relating to a funding plan. The funding plan seems to be a matter in the hands of a committee of creditors for effecting "some plan whereby the properties of the company and the properties bought by Mr. Cary may be reassembled under a common ownership, and all the properties be preserved and worked together as an entirety"; and the plan also involves issuing new bonds and retiring existing bonds, etc. It would appear that at some time the property had been conveyed by the defendant to Mr. Cary. The fact that it was conveyed to Cary some time previous to the service of the summons does not show that at the time the service was made the corporation was doing business in the state, and certainly the undertaking of the committee to bring in the outstanding securities and subject them to the plan is not of itself "doing business in this state" on the part of the corporation, although the corporation is privy to the arrangement, has consented to carry it out, and will do what is necessary to carry it out when the plan is ready for final consummation. But what presumption is there that it will do any act in the state of New York? The litigation proposed in the suit at bar obviously relates to the capital of

the corporation, and its relation to its bondholders and creditors. Such a litigation properly should be conducted under the sovereignty that authorized the corporation, or directly or impliedly permits it to do business within its borders, and where such business, in real substance, is done. It is very evident that the actual business for which the corporation was organized, and which it usually carries on, is not to the slightest extent done in the state of New York.

It follows from these views that the motion should be granted.

### In re ROYCE DRY GOODS CO.

(District Court, W. D. Missouri. November 7, 1904.)

#### 1. BANKRUPTCY—CONTESTED CLAIM—SUFFICIENCY OF OBJECTIONS FILED.

Objections to a claim filed against the estate of a bankrupt should be in writing, and sufficiently specific to indicate to the claimant the nature and character thereof, but no particular form is prescribed; and, where they have been treated on the hearing before the referee as sufficiently specific to raise certain defenses, on which evidence has been taken without objection, the court, on subsequent objection, may properly permit their amendment to conform to the evidence.

#### 2. SAME—REVIEW OF REFEREE'S DECISION—FINDINGS OF FACT.

The findings of a referee on questions of fact, made on conflicting evidence, will not be disturbed by the court on review where they are reasonably supported by competent evidence.

#### 3. SAME—CLAIM OF STOCKHOLDER AGAINST BANKRUPT CORPORATION—SET-OFF.

Under the established law of Missouri, which permits a subscriber to the stock of a corporation to pay his subscription in property other than money, provided it is of the reasonable value of the subscription, but makes him subject to strict inquiry as to such value, and liable for any unreasonable discrepancy, a trustee for a bankrupt corporation may interpose as a set-off to the claim of a stockholder a claim against him for the difference between the value of the property turned over by him in payment for his stock and the nominal value of the stock; and the court, in the interest of creditors, will scrutinize with care the integrity and fairness of the transaction.

#### 4. SAME—CLAIM BY PRESIDENT OF CORPORATION—PROPERTY UNACCOUNTED FOR.

The president and active manager of a mercantile corporation within a few months prior to its bankruptcy made a number of statements of its assets and liabilities to wholesale houses as a basis for credit, and on which he obtained goods for the corporation on credit, which were not paid for. There was a discrepancy between the invoice value of the goods on hand as represented in such statements and those on hand at the time of bankruptcy, and otherwise accounted for, of at least \$25,000. Such president filed a claim against the estate for over \$6,000. Held that, as against him, the representations made in his statements must be taken as true, and, the assets being in his control as managing officer, he was not entitled to share in the estate with other creditors until they were surrendered or satisfactorily accounted for.

In Bankruptcy. On review of decision of referee.

Karnes, New & Krauthoff, for trustee.

Wollman, Solomon & Cooper, for W. K. Royce.

¶ 2. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

See Appeal and Error, vol. 3, Cent. Dig. § 4008.

PHILIPS, District Judge. W. K. Royce, a stockholder in and president of the Royce Dry Goods Company, a corporation, presented to the referee in bankruptcy of said estate for allowance a claim for the sum of \$6,480.74, alleged to be for moneys loaned, for rent of building used by the bankrupt, and for services rendered the bankrupt. On objection made thereto by the trustee in bankruptcy, the referee disallowed this claim; and, on petition of the claimant, the questions involved have been certified to this court for review.

In the exceptions taken on the hearing before the court, counsel for the claimant made question of the sufficiency of the objections filed by the trustee to the allowance of this claim. After notice to claimant's counsel, the court allowed these objections to be amended by amplifying the specifications. The bankrupt act of July 1, 1898, c. 541, § 57f, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], provides that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit." There is nothing in the act or the rules in bankruptcy directing the form of such objections. They should be in writing, and the specifications doubtless should be sufficiently explicit to indicate to the claimant the nature and character thereof. The written objections first interposed by the trustee to the claim in question are about as specific as the claim presented, which merely states that the aggregate sum, \$6,480.74, is "for money loaned to the bankrupt, for rent for building used by the bankrupt, for services rendered to bankrupt." The objections on which the hearing was had and the case turns were "that said bankrupt is not indebted to W. K. Royce in the amount named or in any other amount; that said W. K. Royce, as president of said bankrupt company, has failed to account for assets of said company." Both the parties, in taking the testimony before the referee, seem to have proceeded upon the assumption that the objections were broad enough to go into the question of fact and law as to whether or not the claimant, as a stockholder in the bankrupt concern, had fully paid for the amount of his stock; and, second, as to whether or not at the time of the failure of the corporation the claimant, as president and active manager of the corporation, had failed to account for a large amount of the assets of the corporation, largely in excess of the amount of his claim. Evidence was also introduced, in the form of depositions taken in St. Louis in behalf of the trustee in bankruptcy, tending to show that at various times during the year 1903, and up to within a short time prior to the suspension of business by the Royce Dry Goods Company on account of insolvency, the claimant, as president and active manager of the company, made statements to creditors of the concern as to the financial condition from time to time of the company, and the amount of assets on hand, and debts owing by it to various creditors; also tending to show that, on the faith of the truth of these representations and statements, some of the creditors who have proved up claims against the estate in bankruptcy extended to the company credit in the sale of additional goods to it. There was no objection made on behalf of claimant on the hearing before the referee in respect of the evidence on the issue as to whether or not the claimant was indebted to the corporation on account of stock subscribed by



him to its capital, and as to the amount of property in his possession or control as president and active manager a short time before the failure. The amended specifications introduced no new matter into the controversy not inquired of before the referee, and the amended specifications are but conformable to the proofs before the referee, and which were fully discussed before and determined by him. It would be perfectly competent for this court to re-refer the matter back to the referee, with directions to require the objections to be made more specific, and to receive further evidence if justice demanded it. Section 2, subsec. 10, of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], authorizes the court to "consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees." Section 954, Rev. St. U. S. [U. S. Comp. St. 1901, p. 696], declares that:

"No summons, writ, declaration," etc., "judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, \* \* \* or reversed for any defect or want of form; but the court \* \* \* may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

Conformably to the spirit of this statute, the courts have always been and should be liberal in the allowance of any form of pleading to meet the ends of justice and prevent mere technical objections, to defeat justice.

In view of the fact that claimant's counsel contended, in opposition to these amended specifications of objections, that he did not go fully into the question presented by the depositions of creditors tending to show that they had extended credit on the faith of representations and statements made by this claimant as to the financial condition of the concern, and the amount of assets on hand, as he did not deem such matter in issue under the objections, notwithstanding the fact it appears that the claimant was represented at the taking of said depositions by counsel and cross-examined the deponents, and notwithstanding the fact that on the hearing before the referee, which extended over a long period of time, this claimant was interrogated and testified in respect of some of these claims and representations made by him, the court, in a spirit of large liberality, accorded to the claimant the right to introduce further evidence touching the alleged representations made to said creditors, and whether or not any purchases of goods were subsequently made by him upon the faith of the truth of such representations, which additional testimony on behalf of the claimant has been introduced.

The referee has found that the sum claimed by W. K. Royce against the bankrupt estate is correct. The claim, therefore, should be allowed, unless the objections thereto are valid.

The first controversy is as to the contention of the trustee in bankruptcy that the claimant is indebted to the bankrupt corporation on account of stock subscribed by him to its capital. Section 63a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450] provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

If, therefore, W. K. Royce, at the time he presented his claim for allowance, was indebted to the bankrupt corporation, that debt was an asset of the estate, and it was the duty of the trustee to interpose the same as a set-off or counterclaim.

The referee has found that the capital stock of this concern was \$60,000, of which amount the claimant subscribed \$32,000, which he had undertaken to pay by turning into the company different lots of goods and merchandise, which, in their reasonable value, fell short of the payment of this stock to the extent of \$5,000. The conclusions reached by the referee on such questions of fact should not be disturbed by the court, on review, except for most cogent reasons, such as where there is no evidence to support the findings, or the findings are so contrary to the weight of evidence as to render them palpably unfair and unjust. Any other rule would plague the court with sitting as in a trial *de novo* in the vast multitude of claims passed on by the referee. The burden of this work of review in this district is becoming almost insupportable. It occupies much of the time of the court, with records of testimony running into hundreds of pages. It is so easy and inexpensive for defeated counsel to have the cases certified to the court for review that the per cent. of them is far in excess of the merits or importance of the questions involved. Where such questions involve the conclusions reached by the referee on matters of evidence, as in the case of a master, the court will abide by that conclusion, where it is reasonably supported by competent evidence, and the referee has drawn his conclusions from a conflict of evidence.

The evidence in this case shows that the entire capital stock of this corporation was attempted to be paid up by W. K. Royce and his two sons and Morton Wollman, as stockholders, by turning into the corporation stocks of goods representing the respective amounts of their shares. It is the established rule of law in this state that subscriptions to the capital stock of a business corporation of the state may be paid for by transferring to the corporation property other than money, of the reasonable value of the subscription. But the subscriber is held to strict inquiry as to any unreasonable disproportion between the valuation placed by him on the property conveyed and its actual value. *Van Cleve et al. v. Berkey et al.*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Steam Stone Cutter Co. v. Scott et al.*, 157 Mo. 520, 57 S. W. 1076; *McClure v. Paducah Iron Co.*, 90 Mo. App. 568, 578. As said by the Court of Appeals in *National Tubeworks v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538:

"The fraud is consummated by the issue of its stock as full-paid stock which has not been fully paid, and it does not depend on any fraudulent intent, other than that which is evinced by the act of knowingly issuing stock for property in an amount in excess of its value."

This rule is stated in *Thompson on Corporations*, § 1621, approved in *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649, cited approvingly in *McClure v. Paducah Iron Co.*, *supra*, as follows:

"If there is any meaning at all in the proposition that subscribers to the shares of a corporation must pay for them either in money or in money's worth, and if this principle has any substance at all when appealed to for

the protection of those who have given credit to the corporation, it must follow that where property is turned in to the corporation in payment of its shares, under whatever scheme, at an overvaluation, to the knowledge of the contracting parties, this will be evidence of fraud, such as will render the shareholders liable to make good to creditors of the corporation the difference between the par value of the shares and the real value at which the property was turned in."

In other words, as the declared policy of this state is to require absolute payment by stockholders, so that they shall represent to the creditors an actual asset, and the temptation is great among stockholders to put a fictitious or exaggerated value, like an old and abused stock of goods substituted for a money payment for stock by the incorporators, the courts will scrutinize with care the integrity and fairness of such payments, in favor of the creditors of the corporation.

There is in the record in this case evidence from which the referee was not unreasonably warranted in drawing the inference that W. K. Royce had placed an unreasonably exaggerated value on the stock of goods turned in to the corporation in payment of his subscription. The witness, Lee Dunlap, well known to the referee, came into this corporation as a stockholder after its organization. The corporation began business on the 19th day of May, 1902. In two weeks thereafter, about the 1st of June, when the intermediate purchases of goods probably exceeded the sales, an inventory of the goods was taken at cost price, which showed a shortage, according to the testimony of this witness, of \$10,000. When regard is had to the fact that the goods contributed by the claimant came from stores which he had for many years been conducting, it may well be concluded that many of them were old and worn. So, if the inventory showed a shortage of \$10,000 of the valuation placed on the entire stock transferred to the company, it discloses a discrepancy inconsistent with business integrity and fair dealing, not only as to the subsequent incoming stockholder, but as to the subsequent creditors. It is true, as contended by claimant's counsel, that Dunlap's testimony did not fix this loss, in the estimation, specifically upon the particular goods transferred to the company by the claimant, but upon the stock in mass. In the absence of any reliable proof on the part of the claimant that his proportion of the goods contributed were comparatively better than those of the other contributors, the inference was not unreasonably made by the referee that all were alike derelict. Moreover, the testimony of Dunlap is that the claimant recognized and acquiesced in the correctness of the inventory, by then and there agreeing to make good his proportion of the shortage, which he never did. The referee, who knew, saw, and heard the witnesses, credited Dunlap's statement, and I will not weigh the evidence. The relative apportionment of this shortage among the stockholders who put in goods allots to the share of the claimant \$5,333.33. The referee fixed it in round numbers at \$5,000. Treating this finding as a set-off, the referee should have allowed to the claimant the difference between \$5,000 and the sum of \$6,480.74 claimed by him. But the referee went further, and found that the claimant, who was president and active manager of the corporation, in charge of its affairs, during the year 1903, beginning in February, and on the 30th of November, 1903, within one month of the time the corporation ceased to be a going con-

cern and made an assignment, repeatedly made statements to the wholesale merchants from whom he was buying goods for the company as to the financial condition of the concern, and the amount of assets on hand at different periods, above the liabilities. These statements, beginning in the early part of 1903, and extending up to the 30th day of November, 1903, represented the amount of the assets on hand sometimes as high as \$110,000. On the 30th of November, 1903, the amount represented to be on hand was \$97,670; and, after allowing the debts of the estate owing by the concern, there should have been on hand at these different periods not less than \$60,000 assets, above all liabilities. It is to be conceded that, in the case of some of these creditors who furnished goods to the concern in 1903, the statements were made after the goods were furnished, and therefore it cannot be said that they were furnished upon the faith of the truth of such statements. But this evidence was and is competent as statements made by the president and active manager of the company as to the amount of assets which should have been on hand at the time of the failure of the bankrupt concern. In the case of at least two, if not more, of these creditors, the evidence shows beyond question that the company obtained credit, and the goods were sold to it on credit, on the faith of the truth of such representations. In the case of the Ferguson-McKinney Dry Goods Company, one of the creditors, the evidence shows that on the 2d day of February, 1903, the claimant made a statement to the creditman of said house touching his financial condition, a memorandum of which was at the time taken, and is presented with the depositions, showing that on the 1st day of February, 1903, the Royce Dry Goods Company had assets on hand amounting to \$127,000, with liabilities to the extent of \$47,000, leaving a net worth of \$80,000, and that their paid-up capital was \$60,000. The following questions were asked the witness:

"Q. Why did you want the statement? A. He wanted to buy some goods. Q. Did you inform Mr. Royce at that time that you wanted the statement as a basis of credit? A. Yes, sir. Q. He gave it to you with that understanding—that it should be used as a basis of credit? A. Yes. Q. State whether or not your house sold the Royce Dry Goods Company any goods after this statement was made? A. Yes, sir."

And the evidence shows that at the time of the statement the Royce Dry Goods Company owed said house over \$12,000. This witness also testified that he believed the statements made by W. K. Royce to be correct.

In the case of the La Prelle Shoe Company, a creditor, as late as September, 1903, the claimant, in a letter to this house, represented that the Royce Dry Goods Company had \$3 assets to every dollar of liability; and as late as October 23, 1903, he represented to this house that he could pay two or three for every dollar he owed, and that there were assets at that time of \$100,000; and after the letter of September 17, 1903, and as a result of the conversation with this claimant in October, 1903, credit was extended to him by this house for a bill of goods amounting to \$200, and that this credit was extended upon the faith of the truth of his representations.

In the case of the Rice-Stix Dry Goods Company, the evidence shows that the goods were sold by it to this debtor in October, 1903, and that

thereupon W. K. Royce was asked for a statement respecting its condition, which was furnished, showing the cash value of the merchandise on hand when invoiced to be \$97,670; value of real estate, \$7,040; making in the aggregate the sum of \$104,710, with liabilities at \$33,739. After that time this house sold to the Royce Dry Goods Company about \$490 worth of goods. It is true that, in transmitting this financial statement by Mr. Royce, he sent a letter in which he stated that he made the statement not to establish credit with the house, "as I have a well-established credit with other good houses that I have done business with for the last thirty years." As the statement he sent was on behalf of the Royce Dry Goods Company, it is questionable whether this letter did not have reference to his individual credit. But be this as it may, it was a statement made by him on the 30th of November, 1903, showing \$104,710 worth of property of the concern, and liabilities to the extent of \$33,739, leaving a balance of assets of \$70,971. The goods invoiced in January following, after the failure of the concern, at \$49,000, and the whole sum realized by the trustee in bankruptcy on the sale of all the assets was only \$19,000. Making every reasonable allowance based on the evidence, there was at the time the company made its assignment, the 4th day of January, 1904, a discrepancy between the property W. K. Royce stated in writing to have been on hand November 30, 1903, of at least \$25,000. What became of this difference? The presumption of law in such cases, in the absence of satisfactory explanation, is that the property traced to the hands of the bankrupt a short time prior to the suspension of business remains in his hands, and the bankrupt must answer therefor. In *re* Beuell, 100 Fed. 633; In *re* Greenberg (D. C.) 106 Fed. 496; In *re* McCormick (D. C.) 97 Fed. 566; In *re* Mayer (D. C.) 98 Fed. 839. Judge Sanborn, in *Boyd v. Glucklich*, 116 Fed. 142, 53 C. C. A. 462, expresses the rule thus:

"The property of the bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. He cannot escape an order for its surrender by simply adding perjury to fraudulent concealment or misappropriation. It is still the duty of the referee and of the court, notwithstanding his oath and his testimony, if satisfied beyond a reasonable doubt that he has property of the estate in his possession or under his control, to order him to surrender it to the trustee," etc.

The referee has found that W. K. Royce has failed to make a satisfactory explanation of the disposition of this undelivered asset, and I perceive no sufficient ground for holding that this conclusion is unsupported by the evidence. This fact conceded, will the law admit that the president and active manager of the derelict corporation, in actual control of its assets, may be allowed to prove up a claim against the estate of \$6,480.74, where there has been traced to the hands of the management unaccounted for assets far in excess of his demand? Is it any answer in law to say that such assets is the obligation of the legal entity, the corporation, and not of the active, managing officer? The artificial being, the corporation, breathes, lives, and acts by and through its managing officers. It has no hands to hold and no pockets to conceal property. The actual custody and control of its assets are in and by its manager and director. As said in *Re Alphin & Lake*

Cotton Co. (D. C.) 131 Fed. 825-826: "For the purpose of informing the trustee or referee as to the assets of their bankrupt concern they [the officers] are the real parties." So it should follow that, for the assets intrusted to the hands of the managing officers of the bankrupt concern, they are jointly and severally liable. And it should logically and justly follow that when such derelict officer fails to account for and surrender property traced to his hands in excess of his demands against the bankrupt corporation, his claim should be rejected.

Without finding that the claimant obtained goods from the creditors of the corporation by fraudulent representations, or discussing what would be the legal effect of such fact upon the rights of the claimant to have his demand allowed, it is sufficient to say that when he comes to ask that he be permitted to participate in the dividends of the remaining assets of the insolvent estate pro rata with the creditors from whom he obtained the goods unpaid for, upon the faith of the truth of his statements as to the amount of the corporate assets, he should be held to the truth of those statements; the referee having found that at the time of the presentation of his claim for allowance there should have been, according to his written statement of November 30, 1903, one month anterior to his admitted insolvency, at least \$25,000 of corporate assets controlled by him unaccounted for. In the marshaling of the assets of the bankrupt, the court, in the exercise of a jurisdiction equitable in its nature, should postpone the claim of such a wrongdoer, at least in favor of those creditors who parted with their property upon the faith of the truth of those representations. He cannot now change position as to the truth of his statements to the prejudice of the creditors who acted upon the faith thereof. When this claim was presented for allowance, the wronged creditors unquestionably had the right to object thereto on the ground that the claimant was estopped to deny the truth of his representations. If so, why may not the trustee for them? As said by Judge McCormick, speaking for the Court of Appeals of the Fifth Circuit, in *Atkins v. Wilcox*, 105 Fed. 597, 44 C. C. A. 628, 53 L. R. A. 118:

"By the express terms of the statute, the trustee is selected by the creditors. By the clearest implication, he represents all the creditors, and, as such representative, has an interest in the just administration of the estate which belongs to the creditors. Moreover, this right is expressly recognized in the sixth paragraph of general order in bankruptcy No. 21, which has itself the force of a statute, even if not clearly founded on the text of the statute, which we think it is. It appears to give the trustee precedence even of the creditors, for the language is that 'when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may,' " etc.

It was therefore held that the trustee could resist a claim for a lien—as much so as any creditor.

There being no question of the insufficiency of the assets to pay the creditors of the estate, justice demands that this claimant shall not be permitted to establish his claim and participate equally with the creditors whom he has thus wronged, in the dividends, which at most will be very little.

In respect of the case of *In re Park* (D. C.) 102 Fed. 602, in which it was held that it is no defense to the failure of the trustee to set apart

the bankrupt's exemptions because the bankrupt has not accounted for all of his assets, and the like, it is sufficient to say that such exempt property does not pass to and vest in the trustee in bankruptcy under the bankrupt law. And the bankrupt court has no power to administer such property in any event. The only power vested in the bankrupt court is to set aside such exempt property, leaving the creditor claiming that such property is subject to his debt to pursue his remedy in the state court. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. Clearly enough, therefore, the trustee is in no position to claim that the bankrupt should not have the property set aside to him, on the ground that he had not accounted for the assets in his hands, as the bankrupt court itself was without jurisdiction to administer or control this exempt property. Whereas, in the case at bar, the claimant is asking to have allowed against the bankrupt estate a debt owing to him by the bankrupt, when he has withheld or concealed from the trustee in bankruptcy property which he had in his possession, or over which he had control, far in excess of the amount of his claim, and under a state of facts which should conclude him from denying the existence of such assets in his hands.

The exceptions to the referee's findings on the whole case are overruled.

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JESSUP & MOORE PAPER CO. v. PIPER et al.

(Circuit Court, E. D. Pennsylvania. November 13, 1902.)

No. 27.

1. SALE—ACTION FOR NONDELIVERY—MATTERS EXCUSING NONPERFORMANCE.

Defendants, who owned a colliery reached by a single line of railroad, contracted to deliver at the works of plaintiff, at an agreed price, a stipulated quantity of coal each month during a series of months; the contract providing, however, that they should not be liable for a failure to perform if prevented by hindrances beyond their control. During certain months they delivered less than the required quantity, as claimed, through their inability to obtain sufficient cars. *Held*, that they were excused from full performance if they were unable to obtain cars to enable them to fulfill all their contracts, and they in good faith made deliveries to all customers ratably, but that they were bound to put forth all reasonable and proper exertion, and to pay any reasonable additional expense to obtain cars, and were liable for nonperformance if they failed to do so, or if they made the shortage of cars an excuse to demand an increased price, and gave a preference to such customers as paid it, and that if, after knowledge of the shortage of cars, they made additional contracts which lessened their ability to ship to plaintiff, they would be liable to that extent.

At Law. Charge to jury.

Richard C. Dale, for plaintiff.

Rudolph M. Schick, for defendants.

J. B. McPHERSON, District Judge. Gentlemen of the Jury: There is a question of fact in this case to be submitted to you, and I shall endeavor to explain it in a few words. There is no dispute between the parties as to what the contract between them was, and there could be no dispute, because the contract is in writing.

W. H. Piper & Co., the defendants in this suit, agreed to deliver to the Jessup & Moore Paper Company a certain quantity of coal at a given price—\$1.82, I think it was, a ton—delivered upon the siding near their works, somewhere in the neighborhood of Wilmington. They agreed to deliver from seventeen hundred tons a month up to— I do not think the amount was specified, but it was to be as called for, as I recall.

Mr. Dale: Up to ten thousand tons.

The Court: The maximum was ten thousand tons, but the amount to be delivered was, I think, not specified.

Mr. Schick: Was to be ten thousand tons at the buyer's option.

The Court: The amount was to be at the buyer's option, between seven thousand and ten thousand tons. At all events, the precise amount to be delivered per month is not in dispute. The contract was to run from the 1st of October until the 1st of April, and the deliveries, of course, were to be made within that period. There was no difficulty about the deliveries in the month of October, and I ought to say before I make that remark, even, that at the time the contract was made there was no reason that either party should anticipate a shortage in the supply of cars. Nothing appears in evidence to justify the defendants in anticipating that any shortage would occur. It would be entirely right for you to draw the inference, on the contrary, that both sides assumed that cars would be on hand to deliver the coal as it should be needed. In point of fact, in October there was no difficulty about it, and seventeen hundred tons were delivered to the plaintiffs at their mills. In November the supply of cars began to be somewhat difficult to obtain, although even in that month between seven and eight hundred tons were delivered. The difficulty arises here, during the last four months, December, January, February, and March; and during those months I think the jury would be justified—the parties, indeed, do not seem to be in any dispute upon that subject—in finding that there was a shortage of cars; that is to say, the railroad company did not deliver at the colliery of the defendants cars sufficient to enable them to fulfill all their contracts for delivery during those months. The question is how far that scarcity of cars operated to relieve the defendants from the obligation of this contract. As a matter of course, if the contract had been out and out to deliver so many tons per month within this specified period, the mere shortage of cars would have been no answer. If Messrs. Piper & Co. had undertaken to deliver, it would have been their lookout whether the cars were actually present or not; and, if the cars were not present, no matter if it were the fault of the railroad company that the cars were not on hand, notwithstanding that, the loss must have fallen upon Piper & Co., because of their unqualified contract to deliver.

There is a clause in this contract that they will not be responsible for the fulfillment of it if it be prevented by strikes or by hindrances beyond their control. I have not given you precisely the language, but I have given you what I have no doubt is the essential meaning of the clause. "Hindrances beyond their control" is the phrase that concerns us now. What, in the light of the evidence before us, would be a hindrance beyond the control of the defendant? It appears that this colliery is situated upon a line of the Pennsylvania Railroad, and that



road is the only means by which the coal can be moved in the first instance. Of course, after a while it will reach a point where some other road connects, and then it may go elsewhere, but for the first movement of the coal the defendants are dependent upon the Pennsylvania Railroad. Therefore, if the Pennsylvania Railroad should decline absolutely to furnish them any cars whatever, of course the defendants could not move a pound of coal, except so far as their own cars might suffice to carry it. There is no allegation that the railroad company absolutely refused to deliver them any cars, but that it refused to deliver them cars in sufficient quantity to enable them to fulfill their contract.

It is at that point that we approach the question of fact that is to be submitted for your determination—that is, the allegation upon the part of the defendants that they did not have sufficient cars to enable them to fulfill their contracts, and therefore that they did the next best thing; that is to say, they apportioned their cars among all their customers, giving to each one his due and ratable share. If the facts were as averred by the defendants, I think that would be a fair, a reasonable, and proper thing to do. I do not think the defendants could be called upon to carry out one contract in full at the expense of all the other contracts for which they were equally bound, but that if there was a genuine scarcity of cars, so that it was impossible for them, for example, to carry out more than twenty-five per cent. of their contracts, if they carried out twenty-five per cent. of each contract I think that would be perfectly fair and proper and lawful to do, under such a contract as lies before us.

But the allegation of the plaintiff is that the facts were different, and that the scarcity of cars which prevailed to some extent was made use of by the defendants for the purpose of extorting a larger sum of money for their coal; that they went to their customers and said: "Now, you cannot get the coal we have contracted to deliver to you, unless you agree to make a new contract. If you agree to pay so much more for the coal, we can make an arrangement by which we can carry out our contract with you, and you can get your coal, although you will have to pay a higher figure for it." It is said that the evidence shows that such of their customers as came in to the arrangement of that sort did receive the coal which they had contracted for, and received it in full, but that persons such as the plaintiff, the Jessup & Moore Company, that declined to pay a higher price, were allowed to get it as best they might, and were simply given such coal as the defendants chose to give them. You will have to determine what the facts are upon those questions. Was it within the power of the defendants to carry out this contract? If the plaintiff, the Jessup & Moore Paper Company, had paid that higher price, would the contract have been carried out? Would the defendants have been able to carry it out if this higher price had been contracted for and paid? That is an important matter for the jury to determine, because, if the defendants were using the situation as a mere cover and pretext to extort a higher price for the coal, and if, in point of fact, it was able to carry out its contract by arrangement with the railroad company, as a matter of course such conduct could not be tolerated. It is bound to carry out its

contracts even with that clause in, so far as—at all events—to put forth all reasonable and proper exertion to overcome whatever hindrances may be offered to the carrying out of its contracts. It is not every hindrance that would justify the defendants in stopping the execution of the contract, and saying, "I can no longer carry out this contract." If the hindrance is of that kind that it could be removed by somewhat greater exertion or labor, or the reasonable expenditure of money, the defendants were bound to put forth that additional exertion and labor, and were bound to spend that additional reasonable sum of money in order to carry out their contract.

Moreover, it has been said here—there is some evidence upon the subject—that after this scarcity of cars became manifest the defendants continued to make contracts for delivery of coal, and thereby decreased their ability to comply with their former contracts. The jury will take the evidence upon that subject, and consider how far it establishes that averment, because, if it be true that, after it became manifest to the defendants that they could not get cars enough to carry out the contracts which they then had in existence, if they then continued to make additional contracts, thereby certainly decreasing their ability to carry out the contracts they had already made, and if they attempted to supply these subsequent contracts as well as those preceding, then that certainly was not a hindrance beyond their control, but was a hindrance of their own making; and, so far as these subsequent contracts interfered with their ability to deliver to the plaintiff, then to that extent, at least, there could be no question of their responsibility.

I do not know whether I make myself clear upon that subject. At the risk of being tedious, I shall repeat what I mean on that particular branch of the case. If it became clear to the defendants that they could not get enough cars to carry out all their contracts, if they then made other contracts which obliged them to deliver other coal, and if they attempted to fulfill those subsequent contracts as well as the ones they had before, then I say clearly there can be no question upon that point. It diminished their power to carry out the contracts they already had made, and to that extent, at least, there could be no doubt about the right of the plaintiffs to recover in the present case. That might not be, and would not be, the whole extent of the plaintiffs' claim, but to that extent, at least, I think it would be quite clear that the plaintiffs are entitled to recover.

With regard to the remainder of the plaintiffs' claim, I think I need not repeat what I already have said with regard to the duty of the defendants. If you find that they could have obtained the cars for delivery to the plaintiffs by arrangement with the railroad company, they were bound to make it. They were bound, in other words, to do whatever was reasonable and proper to overcome whatever hindrance existed with regard to this car supply; and, if they failed to do whatever was reasonable and proper, whether it be the expenditure of labor and exertion, or the reasonable expenditure of money, then they have failed in the discharge of their duty, and to that extent they would be liable to respond to the plaintiff in damages. But if there was a scarcity of cars—a shortage of cars—and it was beyond their power—explaining as I have what their duty in that respect was—if it was beyond their

power to remove that hindrance, if they gave the plaintiff its ratable share of cars during the period in question, then they certainly have discharged all their duty with reference to that part of the claim that they could be called upon to discharge. It would still leave the other portion, to which I have already referred, growing out of their having made subsequent contracts at the time when the shortage was already manifest.

The measure of damages, if you find in favor of the plaintiff, is the difference between the contract price and the price which the plaintiff was obliged to pay in the open market for that quantity of coal which by the fault of the defendants was not delivered to it. That may be the whole amount of the plaintiff's claim, or it may be only a part of the plaintiff's claim. It will be for the jury to say to what extent the plaintiff is entitled to recover.

Mr. Dale: On behalf of the plaintiff I will withdraw all the points.

The Court: I think I have answered your points. I think I have answered Mr. Schick's, too.

Mr. Schick: I will withdraw them.

(Mr. Schick excepts to that part of the charge in which the court leave it to the jury to find that they may have made arrangements with the railroad company to supply the cars to the plaintiffs.)

(Exception noted for defendant.)

(Counsel for plaintiff excepts to that portion of the charge in which, in substance, it is said to the jury that the insufficiency of cars to supply all their contracts is a defense.)

The Court: Do you mean where I told the jury if they gave them the ratable quantity? Do you object to that statement?

Mr. Dale: Yes, sir.

The Court: My attention has been called to what may be a misapprehension. Mr. Schick believes I said to the jury that, if the defendant might have made or could have made an arrangement with the railroad company for the supply of cars, it would have been its duty to do so. I do not think I said so. I certainly did not intend to say so. What I intended to refer to with regard to the arrangement with the railroad company was that which seems to be referred to in a letter or two that you have heard read by the defendants in which he speaks of an arrangement with the railroad company apparently having been made with other persons to whom they were to ship coal, and as to which he inquires whether he shall make a similar arrangement with the railroad company on behalf of the plaintiff. That was the arrangement to which I referred, and not any possible arrangement or general arrangement.

## UTAH-NEVADA CO. v. DE LAMAR.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,067.

## 1. FEDERAL COURTS—OBJECTION TO JURISDICTION.

An objection to the jurisdiction of a Circuit Court on the ground that the action is based on a contract assigned to plaintiff, and it does not appear that it could have been maintained in that court by the assignor, is one which cannot be waived, and may be raised at any time, or considered by the court on its own motion, and it need not, therefore, be presented by an assignment of error in the appellate court.

## 2. SAME—JURISDICTION—EVIDENCE TO ESTABLISH CITIZENSHIP.

Where the question is as to the citizenship of an individual as determining his right to maintain an action in a federal court, the fact that he is president of a corporation creates no legal presumption that he is a citizen of the same state as the corporation, the presumption that the members of a corporation are citizens of the state in which it is incorporated being indulged only for the purpose of fixing the status of the corporation as a litigant in such courts.

## 3. SAME—SUIT BY ASSIGNEE—PAROL CONTRACT.

A suit by the assignee of an oral contract to recover a sum of money due thereon is one "to recover the contents of a chose in action," within the meaning of section 1 of the judiciary acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], and a federal court is without jurisdiction of such suit unless it is shown by the record that it could have been maintained in such court by the assignor.

In Error to the Circuit Court of the United States for the Northern District of California.

This action was commenced March 12, 1902, in the superior court of the city and county of San Francisco, Cal., by the plaintiff, to recover of and from the defendant the sum of \$3,422,636, alleged to be due and owing upon a certain agreement between Isaac E. Blake and the defendant.

The complaint, among other things, alleges: "(1) That the Utah-Nevada Company is a corporation organized and incorporated for the purpose, among other things, of dealing in real property, including mining claims, and operating, working, and developing the same, and acquiring stock in other corporations, and was such corporation at all the times hereinafter mentioned. (2) That on the 10th day of April, 1894, one Isaac E. Blake was the owner of a contract for the purchase of that certain mining claim and real property situated in Lincoln county, state of Nevada, and more particularly described as follows, to wit: The mining claims known as the 'Monitor' and 'Jim Crow' mining claims in what is now known and described as 'De Lamar,' Lincoln county, Nevada. (3) That while said Blake was the owner of said contract to purchase, and said contract had not expired and was in full force and effect, said defendant, De Lamar, agreed with said Blake for a valuable consideration that, together with said Blake he would acquire, own, work, and operate for the purpose of abstracting minerals therefrom the said mining property, and to incorporate a corporation for the purpose of acquiring, owning, working, and operating said mining property, and to furnish the necessary capital for doing the same, and, after the moneys advanced by said defendant had been repaid to him out of the proceeds of working and operating said mining property, to transfer to said Blake forty-nine per cent. of said property and of the proceeds thereof, and forty-nine per cent. of the stock in said corporation. (4) That, relying upon said agreement of

¶ 2. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

said De Lamar, said Blake went with said De Lamar from the state of New York to the state of Nevada, in the year 1894, for the purpose of carrying out and performing said agreement with said De Lamar, and in said year said De Lamar, with assistance of said Blake, acquired the title to said mining property, and paid the purchase price therefor, and commenced to work, operate, and develop said mining property. (5) That thereafter, and prior to the date hereof, and between the said dates, said De Lamar received from the proceeds of the said property the purchase price advanced and paid by him as aforesaid, together with all the cost of developing and operating the said mining property, and, in addition thereto, as plaintiff is informed and believes, and therefore alleges, the sum of seven million dollars (\$7,000,000). (6) That prior to the date hereof, the said Blake, for a valuable consideration, assigned and transferred to the Utah-Nevada Company all of his right, title, and interest in, to, and under said contract and agreement with said De Lamar to the Utah-Nevada Company, the plaintiff herein. (7) That said Blake and said Utah-Nevada Company have, and each of them has, performed on his and its part all the terms and conditions of said agreement with said De Lamar, as aforesaid, to be performed by the said Blake and the said company, but that said De Lamar has not paid or delivered to the said Blake or the said company said forty-nine per cent. of the said property, or forty-nine per cent. of the proceeds of the said mining property, or said forty-nine per cent. of the stock in said company so formed as aforesaid, or any part thereof, except the sum of \$7,363.44."

Thereafter, on March 26, 1902, the defendant filed a petition in said superior court for the removal of the cause to the United States Circuit Court. It is alleged in this petition: "(6) That this suit always has been and is one of a civil nature at law, of which the Circuit Courts of the United States are given jurisdiction by the act of Congress of the United States entitled 'An act to correct the enrollment of an act approved March 3d, 1887, entitled 'An act to amend sections one, two, three, and ten of the act to determine the jurisdiction of the Circuit Court of the United States, and to regulate the removal of causes from state courts, and for other purposes,' approved March 3d, 1875,' approved August 13, 1888, and that this action is now pending in said superior court of the city and county of San Francisco, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value and the sum and value of two thousand dollars; that is to say, the said action is brought to recover the sum of \$3,422,636, besides costs. (7) That the plaintiff herein was, at the time of the commencement of this action, ever since continuously has been, and now is, a corporation organized and existing under the laws of the state of Iowa, and that said plaintiff, at the time of the commencement of this action was, ever since continuously has been, and now is, a citizen and resident of the state of Iowa, and that your petitioner, the defendant, was at the time of the commencement of this action, ever since continuously has been, and now is, a citizen and resident of the city of New York, in the state of New York, and that there was, at the time of the commencement of this action, ever since continuously has been, and now is, a controversy therein between citizens of different states, to wit, a controversy between your petitioner, the defendant herein, a citizen of the state of New York, and the plaintiff herein, a citizen of the state of Iowa. (8) That there was, at the time of the commencement of this action, ever since continuously has been, and now is, a controversy therein which always has been and now is wholly between citizens of different states, and which can be fully determined as between them. That such controversy always has been during all of said last-mentioned times, and now is, wholly between the plaintiff, a citizen and resident of the state of Iowa, as aforesaid, and your petitioner, the defendant, a citizen, resident, and inhabitant of the state of New York as aforesaid, and that the plaintiff and your petitioner are the only parties to this action. (9) That this petition is made and filed before your petitioner ever has been or is required by the laws, or by any laws, of the state of California, or by the rules, or by any rule, of said superior court of the city and county of San Francisco, in which this suit was brought and is pending, to appear, or demur, or answer, or plead to the declaration or complaint of the plaintiff

herein, and that your petitioner desires to remove the same from said superior court to the Circuit Court of the United States for the Northern District of California and the Ninth Judicial District, the same being the district in which this suit always has been and now is pending, in pursuance of the provisions of the act of Congress of the United States approved March 3d, 1887, entitled 'An act to amend the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and to further regulate the jurisdiction of the Circuit Courts of the United States, and for other purposes,' and all acts explanatory and amendatory thereof, and to correct the same, and particularly an act approved August 13, 1888, to correct the enrollment of said act of March 3, 1887."

After the removal of the case the plaintiff moved the Circuit Court to remand the case to the state court "upon the grounds that the above entitled Circuit Court has no jurisdiction over said cause and the parties thereto, and that said cause was improperly and illegally removed from said superior court to said Circuit Court, for the reason that the plaintiff above named is the sole plaintiff in said cause, and the defendant above named is the sole defendant in the said cause, and each and both plaintiff and defendant are citizens of states other than the state in which said cause was commenced and were said citizens at the time of the commencement of said action, and that said plaintiff was not, at the time of the commencement of said action, or at any time since, a citizen of said state of California, and that the petition of defendant above named, upon which said cause was removed from said superior court to said Circuit Court, does not state facts or matters or things sufficient to constitute a cause for the removal of said action from said state court to said United States court, nor any cause for the removal of an action from the said state court to the United States court, provided for in the acts of Congress of the United States upon that subject."

This motion was overruled. Amended complaints and answers thereto were subsequently filed, and the case regularly came on for trial before a jury. Objections were made to the introduction of any evidence as to the agreement between Blake and the defendant, because it was not in writing, and came within the prohibited provisions of the statute of frauds.

The court below, in closing an extended opinion upon the points involved in the objections urged by defendant, said: "I have found no rule or principle of law in any of the cases that would authorize me to hold that the agreement alleged in the complaint is not an agreement for the sale of real property, or of an interest therein, either under the law of this state or under the laws of the state of New York. And I am of the opinion that the agreement alleged in the complaint cannot be established by evidence of a parol agreement under the laws of this state." After several additional offers of proof on the part of the plaintiff, the court directed the jury to find a verdict for defendant, which was accordingly done, and a judgment was rendered upon the verdict in favor of defendant for his costs.

It is assigned as error: "(1) That said Circuit Court erred in making and entering the order entered on the 19th day of July, 1902, denying said plaintiff's motion to remand said cause to the superior court of the state of California in and for the city and county of San Francisco, as prayed for in its motion to remand said cause, because both parties are nonresidents. (2) That said Circuit Court erred in exercising jurisdiction over said cause, because both parties are nonresidents."

Numerous other alleged errors are assigned to the rulings of the court in sustaining the objections of the defendant to the testimony offered by the plaintiff.

Houx & Barrett (James G. Maguire, W. H. Metson, and Hiram W. Johnson, of counsel), for plaintiff in error.

E. S. Pillsbury and Alfred Sutro (Curtis H. Lindley, of counsel), and Pillsbury, Madison & Sutro, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). The first question to be considered is whether or not the Circuit Court had jurisdiction to try, hear, and determine the case. The question of jurisdiction is divisible. There are two distinct grounds upon which the plaintiff in error relies: (1) That the court erred in exercising jurisdiction over said suit, because the suit is upon an assigned chose in action, and the record does not show that the assignor and the defendant are citizens of different states; (2) the court erred in denying plaintiff in error's motion to remand said cause to the state court, because both parties were and are nonresidents, as shown by defendant's petition for removal. There will naturally arise in the discussion of either of these points some questions that are common to both. We will first take up the question in so far as it relates to the citizenship of the assignor. It is contended by the defendant in error that this point cannot be considered by this court: (1) Because the motion in the Circuit Court to remand the case was made upon the sole ground that the United States court had no jurisdiction by reason of the fact that the action was commenced in the state court in a state of which neither the plaintiff nor the defendant was a citizen, resident or inhabitant; (2) because this point was not raised in the court below; and (3) because it is not embodied in the assignments of error. These contentions cannot be sustained. The cases cited and relied upon by defendant have no application to the facts of this case. They apply solely to the class of cases which are brought under other provisions of the statute, in which certain actions may be brought in the district where the defendant resides. This character of actions does not touch the general jurisdiction of the court over such a cause between the parties, but, as was said in *Construction Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401, "affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection." There is a clear and well-settled distinction which exists between such cases and the one in hand, which does present the direct question of jurisdiction to the court, and cannot be waived. The books are full of cases where this distinction is made, and it is the duty of the court to always keep it constantly in mind. We are dealing in this case with a provision of the judiciary act which requires certain things, by which jurisdiction is conferred, to be affirmatively shown, and the consideration of such a question has no relation to the clause of the statute relating to the district in which suits may be brought. The question of the jurisdiction of the court in cases like the present one can be taken at any time pending the proceedings. It need not be presented by any assignment of error. It may be raised by the court of its own motion. Failure of the parties to raise the question, or consent to waive it, does not prevent the court from considering it. This court has twice so

decided. *Craswell v. Belanger*, 56 Fed. 529, 6 C. C. A. 1; *German Savings & Loan Soc. v. Dormitzer*, 116 Fed. 471, 53 C. C. A. 639. In *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870, the court said:

"After the cause was argued here, the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one, and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield, C. & L. M. Railway Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; *Mattingly v. Northwestern Va. R. R.*, 158 U. S. 53, 57, 15 Sup. Ct. 725, 39 L. Ed. 894; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 20 Sup. Ct. 690, 44 L. Ed. 482; *Continental National Bank v. Buford*, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 24 Sup. Ct. 63, 48 L. Ed. 140."

It is next claimed by the defendant that the record in this case shows that the defendant and plaintiff's assignor (Blake) are citizens of different states. This contention is sought to be maintained upon the ground that the petition for removal sets forth the fact that the plaintiff is a corporation organized and existing under the laws of the state of Iowa, and is a citizen and resident of that state; that the original complaint in this action was verified by Isaac E. Blake, president of the plaintiff corporation. The argument of defendant is that those who use the corporate name and exercise the faculties of a corporation are conclusively presumed to be citizens of the state wherein the corporation is organized. *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. 325, 328, 14 L. Ed. 953; *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545, 547, 16 Sup. Ct. 621, 40 L. Ed. 802, and *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 106, 18 Sup. Ct. 526, 42 L. Ed. 964, are cited as sustaining these views. The question under consideration in those cases was not as to the citizenship of individuals, but was confined to the status of a corporation under the Constitution and laws of the United States relating to the jurisdiction of the Circuit Courts over controversies between citizens of different states. The language used in an opinion must be read and construed in connection with the facts of the case about which the court was speaking, and when so read it becomes apparent that they do not support the defendant's contention. The particular grounds upon which this contention is based have been heretofore considered by this court, and decided adversely to the views advanced by the defendant.

In *Hanchett v. Blair*, 100 Fed. 817, 822, 41 C. C. A. 76, the whole subject was elaborately discussed. The difficulties which existed as to the status of corporations, and the reasons which controlled the decision of the Supreme Court in *Railroad Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Railroad Co. v. Wheeler*, 1 Black, 286, 296, 17 L. Ed. 130, and *Shaw v. Mining Co.*, 145 U. S. 444, 451, 12 Sup. Ct. 935, 36 L. Ed. 768,



to declare that, "where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence," and "that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States," were fully explained. The court said:

"These presumptions preserved the jurisdiction of the United States courts over corporations in accordance with the evident spirit and purpose of the Constitution, but such presumptions had no relation to the citizenship of individuals as parties to a controversy in their own right, and it would manifestly be an unauthorized extension of their scope and effect to so construe the decisions of the Supreme Court. It follows that there is no legal presumption that the individual complainant, who is also a stockholder of the defendant corporation, is a citizen of the same state as the corporation."

The rule of the Supreme Court was made to prevent the interminable litigation that might arise if every corporation, when suing or being sued in the courts, was compelled to show that each and every one of its members was a citizen of the state in which the corporation was organized. The necessity of the rule—the object in view in adopting it—was to fix the status of the corporations, and determine their rights when bringing suits or being sued. For that purpose the presumption should be indulged in. This is borne out by all the later decisions of the Supreme Court. The constant tendency of such decisions has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.

In *St. Louis & San Francisco Railway v. James*, *supra*, where all of the authorities upon the subject were reviewed, the court said:

"To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the federal courts in 'controversies between citizens of different states.' \* \* \* The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation. We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation. We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

There it should be left. Any attempt to extend it to the individual members of the corporation in the determination of their status as citizens of another state would be fraught with evils of the greatest magnitude, and would be extending the doctrine of the cases far beyond the "verge of judicial power."

Could this action have been originally brought by Blake in the Circuit Court of the United States if no assignment or transfer had been made by him to the corporation plaintiff herein? This is the vital question in this branch of the case, made so by the provisions of the act of Congress approved March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. Three judiciary acts have been passed by Congress in relation to this question, and, as some discussion has been made by counsel as to the phraseology of each, and as some of the decisions which we shall have occasion to cite refer to these different acts, it is deemed proper to quote them.

Section 11, c. 20, of the original act of Sept. 24, 1789, is as follows:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

The corresponding clause in the act of 1875 reads as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Act March 3, 1875, c. 137, 18 Stat. 470.

The provision in section 1 of the act of March 3, 1887, and August 13, 1888, is clothed in the following language:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 24 Stat. 553; 25 Stat. 434 [U. S. Comp. St. 1901, p. 508].

It is claimed by the defendant that the case in hand falls outside of the exceptions in section 1 of the act of March 3, 1887, above quoted, because the contract between Blake and De Lamar was not in writing, and therefore was not, for that reason, a chose in action, or "instrument" in the hands of a holder having "contents." To support this contention the following authorities are cited: *Bushnell v. Kennedy*, 9 Wall. 392, 19 L. Ed. 736; *Deshler v. Dodge*, 16 How. 630, 631, 14 L. Ed. 1084; *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765; *Jewett v. Bradford Savings Bank & Trust Co. (C. C.)* 45 Fed. 801; *Conn et al. v. C. B. & Q. R. R. Co. (C. C.)* 48 Fed. 177; *Buckingham v. Dake*, 112 Fed. 258, 261, 50 C. C. A. 492. Does the word "instrument" as used in the act of 1887-88, limit the choses in action therein named to actions upon written instruments? The principal case relied upon by defendant is that of *Ambler v. Eppinger*, *supra*. The pith of the decision in that case is that the provision in the act of March 3, 1887, did not apply to an action of trespass brought by an assignee of

the claim to recover damages for cutting down and removing timber from the land of the assignor. This was the only question to be decided in the case, and is the only point upon which the case should be cited as an authority. In the course of the opinion in that case, Mr. Justice Field, after quoting the provisions of the statute, said:

"This act, as it appears on its face, does not embrace, within its exceptions to the jurisdiction of those courts, suits by an assignee upon claims like the demand in controversy. The exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other choses in action, where the demand sought to be enforced is represented by an instrument in writing, payable to bearer, and not made by a corporation; the words following the designation of choses in action indicating the manner in which they are to be shown. They must be such as arise upon contracts of the original parties, and not founded, like the one in controversy, upon a trespass to property."

It is, we think, apparent, in the light of the previous and subsequent decisions of the Supreme Court, in some of which Mr. Justice Field participated, that neither he nor the court intended, by the use of the words "in writing," to place such a limit to the word "instrument" in all kinds and character of cases that might arise within the provisions of the statute—to choses in action, as well as notes payable to bearer. The word "instrument" is only used in the act of 1887-88, and as there used is intended to be limited to promissory notes payable to bearer, and does not, and was not intended, to apply to "choses in action" of the character involved in this case. But be that as it may, the Supreme Court of the United States has since, as well as before, laid down the rules by which we must be guided; and, if there is a conflict between them, the later decisions must govern and control our action.

The cases that have been held to be within the prohibition of the quoted clause in the act of 1789 are suits by virtue of equitable assignments, as well as suits by virtue of legal assignments, by the assignees of open accounts by merchants. *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240; *Corbin v. Black Hawk County*, 105 U. S. 665, 26 L. Ed. 1136. It also includes assignees by operation of law, receivers of corporations, assignees in bankruptcy and in insolvency. In *Corbin v. County of Black Hawk*, 105 U. S. 659, 665, 26 L. Ed. 1136, the court said:

"The contents of a contract, as a chose in action, in the sense of section 629, Rev. St. [U. S. Comp. St. 1901, p. 503], are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

And, after referring to the case of *Sere v. Pitot*, supra, the court said:

"There the plaintiffs were the general assignees of the effects of an insolvent debtor by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word 'contents' did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments, as well as suits in virtue of legal assignments, and to exclude from the federal courts the assignee of all the open accounts of a merchant, as well as the same person when the assignee of a particular note. The court say: 'The term "other chose in action" is broad enough to comprehend either case, and the word "contents" is too ambiguous in its import to restrain that general term. The

"contents" of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account.' Following out this principle, the obligation or the promise contained in a contract is its contents when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents. \* \* \* The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made; and it is well settled that this is necessary. *Turner v. Bank of North America*, 4 Dall. 8, 1 L. Ed. 718; *Mollan v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Bank of United States v. Moss*, 6 How. 31, 12 L. Ed. 331; *Bradley v. Rhines' Adm'rs*, 8 Wall. 393, 19 L. Ed. 467."

In *Plant Investment Co. v. Key West Railway Co.*, 152 U. S. 71, 77, 14 Sup. Ct. 483, 38 L. Ed. 358, it was held that a Circuit Court of the United States has no jurisdiction over a suit to enforce a contract for the conveyance of land brought in the state where the land is situated by the assignee of one party to the contract against the other party, if both parties to the contract are citizens of the same state, although the assignee is a citizen of a different state. The court, after referring to the doctrine announced in *Corbin v. County of Black Hawk*, supra, said:

"The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the internal improvement fund and the defendant railway company, but the term 'assignee' in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees, and therefore brings the suit within the prohibition of section 629 of the Revised Statutes."

In *Mexican National Railroad Co. v. Davidson*, 157 U. S. 201, 206, 15 Sup. Ct. 563, 39 L. Ed. 672, the court, after referring to *Sere v. Pitot*, 6 Cranch, 332, 335, 3 L. Ed. 240; *Sheldon v. Sill*, 8 How. 441, 449, 12 L. Ed. 1147; *Corbin v. County of Black Hawk*, 105 U. S. 659, 26 L. Ed. 1136; *Deshler v. Dodge*, 16 How. 622, 631, 14 L. Ed. 1084; and *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765—said:

"The act of 1875 referred to suits 'founded on contract,' but the act of 1887 restored the words of the act of 1789, 'to recover the contents of any promissory note or other chose in action,' and we do not think that the words 'if such instrument be payable to bearer and be not made by any corporation' limit the comprehensiveness of 'chose in action' as construed under the act of 1789; and, as this cause of action is based on contract, we are of opinion that it is within the definition heretofore ascribed to the words 'to recover the contents of a chose in action.' This being so, it follows that the action could not have originally been brought in the Circuit Court of the United States by Davidson, the assignee of a Colorado corporation, against a Colorado corporation. \* \* \* We must hold, therefore, as has indeed already been ruled (*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 461, 14 Sup. Ct. 654, 38 L. Ed. 511), that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such, and cannot be waived. *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. Ed. 229; *Mansfield Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543."

The decisions in *Parker v. Ormsby*, 141 U. S. 81, 84, 11 Sup. Ct. 912, 35 L. Ed. 654, *New Orleans v. Benjamin*, 153 U. S. 411, 435, 14 Sup. Ct. 905, 38 L. Ed. 764, and *Benjamin v. New Orleans*, 169 U. S. 161, 163, 18 Sup. Ct. 298, 42 L. Ed. 700, are instructive upon several of the questions hereinbefore discussed.

In *Parker v. Ormsby*, the court, after quoting the judiciary acts of 1789, 1875, and 1887-88, said:

"It thus appears that the act of 1887, in respect to suits to recover the contents of promissory notes or other choses in action, differs from the act of 1789 only in the particular that the act of 1887 excludes, under certain circumstances, from the cognizance of the Circuit and District Courts of the United States, suits in favor 'of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation.' It is not necessary now to consider the meaning of the words just quoted; for the present suit is by an assignee of a promissory note payable, not to bearer, but to the order of the payee. And we have only to inquire as to the circumstances under which the court below could take cognizance of a suit of that character. That inquiry is not difficult of solution. It was settled by many decisions under the act of 1789 that a Circuit Court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appeared affirmatively that it could have been maintained in that court in the name of the original payee. *Turner v. Bank of North America*, 4 Dall. 8, 11, 1 L. Ed. 718; *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545; *Gibson v. Chew*, 16 Pet. 315, 316, 10 L. Ed. 977; *Coffee v. Planters' Bank of Tennessee*, 13 How. 183, 187, 14 L. Ed. 105; *Morgan's Executor v. Gay*, 19 Wall. 81, 82, 22 L. Ed. 100. There were these recognized exceptions to that general rule in its application to promissory notes: (1) That an indorsee could sue the indorser in the Circuit Court, if they were citizens of different states, whether a suit could have been brought or not by the payee against the maker; for the indorsee would not claim through an assignment, but by virtue of a new contract between himself and the indorser. *Young v. Bryan*, 6 Wheat. 146, 151, 5 L. Ed. 228; *Mollan v. Torrance*, 9 Wheat. 537, 538, 6 L. Ed. 154. (2) The holder of a negotiable instrument payable to bearer or to a named person or bearer could sue the maker in a court of the United States without reference to the citizenship of the original payee or original holder, because his title did not come to him by assignment, but by delivery merely. *Bank of Kentucky v. Wister*, 2 Pet. 318, 326, 7 L. Ed. 437; *Thompson v. Perrine*, 106 U. S. 589, 592, 1 Sup. Ct. 564, 568, 27 L. Ed. 298; and authorities there cited. There can be no claim that the present case is within either of those exceptions. The authorities we have cited are conclusive against the right of the plaintiff to maintain this suit in the court below, unless it appeared that the original payee, Lamb, could have maintained a suit in that court upon the note and coupons. Consequently, it was necessary that the record should, as it does not, disclose his citizenship. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; *Crehore v. Ohio & Mississippi Railway*, 131 U. S. 240, 243, 9 Sup. Ct. 692, 33 L. Ed. 144; *Rollins v. Chaffee County (C. C.)* 34 Fed. 91."

In *New Orleans v. Benjamin*, which was a suit to recover the contents of a chose in action within the judiciary act of 1887-88, it was held that, as the bill contained no averment that the suit could have been maintained by the assignors, the jurisdiction of the Circuit Court could not be sustained on the ground of diverse citizenship.

In *Benjamin v. New Orleans*, the court, among other things, said:

"The judicial power extends to controversies between citizens of different states and between citizens of a state and citizens or subjects of foreign states; but from the judiciary act of 1789 to the act of August 13, 1888, it

has been provided, in substance (the differences being immaterial here), that no Circuit Court shall 'have cognizance of any suit [quoting the statute of 1887-88].' And, to avoid the operation of this limitation, it is necessary in such cases that the record should show that the suit could have been maintained in the Circuit Court in the name of the assignor. *Parker v. Ormsby*, 141 U. S. 81 (11 Sup. Ct. 912, 35 L. Ed. 654)."

In *Simons v. Ypsilanti Paper Co.* (C. C.) 33 Fed. 193, 195, it was held by Brown, J., that an action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract is a suit to recover the contents of a chose in action, within the meaning of the act of March 3, 1887, and the Circuit Court has no jurisdiction of such suit in favor of an assignee, unless it might have been prosecuted in such court if no assignment had been made. And, after referring to several cases which we have heretofore referred to, the court said:

"From this summary of decided cases it is quite evident that when the action is founded upon an express promise between the original parties it cannot be prosecuted by the assignee of the original promisee, unless the action would have lain by the assignor. \* \* \* No distinction is intimated between oral and written contracts, and none can be justly inferred from the language of the act. The words, 'or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation,' were not intended as a new limitation, and are referable only to the written instruments previously mentioned. The clause was introduced for the purpose of nullifying a series of decisions under the act of 1789, which held that promissory notes and other written instruments payable to a person named 'or bearer' were not within the exceptions of the statute, because the promise was in law made directly to the bearer, and he did not take by assignment from the person named. We are clear in our opinion that it was not intended to qualify or limit in any way the words 'other chose in action.' A right of action upon an oral contract is as much a chose in action as if the contract were in writing."

We have, perhaps, quoted from the decisions of the Supreme Court at greater length than was necessary. A terse statement of the rules announced by the decisions, and their citation, is all that would be essential to explain our views; but the importance of the case in hand, and the able briefs filed by the respective counsel, have induced us to lean upon the language as used by the court as a safer and surer guide than expressions of our own, however carefully formulated from the opinions in question, would be.

In discussing the case we have endeavored to observe the rule so often expressed by the national courts that, where the question of jurisdiction is presented, we are confronted with the presumption that the cause is without the jurisdiction of the court, unless the contrary affirmatively appears. We are also aware that a decision of this court which is based upon the question of jurisdiction, where the point was not timely brought to the attention of the trial court by the parties who rely upon it, is, to say the least, always unsatisfactory. It may be that, if the attention of the lower court had been more directly drawn to the point we have discussed, the parties would have been saved the time, labor, and expense incurred in the trial thereof. But plaintiff's dereliction in this respect is not of such a character as to estop it from now raising the question for the reasons heretofore given in this opinion. Our conclusion is that the Circuit Court was without jurisdiction to try, hear,

and determine this case upon its merits, and that it erred in refusing to remand the case to the state court from whence it came.

The judgment of the Circuit Court is reversed, and the cause remanded to the Circuit Court, with directions to remand the case to the state court.

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**STREETER et al. v. SANITARY DIST. OF CHICAGO.**

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,067.

**1. APPEAL—REVIEW—TRIAL TO COURT.**

Where a jury trial is waived by stipulation in a Circuit Court in an action at law, and the cause is tried to the court, as provided in Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], and a general finding made, a review by an appellate court is limited to the rulings made during the progress of the trial which are presented by a bill of exceptions.

**2. SAME—BILL OF EXCEPTIONS—FINDINGS.**

When in such case the judgment was rendered on a general finding, there is no authority for inserting special findings in the bill of exceptions signed at a succeeding term of court.

**3. FEDERAL COURTS—TRIAL TO COURT—PRACTICE.**

On the trial of a cause in a Circuit Court without a jury, as provided in Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], the procedure is governed by the provisions of such statute; and the court may, at its option, make either general or special findings. It cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice.

**4. SAME—REVIEW IN APPELLATE COURT.**

In a cause tried in a Circuit Court without a jury, under Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], where there were no special findings, nor a stipulation of facts, a request for a holding, as matter of law, that plaintiffs were entitled to recover the amount claimed, requires a weighing of the evidence and a determination of facts, and the ruling thereon is not reviewable by an appellate court.

**5. SAME—RULINGS ON EVIDENCE.**

On a trial to the court without a jury, the improper admission of evidence is not of itself necessarily a ground for reversal, but the evidence improperly admitted or excluded must be of such kind and so forceful that it should work a different result from that reached by the trial court.

**In Error to the Circuit Court of the United States for the Northern District of Illinois.**

This suit is brought by the plaintiffs in error to recover upon a contract between them and the defendant the sum of \$125,000, claimed to be due them thereon. The plaintiffs agreed to excavate section E of the main drainage canal in the valley of the Des Plaines river according to the terms of the contract and the specifications thereto, and to complete the work by October 1, 1896. The plaintiffs commenced the excavation, taking off the top of the entire section to the depth of about 10 feet; the average depth contemplated being about 37 feet. In the course of the excavations they encountered a hard material, and practically ceased the work in January, 1894; insisting that the defendant should double the contract price for glacial drift. This application was considered by the drainage board, and was denied on August 8, 1894, and an order was passed by the board requiring the plaintiffs to resume work within 10 days; there having been practically a cessation of work by the plaintiffs during the spring and summer of 1894. The defendant claims that the plaintiffs failed to resume work, and the drainage district thereupon en-

tered into contract in September, 1894, with the firm of Angus & Gindele, at a lower rate than that agreed to be paid by the contract with the plaintiffs. The firm of Angus & Gindele entered upon the performance of the work, but, meeting with financial failure in December, 1896, by consent of the drainage district their contract was assigned March, 1897, to Halverson, Richards & Co., who completed the work on August 31, 1899.

The plaintiffs claim that there was no abandonment by them of the contract, and assert that they are entitled to recover the reserve percentage upon the amount of the work done by them, and the difference between the amount agreed to be paid by their contract and the amount agreed to be paid by the contract with Angus & Gindele and Halverson, Richards & Co., amounting in all to \$88,893.50, with interest from December 22, 1899.

The defendant pleaded the general issue, and, upon stipulation in writing, a jury was waived and the case was tried to the court. A large mass of testimony was presented at the trial, both oral and written, and there was much dispute upon the facts. This testimony comprises 169 printed pages of the bill of exceptions. At the conclusion of the evidence the plaintiffs in error submitted to the court 35 propositions of law, requesting that the court hold them to be the law of the case. Twenty-seven of these propositions were refused by the court, and an exception reserved to each ruling. The eighth proposition was as follows:

"(8) The court holds, as matter of law, that the plaintiffs are entitled to recover in this case the sum of \$88,893.50."

On November 6, 1902, the court made a general finding as follows:

"Now come the parties by their attorneys, and the court, having considered and being now fully advised in the premises, finds the issues for the plaintiffs, and assesses their damages at the sum of twenty-one thousand eight hundred and forty-eight dollars."

On August 18, 1903, judgment upon that general finding was rendered, to reverse which judgment this writ of error is sued out. On February 17, 1904, there was signed and filed a bill of exceptions in the cause, which contains the evidence, certain rulings in the admission and exclusion of testimony, the 35 propositions of law referred to, and then states:

"The court finds from the evidence in this case that the plaintiffs are entitled to recover the sum of \$18,998.95; the same being the amount of reserve percentage held back by the defendant at the time defendant proceeded under clause 'L,' and relet the work under plaintiffs' contract to Angus & Gindele.

"The court further finds that plaintiffs are entitled to recover interest at the rate of five per cent. per annum upon said \$18,998.95 from December 22, 1899, the date of the final certificate to Halverson, Richards & Co., to the date of the entry of judgment herein.

"As to the claim of plaintiffs that they are entitled to recover \$6,092.05, the same being one-half cent per cubic yard upon 1,218,410 cubic yards of glacial drift, and the sum of \$63,802.50, the same being thirty cents per cubic yard upon 212,675 cubic yards of solid rock—the said \$6,092.05 and \$63,802.50 being the difference between plaintiffs' contract price and the contract price at which the work was relet to Angus & Gindele and Halverson, Richards & Co.—the court finds that the defendant has sustained damage to the amount of said sums of \$6,092.05 and \$63,802.50, the result of plaintiffs' failure to complete their contract, which the defendant is entitled to recoup and set off against the above sums so claimed by plaintiffs, and therefore the plaintiff is entitled to recover only the sum of reserve percentage, \$18,998.95, with interest, as aforesaid."

The plaintiffs excepted to the last paragraph of the finding.

The sixth and seventh assignments of error challenge the supposed findings of the court contained in the bill of exceptions above quoted. The assignments of error from the eighth to the thirty-second, both inclusive, refer to the admission or exclusion of evidence offered at the trial. The remaining of the 64 assignments of error refer to the refusal to hold the propositions of law tendered.



Adams H. Goodrich, Ralph R. Bradley, and Albert M. Cross, for plaintiffs in error.

Seymour Jones, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The hearing of this cause upon the merits was interrupted by the court with the suggestion whether there was anything in the record which could properly be reviewed. The hearing upon the merits was thereupon suspended, and we were furnished with briefs upon the question suggested, which we now proceed to consider.

The statute of March 3, 1865, 13 Stat. 501, Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], provides as follows:

"Issues of fact in civil cases in any Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause in the progress of the trial of the cause, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

The prohibition to review the findings of a jury upon the facts otherwise than according to the rules of the common law is constitutional. Const. U. S. Amend. 7. That mode of review is either by a new trial allowed by the trial court, or by the granting of a new trial by an appellate tribunal for some error at law intervening at the trial.

A general finding upon a trial by the court without a jury has by the statute the same effect as the verdict of a jury. The parties are concluded upon the facts by the determination of the court, and nothing is presented for review, except as might have been reviewed, had there been a trial by jury. *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827.

The statute in question has been under frequent review. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Dirst v. Morris*, 14 Wall. 484, 20 L. Ed. 722; *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827; *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. Ed. 47; *Crews v. Brewer*, 19 Wall. 70, 22 L. Ed. 63; *Insurance Co. v. Sea*, 21 Wall. 158, 22 L. Ed. 511; *Insurance Co. v. Boon*, 95 U. S. 117, 135, 24 L. Ed. 395; *The Abbotsford*, 98 U. S. 440, 443, 25 L. Ed. 168; *Booth v. Tierman*, 109 U. S. 205, 3 Sup. Ct. 122, 27 L. Ed. 907; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Santa Anna v. Frank*, 113 U. S. 339, 5 Sup. Ct. 536, 28 L. Ed. 978; *British Queen Mining Co. v. Baker Silver Mining Co.*, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Grayson v. Lynch*, 163 U. S. 468, 472, 16 Sup. Ct. 1064, 41 L. Ed. 230; *St. Louis v. Western Union Telegraph Company*, 166

U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044; *Wilson v. Merchants' L. & T. Co.*, 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113.

The result of the rulings in these cases is that, if the finding be general, the review is limited to the rulings of the court in the progress of the trial. If the findings be special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. No other or different review is permitted. The special finding of the statute is not a mere report of the evidence, but is a finding of those ultimate facts upon which the law must determine the rights of the parties. If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions, but in such case a bill of exceptions cannot be used to bring up the whole testimony for review, any more than on a trial by jury. *Grayson v. Lynch*, *supra*. Nor can there be both a general and a special finding. It must be the one or the other. *British Queen Mining Co. v. Baker Silver Mining Co.*, *supra*; *Corliss v. County of Pulaski*, 53 C. C. A. 567, 116 Fed. 289.

The judgment here was rendered on a general finding. The bill of exceptions, signed five months thereafter, and at a subsequent term of the court, presents certain supposed special findings. This procedure is unauthorized, and must be disregarded. The supposed special findings, moreover, determine no ultimate facts, and are merely explanatory of the result reached by the general finding. There being then only a general finding, and no agreed statement of facts, inquiry upon review must be limited to the sufficiency of the declaration and to the rulings during the progress of the trial. *Lehnen v. Dickson*, *supra*. In this case Mr. Justice Brewer remarks as to the conclusiveness of the general finding (page 77, 148 U. S., page 484, 13 Sup. Ct., 37 L. Ed. 373):

"But the burden of the statute is not thrown off simply because the witnesses do not contradict each other and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

We are thus precluded from a review of the evidence to reach a determination with respect to the ultimate facts upon which the judgment proceeded.

At the close of the evidence the plaintiffs, following the practice sanctioned by the state law (3 Starr & C. Ann. St. Ill. c. 110, par. 42, p. 3033), presented certain propositions to be held by the court as law in the decision of the case. It is claimed that the refusal of the court to hold as requested was in each case error reviewable by the appellate court. The practice of the state court in this respect, as regulated by the statute, cannot be operative in a trial in the federal court. Such trial, in that respect, is governed exclusively by the federal statute, since Congress has spoken to the subject. Is it then permissible on a trial before the

court without a jury that a party may, as of right, demand that the court shall rule upon specific questions of law, founded upon the evidence submitted upon the one side or the other? This question would appear to have been passed upon by the Supreme Court. Thus in *Dirst v. Morris*, supra, the trial court decided that the plaintiff was entitled to recover notwithstanding the possession of the premises taken by the defendant, and found the issues generally for the plaintiff. This ruling was alleged for error. But the Supreme Court said (page 490, 14 Wall., 20 L. Ed. 722), after disposing of a question upon admission of evidence:

"The particular reason why, or ground on which, the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor, is not specified. The court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether, as matter of law, it regarded that fact as not material, or what other view of the case it may have taken, does not appear, and therefore no error can be asserted in the decision. This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence; and there was no special finding of facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But as the law stands, if a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

So, also, in *Insurance Co. v. Folsom*, supra, at the close of the testimony the court was requested, but refused, to rule upon numerous propositions of law, and such request was assigned for error; but the Supreme Court said (page 253, 18 Wall., 21 L. Ed. 827):

"Requests that the court would adopt certain conclusions of law were also presented by the defendants in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the Circuit Court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the Circuit Court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertains to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instructions, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court."

It is thus clear that the ultimate tribunal has placed a construction upon the statute which forbids the practice which in similar cases obtains in the state courts of Illinois, and denies the right to a party in a federal tribunal to thus catechize the court.

But it is insisted that the eighth request—that the court hold, as matter of law, that the plaintiffs are entitled to recover the amount claimed—is equivalent to a request for an instruction to a jury to return a verdict for the plaintiff, and so permit a review of the evidence. The request, in our judgment, goes to the weight or preponderance of evidence, not to the question whether the evidence making for the plaintiff

is adequate, unimpeached, and without conflict. It demands a weighing of the evidence. It does not proceed upon the ground that there is a total lack of evidence to support a contrary finding. Whether they were so entitled depends upon many considerations of fact—whether they had abandoned the work; whether they were wrongfully prevented from finishing the work; whether the defendants were entitled to any or all of the six items of recoupment claimed; whether any or all of them had been waived. These are questions of fact, requiring for solution by us an examination of the evidence and a determination of the fact, which is not permissible. We have no right to enter into that field of controversy. That duty is lodged by the statute exclusively in the trial court. It is, however, claimed that, within certain rulings of the Supreme Court, this request is equivalent to a challenge to the whole evidence, and that we are at liberty to review. This contention is founded upon the cases of *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608, and *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. In the former case the record shows that at the close of the evidence the court found the issues and rendered judgment for the defendant, to which decision and ruling the plaintiff excepted. The Supreme Court ruled that the bill of exceptions must present some erroneous ruling of the court in the progress of the trial, and that the exceptions presented involved no ruling of that class, and affirmed the judgment. Thereupon Mr. Justice Miller undertook to lay down four rules with respect to a review of a trial by the court without a jury: (1) That only such rulings in the progress of the trial can be reviewed as are presented by the bill of exceptions, or as may arise upon the pleadings; (2) in such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury; (3) that, if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them; (4) that all of these must appear by the bill of exceptions. It is under the third provision that the plaintiffs here rely to have the evidence reviewed under the eighth request. It will be observed that the statement of rules by Mr. Justice Miller is obiter—not called for by the exigencies of the cause; the court having determined that the ruling excepted to was not a ruling in the progress of the trial, but was an exception to the finding of the court. This obiter statement by that learned justice has been the foundation for some rulings in the federal court which might seem to lend strength to the contention of the plaintiffs. Thus in *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, there was at the close of the trial an application for a declaration of law “that the plaintiff was entitled to judgment for the sum claimed,” which instruction was refused, and exception taken. Mr. Justice Brewer observes, “And this, as was held in *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608, presents a question of law for our consideration.” He ignores the ruling in *Dirst v. Morris* and in *Insurance Company v. Folsom*, referred to above, and in *Cooper v. Omohundro*, *supra*, in which latter case there was a request at the close of the evidence that the court should hold “that, upon the whole case, judgment should be

for the defendant," and with respect to which the court said (page 69, 19 Wall., 22 L. Ed. 47):

"Beyond all doubt, the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the Circuit Court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reasons given in the opinion of the court in the case of *Insurance Company v. Folsom*, decided at the present term."

These three cases are subsequent to the case of *Norris v. Jackson*, and in direct antagonism to the third rule therein stated obiter. In the *St. Louis Case* Mr. Justice Brewer states as one reason for reviewing the ruling:

"Further, there was, as also appears in the bill of exceptions, an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based."

This consideration would seem to have induced the court to a review of the proposition of law. Mr. Justice Brewer adds that there was also some oral testimony—

"But as it appears from the opinion of the court that it made a distinct ruling upon a proposition of law not at all affected by the oral testimony, and which, in its judgment, was decisive of the case, we cannot avoid an inquiry into the matter thus determined."

If the *St. Louis Case* were applicable here, and may still be considered the law of the land, it certainly would seem to lend support to the contention of the plaintiffs. There is in the case at bar, however, no consensus of facts disclosed by the bill of exceptions. It is simply a stenographic report of the evidence, and of the rulings at the trial, and of the propositions of law. We cannot, therefore, as could the ultimate tribunal in the *St. Louis Case*, "approach the consideration of the declaration of law with a certainty as to the facts upon which it was based." And here it does not appear, as in the *St. Louis Case*, that "the ruling upon the propositions of law was not at all affected by the oral testimony."

The *St. Louis Case* was reversed, and retried without a jury, and came again to the Supreme Court. 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044. Upon the new trial, at the close of the testimony there was a request for several rulings upon the law, one of which was that, upon the pleadings and evidence, the plaintiff was entitled to recover the sum claimed. The Supreme Court declined to review the ruling and affirmed the judgment; observing that the ruling "involved a determination of facts, and as those facts were not found for us by a special finding of the court, and as the evidence which developed the facts is not brought to our notice by exception to its competency or relevancy, no questions of law are presented for our review." It is clear to us that the decision in the *St. Louis Case* upon the first appeal is overruled by the decision in the latter appeal. The request presented upon each appeal was that, as matter of law, the plaintiff was entitled to the sum claimed, as is the case in the suit at bar. If the request was effective to authorize a review upon the first appeal, it should have been equally

effective upon the second. There is between the two requests not the difference of the "shadow of a shade." Both decisions cannot stand, for they are in direct conflict, and we must have regard to the later decision, especially as it brings the court in accord with most of the decisions of the ultimate tribunal speaking to the question.

It remains to consider the assignments of error with respect to the admission or rejection of evidence upon the trial. There are 25 of these assignments of error. The brief of the appellants does not seem to place great stress upon these alleged errors; but, since opportunity for argument of them was cut off by the action of the court as stated, we are disposed to restore the cause to the calendar for argument upon these assignments, if the plaintiffs so desire. It should, however, be borne in mind that, on a trial to the court without a jury, the improper admission or rejection of evidence is not of itself necessarily a ground for reversal. *Craig v. Missouri*, 4 Pet. 427, 7 L. Ed. 903; *Field v. United States*, 9 Pet. 202, 9 L. Ed. 94; *United States v. King*, 7 How. 853, 854, 12 L. Ed. 934; *Weems v. George*, 13 How. 190, 14 L. Ed. 108. The evidence improperly admitted or improperly rejected must be of such kind and so forceful that it should work a different result from that arrived at by the trial court.

If the plaintiffs shall so elect, and shall file a written election with the clerk within 10 days, the cause will be restored to the calendar for argument upon the assignments of error respecting the admission or rejection of evidence; otherwise the judgment will be affirmed.

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FOX v. GUNN et al.

(Circuit Court of Appeals, Ninth Circuit. October 17, 1904.)

No. 1,043.

1. TRUST—SUIT TO ENFORCE—EVIDENCE CONSIDERED.

Evidence considered, and *held* to establish complainant's right to an undivided interest in certain mining property and claims held in trust by one of the defendants under an agreement that on the repayment to him of advances made thereon, either from the proceeds of sales or ore, the property should be divided, and to entitle complainant to an accounting from defendant, as against such advances, for the value of certain of the claims which he had disposed of, denying complainant's interest therein.

Appeal from the Circuit Court of the United States for the District of Oregon.

Mitchell & Tanner and M. B. Kellogg (A. E. Shaw, of counsel), for appellant.

A. C. Hough, M. S. Wilson, and C. H. Lovell, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellant was the complainant in the court below in this suit in equity, to which the appellees were made defendants. In his amended bill the complainant alleges that

he is, and for a long time prior to the filing of the original bill was, the owner of an undivided half of certain described real property, mines, and mining claims, and of the ores and precious metals contained therein, situated in the county of Josephine, state of Oregon, to wit: (a) The southwest quarter of section 36, township 40 south, range 8 west, Willamette meridian, embracing what is called in the record the "Waldo Mine"; (b) the south half of section 25, township 40 south, range 8 west, Willamette meridian, also embracing a mine with ores and precious metals; (c) a certain lode-mining claim adjoining the Waldo mine, located under the laws of the United States by the complainant, Fox, on the 12th day of March, 1900, called the "Young Tom Lode"; (d) a certain other mining claim adjoining that last described, located under the laws of the United States by one Oliver Roberts on the 12th day of March, 1900, and called the "Young Lou Lode"; and (e) a certain other mining claim, adjoining that last described, located under the laws of the United States by one Charles Decker on or about March 12, 1900, and called the "Young Charley Lode."

It is alleged, among other things, in the amended bill, that the property mentioned is of the value of \$200,000, and—

"That the said defendants, and each of them, though at times heretofore having admitted and acknowledged the ownership of the plaintiff, your orator, to the undivided half of all the above said properties and mines and mining claims, now deny the same, and claim an interest and interests in said undivided half adverse to the claims and ownership of your orator, but that the nature and the amount of said claims of defendants, and each of them, your orator is unable to state; and your orator states that the reason of such inability on his part is that such claims are made by defendants from time to time in varying terms, and that they at times deny that your orator has any title or interest in any of said properties, mines, and mining claims, and at other times assert that your orator has title and interest in said properties, mines, and mining claims only in a small fraction, and much less than an undivided half, and that they own all said undivided half so belonging to your orator, except a very small proportion thereof; that the claims of said defendants, and each of them, against said undivided half, are, and each of them is, without any right whatsoever, and that neither of the defendants have any estate, right, title, or interest whatsoever in and to said undivided half of said real properties, mines, and mining claims above described, or any part or portion of said undivided half."

The prayer of the bill is, among other things, that the defendants be required to state the nature of their claims, and for a decree that neither of them have any estate or interest in the undivided half of the property owned by the complainant, and that each of them be enjoined from asserting any claim thereto adverse to the complainant, and that the defendants be required to execute to the complainant such grants and other conveyances as may be proper, and for general equitable relief.

The defendants answered the amended bill, and at the same time filed, by leave of the court below, a cross-bill. In their answer they denied, among other things, that the complainant is or ever was the owner of any interest in any of the property mentioned in the bill, except as stated in the answer and in the cross-bill. In respect to the three mining claims mentioned in the amended bill as the "Young Tom Lode," the "Young Lou Lode," and the "Young Charley Lode," the answer of

the defendants denied that any vein or lode was discovered in either of those claims prior to the location thereof, and that subsequent to their location the locator of each of the claims failed and neglected to sink any shaft, or to make any cut or crosscut or tunnel, or to do or perform any of the work upon the claims required by section 3 of an act of the Legislature of the state of Oregon approved October 14, 1898, entitled "An act relating to mining claims, repealing chapter xiii of the Code of Civil and Criminal Procedure in Justices' Courts, and sections 3827, 3828, 3830, 3831, 3832, 3833, 3834, 3835, and 3836 of chapter LX of Hill's Annotated Laws of Oregon" (Laws 1898, p. 17), by reason of which the answer averred that each of those locators forfeited and lost all right thereto, and that the defendant Gunn, finding the ground theretofore covered by the Young Tom location vacant and unoccupied, located the same on or about the 14th day of June, 1900, under the mining laws of the United States, as the Spruce claim, marking the boundaries thereof, and recording the claim as required by law, and doing the necessary work thereon, which disclosed a vein or lode of rock in place, carrying copper and gold, which claim the defendant Gunn has at all times since claimed and owned, to the exclusion of the complainant, Fox, and with his knowledge and consent; that on or about the same day in June, 1900, the defendant Draper located, under the laws of the United States, as the Pine claim, the ground theretofore covered by the Young Lou Lode, marking and recording the claim as required by law, and doing the necessary work thereon within the time required by law, and finding in the bottom of the shaft a vein of rock in place, carrying copper and gold, which claim the defendant Draper has at all times since claimed and owned; that on or about the 14th day of June, 1900, the complainant, Fox, "by and through his servants and agents," located as the Fir claim the ground theretofore covered by the Young Charley Lode, marking and recording the same as required by law, and doing the necessary work thereon within the time required by law, and disclosing in the bottom of the shaft a vein or lode of rock in place, bearing copper and gold; and that thereafter, to wit, July 5, 1900, Fox executed to the defendant Gunn a deed conveying all his interest in and to the Fir claim to Gunn, which deed was duly recorded in the office of the recorder of the county in which the property is situated.

The cross-bill alleges, in substance, that about the month of July, 1896, Fox, being desirous of obtaining bonds for deeds or options of purchase upon mines and mining claims in Josephine county, Or., and not being financially able to carry out his desires in that regard, applied to Gunn for financial assistance, whereupon an agreement was made between the two by which Fox should proceed to the county named, and obtain bonds and options upon mines and mining claims in that vicinity—Gunn to advance the necessary money to obtain such bonds and options, and with which to prosecute development work upon such mines and mining claims, and also money with which to pay the expenses of locating such mining claims as Fox might discover and be able to locate—all of which bonds and options and locations should be taken and located in the name of Gunn, or in the name of such person as he might designate; that it was understood that all money so ad-



vanced by Gunn and so expended should be repaid to Gunn out of any sale or sales made of the property, or out of any ores extracted therefrom, the remainder of which should be owned by Fox and Gunn in equal proportions; that Gunn "should hold and own said properties, and maintain and operate them as he might see fit until he was repaid in full for all moneys paid, laid out, expended, or advanced on account of said properties, and, upon being so repaid, that he would execute all proper deeds and conveyances for an undivided half thereof to the said defendant Fox"; that, under and by virtue of this agreement, Fox proceeded to Josephine county, Or., and there obtained bonds and options on certain mines and mining claims, known as the "Free and Easy," "Sowell No. 1," "Sowell No. 2," "Jumbo Elephant," "Baby Elephant," and other mines and mining claims unknown to the cross-complainant, and did make locations of certain other mines and mining claims in the same vicinity, to wit, the Scott, Dodd, Gunn, Folsom, and others, to the cross-complainant unknown, all of which were subsequently conveyed by deeds to Gunn, and that subsequently, and while the contract between those parties was in full force, the aforesaid southwest quarter of section 36, embracing the Waldo mine, was conveyed to Gunn by its then owner, John C. Elder, Gunn paying to Elder therefor the consideration for the conveyance, namely, the sum of \$5,500, the title to which Gunn still holds subject to the rights of Fox and Draper; that thereafter, and on or about February 12, 1900, Gunn purchased, through his attorney and trustee, Hough, from the Oregon & California Railroad Company and the Union Trust Company of New York, the aforesaid south half of section 25, paying therefor the sum of \$760, which property was duly conveyed to him by deed, and the title to which Gunn still holds subject to the rights of Fox. The cross-bill also alleges that all of the bonds and options so secured upon mining claims were allowed to expire, and the title thereto returned to the owners thereof, and that all of the mining claims so located as aforesaid were abandoned and forfeited by reason of the wrongful location thereof by Fox, and by reason of his failure to perform or cause to be performed, for and on behalf of Gunn or otherwise, the annual labor thereon required by law.

It is further alleged in the cross-bill that, after acquiring the aforesaid southwest quarter of section 36 and the south half of section 25, Gunn expended large sums of money in developing the Waldo mine, contained in the southwest quarter of section 36, and in prospecting and attempting to discover a lode or vein of mineral within the boundaries of the south half of section 25, and in work upon the aforesaid mining claims prior to their abandonment and the expiration of the options mentioned, aggregating the sum of \$27,955.76, and has received as proceeds from the sale of ore extracted from the Waldo mine the sum of \$1,686.07, and no more; that on or about the month of December, 1897, Gunn and Fox entered into a contract, by the terms of which Fox agreed to introduce to Gunn one McCormick, who had discovered a method of making blasting powder, and who was without means of prosecuting his experiments and obtaining letters patent therefor, and who wished the financial aid of Gunn; that in pursuance of that agreement the three met, and agreed that Gunn should furnish certain money to

enable McCormick to prosecute his experiments and to obtain letters patent for his invention in the United States and foreign countries, and that when the powder was perfected, and letters patent had been issued, and the powder placed upon the market, all moneys so advanced by Gunn should be returned to him, and an undivided half interest in the invention and letters patent should be conveyed to Gunn, and the remaining half become the property of McCormick and Fox; that, in the event of a failure of the enterprise, all moneys so advanced by Gunn should be repaid to him by Fox; that, in pursuance of that agreement, Gunn advanced the sum of \$2,911.30; that it subsequently turned out that no patent could be obtained, and the experiments were not successful, so the whole project proved a failure, leaving Fox, according to the averments of the cross-bill, indebted to Gunn therefor in the further sum of \$2,911.30, none of which has been paid; that the aggregate amount of the moneys advanced by Gunn under the aforesaid agreements with Fox is \$29,180.99.

The cross-bill further alleges that it was expressly understood and agreed between Gunn and Fox that, when Gunn should be fully repaid all moneys advanced by him "for or on account of any and every agreement or mining enterprise entered into" between them, then Gunn would execute to Fox or his assigns a proper deed or deeds to an undivided half interest "in and to any and all real properties and mines and mining claims obtained or owned" under the agreements, which the cross-bill alleges Gunn's willingness to fulfill. It is further alleged in the cross-bill that the Waldo mine, by reason of the development work made thereon with money advanced by Gunn, has a prospective value of about \$50,000, and that about the month of April, 1900, Fox sold of his contingent interest in the southwest quarter of section 36, in which that mine is situate, an undivided one-fifth to the cross-complainant Draper for the sum of \$1,000, one-half of which sum was thereupon paid to him by Draper, and that thereafter, and before the month of November, 1900, Draper paid to Fox on account of that purchase the further sum of \$200, leaving due a balance of \$300, which last-mentioned sum Draper tendered to Fox on the 23d day of September, 1901, together with a proper deed for his signature and acknowledgment, for the conveyance of such one-fifth of Fox's alleged contingent undivided half interest in the aforesaid southwest quarter of section 36, but that Fox refused to accept the \$300 or to execute such deed. The cross-bill also contains a tender by Draper and the averment of a willingness to pay to Fox the \$300 on his executing the deed.

The prayer of the cross-bill is, among other things, for a decree to the effect that Gunn is the owner of the southwest quarter of section 36 and the south half of section 25 in township 40 south, range 8 west, Willamette meridian, and that he holds the title to an undivided four-tenths of the southwest quarter of section 36, and the title to an undivided half of the south half of section 25, in trust for Fox, subject to a lien upon the interest so held in trust, for the sum of \$27,875.52; that Fox be required to release and relinquish to Draper an undivided one-tenth of the southwest quarter of section 36, and execute to Draper a deed therefor; that Gunn holds a title to an undivided one-tenth of the southwest quarter of section 36 in trust for Draper, subject to a lien

for the sum of \$1,305.27 due Gunn by Draper; that Fox be adjudged to pay Gunn \$27,805.52 within a time to be fixed by the court, upon the payment of which Gunn should execute to Fox a deed for the undivided four-tenths of the aforesaid southwest quarter of section 36 and the undivided half of the aforesaid south half of section 25; and that upon the failure of Fox to make such payment the said four-tenths of the southwest quarter of section 36 and the undivided half of the south half of section 25 so held in trust by Gunn for Fox be sold to satisfy the demand of Gunn.

A replication was duly filed by Fox to the answer of the defendants, and an answer to the cross-bill.

From the foregoing statement of the pleadings, it will be seen that Gunn and Draper denied any interest in Fox in either of the mining claims mentioned in the bill of complaint, but admitted a contingent interest in him in the southwest quarter of section 36 and the south half of section 25. It is perfectly plain, however, from the evidence in the cause, that Fox's interest was precisely the same in the three mining claims described in the amended bill of complaint as the "Young Tom Lode," the "Young Lou Lode," and the "Young Charley Lode," and also in the record as the "Fir," "Pine," and "Spruce," as it was in the southwest quarter of section 36 and the south half of section 25. This fact very clearly appears from the testimony of both Gunn and Draper themselves. It was admitted upon the trial that in pursuance of the agreement between Gunn and Fox that in June, 1899, a bond for a deed was taken in the name of Gunn from Joseph L. Sowell and R. L. Ank for the quartz mining claims known as the "Baby Elephant," "Jumbo Elephant," "Sowell No. 1," and "Sowell No. 2," and that thereafter the quartz mining claims known as the "Dodd," "Scott," "Folsom," and "Gunn" were located, all of which locations and bonds were afterwards abandoned. But it appears from the testimony of Gunn himself that while they existed he advanced moneys for work upon them, as well as upon the three mining claims described in the amended bill of complaint, which moneys so advanced were expended by Fox upon them. It is true that Gunn, after having testified, in effect, that the Waldo mine and the south half of section 25 and the Sowell and other mining claims mentioned in the record as having been bonded, located, and afterwards abandoned, were all acquired under the general understanding between himself and Fox that the two parties were to own them in equal shares after the advances made by Gunn had been repaid to him, and that he and Fox had never made any change in their general plan, when asked upon cross-examination, "Is it not a fact, Mr. Gunn, that these three mining locations known as the 'Spruce,' 'Fir,' and 'Pine' were also secured as a part of this same general plan?" answered, "I don't know anything at all about it. I don't remember them at all." A little further along this witness was again asked with respect to the Spruce, Fir, and Pine locations, and testified as follows:

"Q. Is it not a fact that those claims were secured in the same general manner, and under the same general purpose, and with the same intent? A. No. Q. They were not? A. They were not. Q. Can you state how they were secured? A. They were secured in furtherance of a new corporation which was intended to be form[ed]. Q. What corporation was that, Mr. Gunn? A.

The corporation that some gentlemen from Colorado, who had means, and who were negotiating for neighboring properties, were forming."

An exhibit being shown the witness, he was asked:

"Q. On this map, Mr. Gunn, I call your attention to the three claims adjoining the Waldo copper mine on the south, marked 'Fir,' 'Pine,' and 'Spruce,' and ask you if you know whether or not they correspond to the three mining claims designated on the complainant's amended bill as the 'Young Lou,' 'Young Tom,' and 'Young Charley'? A. I have learned it since the commencement of this suit. Q. You have learned it since the commencement of this suit? A. Yes, sir. Q. In whose names were those three claims located? A. I think it was Draper, Fox and Gunn. I am not sure. Q. Draper, Fox, and Gunn? A. I think so. Q. You say, Mr. Gunn, that these claims were located in connection with a project to incorporate a company? A. Yes, sir. Q. What was the purpose of that company? A. The purpose of the company was, they had negotiated the purchase of adjoining claims, and were becoming interested in the district for the development of copper claims. Q. Had that company been incorporated? A. No. Q. It had not been incorporated? A. It had not. Q. Had you any interest in that corporation? A. I would have had if I could have fixed something up with Fox. Q. Had the defendant Draper any interest in that company? A. He had. Q. Had the complainant, Fox, any interest in that company? A. No. Q. One of those claims, however, was located in the name of A. W. Fox, wasn't it? A. It was, as a compliment to him. Q. Where did the money come from to pay for those locations? A. I furnished it. Q. You furnished it? A. I think, I don't know, I am sure. I really don't know. Q. You don't know whether you furnished that money or not? A. I really don't know. Q. Do you know who made those locations? A. They were made by— No, I can't say now who made them. Q. Were they made by Mr. A. C. Hough? A. I couldn't tell you. Q. Were they made at your request? A. No; they were not. Q. They were not made at your request? A. No. Q. You don't know where the money came from to pay for them? A. No; I do not. Q. And you don't know who paid it? A. No; I do not. Q. Are those locations still alive? A. I couldn't say. I have never been on the ground. I think they are. Q. You never have been on the ground? A. I never have been on the ground. Q. Do you know whether the assessment work has been done? A. Yes. Q. Do you know whether the assessment work was done on the three claims as previously located? A. I don't know. Q. You don't know? A. No. Q. As a matter of fact, then, you want it to be understood that, so far as these three locations are concerned, you have no knowledge of your own on the subject? A. I have no knowledge; no recollection. Q. Did you ever give the complainant, Fox, any consideration for the deed which he made to you to one of these claims? A. None at all. Q. Did you request him to make that deed to you? A. I asked him if he would sign that deed transferring that claim to me. He said, 'Yes; certainly,' and he did. Q. Did you explain to him at that time that these claims were not included in the general purpose with which you and Fox had operated up there? A. No; I did not. Q. It had been customary, had it not, for the complainant, Fox, to take deeds and bonds in your name? A. Yes, sir. Q. And so far as anything that you told him was concerned, you treated this location in exactly the same way, did you not; asking him to deed it to you? A. I can't say that I did. Q. Did you explain to him, when you asked him to deed it to you, that it was not a part of that? A. No; I did not. Q. Have you any other mining properties in this district, located since the 1st of May, 1900? A. Yes."

Draper, having testified something in reference to the Waldo Smelting & Mining Company, a corporation organized under the laws of the state of Colorado, was asked:

"Q. This last corporation you have referred to— You are interested in that, are you? A. Yes, sir. Q. I presume your codefendant Gunn is also interested in it? A. He is the president of the company. Q. He is the president of the company? A. Yes, sir. Q. Who else is interested in that company? A. I can't give you the list of the stockholders, but Mr. John Barth, of Milwaukee,

is a stockholder; Mr. Charles L. Tutt, of Colorado Springs; Mr. Spencer Penrose, of Colorado Springs; Mr. Richard Penrose, of Philadelphia; Mr. Bond Thomas, of New York; and some miners, whose name I have not got. Q. Did you and Mr. Gunn secure whatever interest you may have in that property by reason of turning over to that company these eight mining claims known as the 'Chestnut,' 'Laurel,' 'Poplar,' 'Oak,' 'Cedar,' 'Fir,' 'Pine,' and 'Spruce'? A. Am I to testify for Mr. Gunn, or just for myself, Mr. Shaw? Q. Testify for both, if it is in your knowledge. A. Only so far as I am concerned, I turned in the claim standing in my name known as the 'Fir,' as a partial interest that I might have in the Waldo Smelting & Mining Company. Q. Of your own knowledge, then, you don't know whether the defendant Gunn turned over any of this property to that corporation, or not? A. Yes, sir; I do know. Q. Well? A. Mr. Gunn turned in his three claims. Q. Which were his three claims? A. The Spruce, Pine, and Oak. Q. From whom were the other claims secured, if you know? A. From the owners thereof—Mr. Tutt, Mr. Penrose, Mr. Barth, and Mr. Thomas. Q. Did these gentlemen that you have just mentioned locate these various claims themselves? A. I located them as their agent. Q. You located them as their agent? A. Yes. Q. These claims were all located in June of 1900, I understand? A. Yes. Q. At the time you were in the employ of the complainant and defendant Gunn. Is that correct? A. Yes, sir. Q. The assessment work upon these claims was done by whom? A. It was done under my direction. Q. Yes; by whom? A. By various contractors and miners. Q. Were those contractors and miners at that time employed upon the Waldo copper mine, and sent over there to do this work? A. They were not employed on the Waldo copper mine. Q. Had they been employed upon the Waldo copper mine? A. I think not. Q. It is your impression, then, is it, that outside miners were secured to do this work under your direction? Is that correct? A. The contracts were advertised, the work was advertised, and bids were received for the work on the consolidated group, as we called it. Q. Did I understand you this morning to state that Mr. Thornilly, your foreman, did what is known as the 'state work' on these mines? A. No; I simply requested Thornilly, at any time when I was absent, to see to it that the assessment work was properly done. Q. He was at that time employed upon the Waldo copper mine, was he not? A. Yes, sir. Q. I would like to ask, Colonel Draper, if you are interested at the present time in a group of mines known as the 'Monarch Group'? A. Yes, sir."

We think it perfectly clear from the testimony of Gunn and Draper, to say nothing of that of Fox, that the latter had precisely the same interest in the ground covered by the Pine, Fir, and Spruce claims that he had in the balance of the property described in the amended bill. The original locations of that ground were made by Fox under his agreement with Gunn, and the relocations of it were made by Draper while in the employ of Gunn and Fox, under the same general agreement, and with money furnished by Gunn under that agreement, and for the repayment of which, in part, Gunn, in his pleadings and in his testimony, asserts the right to withhold from Fox the conveyance of any interest in any of the property in question. We agree with the court below that, under the contract between Gunn and Fox, all the moneys advanced by Gunn in pursuance of it were to be returned to him before Fox should receive anything—not, however, as is claimed in the cross-bill, out of Fox's half, but out of the whole property—and that such reimbursement should be made either out of proceeds arising from working the mines and mining claims, or from the bona fide sale of the whole or any part of the property, and that the title to the property should remain in Gunn until such reimbursement. But surely, when Gunn disposed of any of the property embraced by the contract, the proceeds thereof, whatever they may have been, should be applied upon his claim against the property covered by the agreement.

We also agree with the court below that Draper is entitled to the one-fifth of Fox's interest in the southwest quarter of section 36 upon the payment to the latter of the balance of its purchase price. It does not appear that any time was fixed by the parties for its payment, nor that the deferred payment should bear interest, and it does not appear that an unreasonable time elapsed prior to the tender of the balance due from Draper to Fox. The record shows that Gunn disposed of a part of the property in which Fox was interested to the Waldo Smelting & Mining Company. It does not show what he received as a consideration for such transfer. But whatever it was, upon no principle of right or justice can Fox be deprived of his interest in it. For aught that the record shows, the consideration so received by Gunn may have been sufficient to repay the amount of money advanced by him under his contract with Fox. It will not do to say, as did the court below in its opinion, that as to these claims "there is nothing from which it appears that they are of any substantial value; nor is there any specific claim for relief made in respect to them." They may have been, as has been said, of very great value, for anything that appears to the contrary. And as to the claim for relief in respect to them, the complainant sought by his bill the precise relief in respect to those claims that he did in respect to the southwest quarter of section 36 and the south half of section 25. The interest of Fox in all of that property was held by Gunn in trust, and the proceeds of the three mining claims are to be accounted for by him as such trustee, just as he accounted for the \$1,686.07 realized by him from the sale of ore from the Waldo mine.

Gunn and Draper by their pleadings not only deny any interest of Fox in the ground covered by the Pine, Spruce, and Fir locations, but further deny that he is or ever will be even entitled to a conveyance of any interest in the southwest quarter of section 36, or the south half of section 25, until all of Gunn's advances shall have been repaid out of Fox's interest therein. The court below was therefore also in error in saying, as it did, at the conclusion of its opinion, that neither Gunn nor Draper questioned the right of Fox "to a conveyance of an undivided four-tenths of the properties in question" upon the reimbursement of Gunn out of the whole properties, and that therefore there was "no occasion for any decree respecting such right." Having found—and rightly found—on that issue in favor of Fox, he was entitled to a decree fixing his interest in the property, and adjudging the terms upon which it should be conveyed to him. To so adjudge will necessarily involve an inquiry into the amount of the proceeds received by Gunn by the disposal of the ground covered by the Pine, Spruce, and Fir locations.

It results that the judgment must be, and is, reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion, and with leave to the respective parties to amend their pleadings and to take further testimony if they shall be so advised.

**PERRIAM v. PACIFIC COAST CO. et al. (OREGON R. & NAV. CO. et al.,  
Intervenors).**

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,028.

**1. ADMIRALTY—APPEAL—PARTIES.**

Sureties on a stipulation in admiralty for the release of a libeled vessel do not become parties to the suit in such sense as to require that they be joined in an appeal by the claimant from the decree entered therein, although such decree is joint in form against the claimant and stipulators, unless some extraneous question has arisen in the suit involving their rights or obligations.

**2. SAME—REVIEW ON APPEAL—FINDINGS OF FACT.**

The findings of fact of the trial court in an admiralty case, made upon conflicting testimony, will not be disturbed on appeal unless they are found to be clearly against the weight of evidence.

**3. SAME—AMOUNT OF SALVAGE AWARD.**

The amount of the award in a salvage case, which rests largely in the discretion of the trial court, will not be readjusted in an appellate court where there has been no mistake of fact or application of an unwarranted rule of compensation.

**4. SALVAGE—AWARD ON ACCOUNT OF PENDING FREIGHT—UNFINISHED VOYAGE.**

In fixing the award for the salvage of a vessel while proceeding on a voyage with cargo, the freight will be treated as divisible, and the amount to be reckoned in the value of the salvaged property is the proportion thereof which has been actually earned at the time of the salvage service.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.  
In Admiralty.

On November 25, 1901, the British ship *Nelson*, of 1,310 tons gross and 1,247 tons net register, with a crew of 23, including officers, carrying a cargo of wheat of the value of \$35,000, with pending freight of \$15,000, sailed from the mouth of the Columbia river, Or., on a voyage to the United Kingdom. She had proceeded a little more than 100 miles off the coast of Oregon when she encountered heavy weather and gales of unusual violence, which so distressed her by damage to her rigging, gear, and sails, and by causing her cargo to list to starboard, that she was compelled to abandon her course, and return to some port of refuge for repairs and to restow her cargo so as to bring her to an even keel. She returned to the mouth of the Columbia river for the purpose of entering the port of Astoria. She arrived off the mouth of the river about December 1st. On the morning of December 3d the tug *Wallula*, then plying off the bar, observed her signals, and spoke her. The *Nelson* was then heading inshore. The morning was squally, with fog and occasional rain. The ship requested assistance to be towed into Astoria. The tug answered that the bar was impassable, and that it would be best for the ship to go to Puget Sound or San Francisco. The ship replied that it had no sails other than those spread, which were the fore topmast staysail, the fore lower topsail, the main lower topsail, and lower mizzen topsail and mizzen staysail. The tug declined to undertake, alone, to take the ship in tow, but replied that she would go toward Astoria and secure assistance. She returned inward, and spoke the tug *Tatoosh*. Both tugs then went out to the *Nelson*. At about 10 o'clock in the morning of December 3d the tugs made fast to the ship. The wind had then veered more to the

¶ 2. See Admiralty, vol. 1, Cent. Dig. § 770.

¶ 3. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

south, the weather was squally, and the barometer was falling. The Tatoosh laid her hawser on the lee side of the ship, and the Wallula laid hers on the weather side, and from that time until 3 o'clock in the afternoon they towed the ship in an attempt to get over the Columbia river bar. During this time the wind arose to stiff gales, and by 3 o'clock it had veered to northerly of west. The force of the wind and the sea became so great that it was impossible for the tugs to hold the ship to the wind without making sternway. They were then about three miles off shore. The ship was rolling and pitching, and the strain on the hawsers was severe. The Wallula, having depleted her coal supply, was compelled to slip her hawser and return to port. The Tatoosh then shaped her course northwest by west-westerly, to get the wind on the quarter, and signaled the ship to make sail and follow. The course so adopted was for the track of vessels plying coastwise between Puget Sound and San Francisco. The wind veered still further to the west, and was blowing with great force, and the weather was rainy, and the sea choppy and heavy. The ship signaled that her sails were all split and blown away, and she did not comply with the tug's signal to set her sails in accordance with the new course. At 10 o'clock on the night of December 3d the hawser of the Tatoosh parted. Thereafter the tug cruised for the ship, but was unable to sight her. The tug made efforts to ship her trailing hawser, but the seas were so heavy that she was unable to do so and the hawser was cut. On the following morning the Tatoosh, being unable to find the ship, returned toward Astoria, arriving there about 5 p. m. on that day. On arriving at Astoria the captain of the Tatoosh sent to his owners at Seattle the following telegram: "Ship Nelson broke adrift from me ten last night, fifteen miles west Shoalwater Bay. Could not find her. Probably go Sound. Salvage." The ship, after the hawser parted, set all hands to make sail, and proceeded up the coast about 25 miles off shore, and flying signals of distress. When about 35 miles southeast of Carroll's Island she spoke the steamship Walla Walla, a passenger steamer bound for Puget Sound, and requested the steamship to give her a tow into Puget Sound. At that time some of the Nelson's sails were blown away, others were so injured as to be of little use, her lifeboats and other boats were smashed, her rigging was badly torn, and she had a list of 22 inches to the starboard, and the weather was thick and the barometer falling. At about half past 3 o'clock on the afternoon of December 4th the steamship made fast her hawser to the Nelson and took her in tow on her course to Puget Sound. She arrived with her tow at Port Townsend in the afternoon of December 5th. On the libels of the Pacific Coast Company and the Pacific Coast Steamship Company, respectively the charterer and the owner of the Walla Walla, the Nelson was arrested, and released on a bond. The tugs Tatoosh and Wallula belonged to the Puget Sound Tugboat Company, but at this time were chartered to the Oregon Railroad & Navigation Company under a charter party which provided that the owner and the charterer should share jointly in all salvage awards earned by the tugs. These two corporations intervened, and sought awards for services which the tugs had rendered to the ship, and asserted that the Pacific Coast Company and the Pacific Coast Steamship Company were not primary salvors, and that, had it not been for the services of the tugs, the Nelson would have become a total loss. Capt. Perriam, claimant of the ship, filed a cross-libel against the Oregon Railroad & Navigation Company and the Puget Sound Tugboat Company, seeking to recover damages in the sum of the value of the services of the steamship Walla Walla, "for the recovery of which suit is pending as aforesaid, and the amount of which has not yet been determined by the court, less the reasonable value of the towage service performed by said tug Tatoosh under said contract, and in the further sum of the amount of costs and expenses of said suit of the Walla Walla against said ship and cargo." On the trial in the District Court of the issues involved in these pleadings the cross-libel of Capt. Perriam, the claimant, was by the court dismissed on the ground that the allegations thereof were not sustained by the evidence. The decree of the court awarded to the Pacific Coast Company for the services of the steamship \$15,000, to her master, officers, and crew \$5,200, and to the intervening libelants, for the services of the tug-



boat Tatoosh, \$2,000, and for the services of the tug Wallula \$500. The District Court in the decree made the finding that the steamship Walla Walla, her master, officers, and crew, "performed a highly meritorious salvage service, whereby the ship Nelson, her tackle, apparel, furniture, and cargo, were saved from total loss on the 4th day of December, 1901, while she was in a helpless condition, and the lives of her officers and crew were greatly imperiled," and that "said tugboats, on the 3d day of December, 1901, at the request of the master of the ship Nelson, performed towage services for the said ship Nelson at a time when she was in distress and danger." In the opinion filed by the trial court it was said: "There is conflict in the testimony as to some of the important facts. The testimony of the captain of the ship Nelson and the witnesses on his side is in a large measure discredited by the manifest disposition of said witnesses to prevaricate and minimize the peril from which they were rescued, and the exertions made in their behalf by the salvors. I am convinced by the evidence that the steamship Walla Walla, her captain, officers, and crew, rescued the ship Nelson from extraordinary peril and probable destruction, and, considering that the steamship Walla Walla was a passenger ship, having on board a large number of passengers and a valuable cargo, and that she was not seeking employment as a towboat, the services rendered were of a high order of merit, and entitled to be compensated on a scale of liberality. It is my opinion that the Wallula and the Tatoosh did not earn salvage, because their efforts did not place the ship Nelson in any better position or condition than she was when they first went to her assistance; but they did not fail to make the utmost endeavors to rescue the ship, and committed no fault which in any way contributed to increase the peril to which the Nelson was exposed. The lives of the men on board the steam tugs were placed at risk, as well as the property in their charge. Fuel was consumed, and a towline was sacrificed, and more or less damage was done to the steam tugs in the efforts to tow the ship at the request of her captain; and for this compensation should be awarded, not as salvage, but for extraordinary towage."

William H. Gorham and Gorham, Brown & Gorham, for appellant.  
Piles, Donworth & Howe and C. H. Farrell, for appellees Pacific Coast Co. and Andrew L. Hall.

W. W. Cotton and W. C. Bristol, for appellees Oregon R. & Nav. Co. and Puget Sound Tugboat Co.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Upon the argument the appellees moved to dismiss the appeal on the ground that it was taken by the appellant alone from a judgment rendered against him and the United States Fidelity & Guaranty Company jointly for a specific sum of money, and that no permission of the court was granted the appellant to appeal therefrom alone, nor was there any severance and summons. The appellee, in advancing the motion, relies on the doctrine that when a decree is entered against two persons jointly one of them cannot appeal therefrom unless he serve the other with notice of his appeal and the other refuse to join therein. The appellant, on the other hand, contends that the sureties of a claimant do not become parties to the record with a right to be heard, and that, therefore, they are not necessary parties to an appeal. This position, we think, is sustained both by reason and authority. Sureties to such a stipulation are not parties to the controversy. The claimant

alone conducts and controls the defense. This was early decided in *Lane v. Townsend*, 1 Ware, 289, Fed. Cas. No. 8,054. Counsel for the appellees contend that the decision in that case has no application here, for the reason that it was rendered prior to the enactment of the act of 1847 authorizing the entry of judgment against the surety at the time of rendering judgment against the principal. But we are unable to see how that fact is material. In *The Glide*, 72 Fed. 200, 18 C. C. A. 504, the Circuit Court of Appeals for the Fourth Circuit reaffirmed the doctrine that sureties on a stipulation in admiralty stand in the position of bail to the action, and are not parties to the cause, but are represented by the claimant; and that, having covenanted to pay such decree as may be made against him, the decree against him binds them. Again, in *The New York*, 104 Fed. 561, 44 C. C. A. 38, the Circuit Court of Appeals for the Sixth Circuit, upon an exhaustive discussion of the question, held that the stipulators for the release of a vessel do not become parties to the suit in any such sense as to require that they be joined in an appeal taken by the claimant from a judgment in a suit, although such judgment is joint in form against the claimant and the stipulators, unless some extraneous question has arisen in the suit involving the scope of the bond or the obligation of the sureties thereof. The appellees rely upon *Ex parte Sawyer*, 21 Wall. 235, 22 L. Ed. 616, in which, in the course of the decision, the court remarked: "The sureties upon the stipulation are entitled to an appeal from any decree that may be rendered against them;" and further said: "From that decree another appeal must be allowed, or the sureties will be bound by a proceeding to which they were not and could not be parties." But this language of the court must be interpreted in the light of the facts in that case and the question which was presented for determination. The case had been appealed from the District Court to the Circuit Court, and from the decision of the Circuit Court an appeal had been taken to the Supreme Court, which court affirmed the decree of the Circuit Court. Thereafter, having received the mandate from the Supreme Court, the Circuit Court directed that the sureties show cause, if any they had, why an execution should not issue against them. On the hearing upon this order to show cause the Circuit Court held that the sureties were not liable upon the stipulation, and declined to issue execution. Thereupon an application was made to the Supreme Court for mandamus to compel the Circuit Court to order that execution issue against the sureties. Mandamus was refused on the ground that the Supreme Court on the appeal had only affirmed the decree of the Circuit Court, and had given it no instructions, and that the action of that court was subject to review by appeal only, and not by mandamus. The case was one in which a question had arisen as to the liability of the sureties upon their stipulation. It was a question which had nothing to do with the merits of the original case, but it presented a controversy in which their attitude was antagonistic to the claimant, and upon which they had a right to be heard. There is nothing in the case to indicate that their right to appeal, which the Supreme Court recognized, would have existed if a question had not arisen as to their liability upon the stipulation. The decision is believed to be in harmony with the rule that in all matters connected with the merits of

the case the stipulators are not properly parties to the suit, but are represented by the claimant. The surety on a stipulation in admiralty is not in the attitude of an ordinary surety on a common-law bond or undertaking. The stipulation runs to the marshal, and is a mere substitute for the res. Section 941 of the Revised Statutes [U. S. Comp. St. 1901, p. 692] provides that such a bond or stipulation shall be returned to the court, "and judgment thereon, against the principal and sureties, may be recovered at the time of rendering the decree in the original cause." This has always been held to mean that the entry of judgment against the stipulators is a matter of course, and that the stipulators have rendered themselves subject to such entry of judgment by the bare fact that they have so stipulated. On an appeal from a final decree in admiralty the case is tried *de novo*. The stipulation follows the appeal, and is subject to the decision thereof. Said the court in *The Wanata*, 95 U. S. 600, 24 L. Ed. 461:

"Where the claimant appeals from the decree of the District Court, the bond and other stipulations follow the cause into the Circuit Court, and upon the affirmation of the decree the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below, they being in fact nothing more than a security taken to enforce the original decree and are in the nature of a stipulation in admiralty."

In *The Belgenland*, 108 U. S. 153, 2 Sup. Ct. 383, 27 L. Ed. 685, the court said:

"It is no doubt within the power of the court to postpone a decree against the sureties until after the time for appeal by the principal has expired, and then proceed only on notice."

There is implied in these utterances of the court a denial of the right of the sureties to be heard on the appeal as to any matter affecting the merits of the main controversy. No controversy has arisen in this case concerning the liability of the surety company upon its stipulation. So far from seeking to deny its obligation, it appears in this court as the surety for the appellant upon the appeal, and no exception has been taken to the appeal bond on that account. The motion to dismiss will be denied.

The District Court, upon testimony taken before a commissioner and reported to the court, found that the tugs *Wallula* and *Tatoosh* rendered the *Nelson* extraordinary towage services when she was in distress and danger, for which their owner was entitled to receive \$2,500; and that the *Walla Walla*, her captain, officers, and crew, rescued the *Nelson* from extraordinary peril and probable destruction; and that the services rendered were of a high order of merit, and entitled to be compensated on a scale of liberality. On reading the voluminous and conflicting evidence in the record, we are not convinced that these conclusions were erroneous. The general rule is well established, and has been repeatedly affirmed by this and other courts, that the findings of fact of the trial court in an admiralty case made upon conflicting testimony will not be disturbed on appeal, unless they are found to be clearly against the weight of the evidence. *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54; *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331; *The Oscar B.*, 121 Fed. 978, 58 C. C. A. 316; *Memphis & Newport Packet Co. v. Hill*, 122 Fed.

246, 58 C. C. A. 610. It is equally well established that the amount of the award in a salvage case, resting, as it does, largely in the discretion of the trial court, will not be readjusted in an appellate court, where there has been no mistake of fact or application of an unwarranted rule of compensation in arriving at the award. *Simpson v. Dollar*, 109 Fed. 814, 48 C. C. A. 663, and cases there cited; *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448, 458. While we are disposed to think that the award in this case may have been greater than the actual peril of the *Nelson*, as we understand the testimony, warranted, we would not feel justified in disturbing it were it not for the fact that, in our opinion, a mistake of law was made in including in the estimate of the value of the salvaged property as the basis of the award, the amount of the total freight which was to be earned by the *Nelson* on her voyage from Portland, Or., to the United Kingdom. By the decided weight of authority the amount of freight to be reckoned in the value of the salvaged property in such a case is the proportion thereof which has been actually earned at the time of the salvage service. In *Jones on the Law of Salvage*, 91, it is said:

"In estimating the salvage upon freight where the services of the salvors terminate before the completion of the voyage, the court will treat the freight as divisible, and as though a pro rata freight were payable at the intermediate port."

See, also, *James*, on the Law of Salvage, 122; *Carver's Carriage at Sea* (2d Ed.) 351; *The Suliste* (C. C.) 5 Fed. 99; *The Sandringham* (D. C.) 10 Fed. 556, 576; *The Norma*, Lush. 124. In the case last cited *Dr. Lushington* said:

"But in salvage we have to decide on purely equitable principles, and the question here is not so much what freight was earned at Bermuda, but what services, in respect of the contract for freight, the salvors had then earned. Judging by this test, the salvors are entitled to salvage upon a considerable part of the total freight, for it is clear that a large portion of the voyage had been performed before the salvage service, and that the entire benefit of so much was preserved to the shipowners by the salvors, not, indeed, absolutely, for expenses had to be incurred, and the perils of the voyage from Bermuda home had yet to be undergone, but preserved from immediate and total loss."

Applying the rule to the case at bar, we find that of the freight of the *Nelson* for the voyage upon which she had sailed there was salvaged to her owners the cost of loading at Portland and the very small proportion of the voyage which had been accomplished. Indeed, when we come to consider that from the port at which the vessel was left by the salvors the voyage to the United Kingdom was as long as from Portland, and that the cargo had so listed as to render it necessary to restow the same, it is doubtful whether any freight whatever should enter into a consideration of the value of the property salvaged. The amount of freight earned and saved to the owners was, in any event, inconsiderable, and we think the ends of justice will be subserved by wholly eliminating from the valuation the item of freight, rather than by remanding the cause to the District Court for the purpose of hearing evidence upon the doubtful question whether some portion thereof had not in fact been earned at the time of the salvage services.

Estimating the value of the ship when brought into the port of Seattle at \$25,000 and her cargo at \$35,000, as found by the District Court, it is ordered and adjudged that the decree be modified; that there be awarded to the owner of the Walla Walla the sum of \$12,000, and to her master, officers, and crew the sum of \$4,160, the same to be charged five-twelfths against the ship and seven-twelfths against the cargo; and that in other respects the decree of the District Court be affirmed.

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In re BREITLING.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,043.

1. BANKRUPTCY—RIGHT TO DISCHARGE—FRAUDULENT CONCEALMENT OF ASSETS.

A bankrupt is required to show the utmost good faith and make the fullest disclosures of his assets, and where he knowingly and designedly omits assets from his schedule, although the amount is small, he will be held to have done so with intent to defraud his creditors, and denied a discharge, notwithstanding his claim that he acted under advice of counsel, unless it appears that he stated the facts fully to his counsel, and that the advice was given and received in good faith.

2. SAME.

A bankrupt, a day or two before filing a voluntary petition, contracted to sell certain property to be taken away by the purchaser. He did not schedule either the property or the debt, and on objection to his discharge on the ground of false oath and concealment of property claimed that when he signed his schedules he did not know whether the purchaser had taken the property or not, and that it was omitted by advice of his counsel, from which he understood that he was entitled to it as a part of his exemption, but he scheduled and claimed as exempt other specific property to the full value of his exemption right. *Held*, that his testimony was not sufficient to show that he acted in good faith, or fairly presented the facts to his counsel, and that he was not entitled to a discharge.

Appeal from the District Court of the United States for the Northern District of Illinois.

This is an appeal from a decree discharging the bankrupt from his debts. A voluntary and duly verified petition in bankruptcy was filed August 8, 1902, an adjudication in bankruptcy forthwith following. The schedules attached to the petition, and which are material to be considered, exhibit as follows: Personal property, Schedule B (2). A. Cash on hand, \$100. C. Stock in trade, none. D. Household goods, etc. (specifying them), \$300. Schedule B (3). Debts due petitioner on open account, Harry Van Kuran, \$13.75. D. Unliquidated claims, none. Schedule B (4). Sum paid to counsel for services in bankruptcy, \$50. Schedule B (5). Property claimed to be exempt by the law of Illinois (Rev. St. c. 52, § 13): specifies the property stated in Schedule B (2) D, valued at \$300, and in Schedule B (2) K, machinery, fixtures, etc., used in business, valued at \$800, and places the valuation of the entire property claimed as exempt at \$400.

On August 26, 1902, the bankrupt filed amended schedules which, so far as material, are as follows: Schedule B (3). A. Debts due petitioner on open account. Six additional accounts are inserted, namely, Koppelmeier & Mohr, \$86.85; F. M. Ellis, \$9.20; D. L. Hahn, \$70.30; E. H. Hann, \$66.76; James Madison, \$37.94; H. A. Colton, \$18.26. Schedule B (5). Property claimed to be exempt by state law; omits six articles of household furniture stated in the original schedule, and includes one lamp, one bicycle, and one

ice box, not mentioned in the original schedule, and places the valuation of the property claimed as exempt at \$400.

On November 20, 1902, the bankrupt petitioned for a discharge from his debts, which was opposed by one Palmer, a creditor, who, on December 18, 1902, filed specifications of objections to the discharge, that the bankrupt had knowingly and fraudulently made a false oath, and had concealed from his trustee in bankruptcy a quantity of lumber and a certain debt due on open account from the Waldheim Cemetery Company, and also a half interest in a certain claim and action for \$5,000 damages for trespass, then pending in a state court. The answer of the bankrupt denied that he in any wise had made any false or untrue statements, but alleged that the schedules truthfully set forth the condition of his estate. He alleged that the small stock in trade possessed by him had, prior to filing his petition in bankruptcy, been sold, and the proceeds, when received by him, were applied to the cost of the bankruptcy proceeding and in partial payment of his solicitors; that the account of the Waldheim Cemetery Company, with others, was, by agreement between the bankrupt and his solicitors, to apply upon their fees and the costs of the bankruptcy proceedings; and that at the time of making oath to the schedules he did not understand that the lumber or the account due upon the sale thereof, was required to be scheduled. He concedes the facts charged with respect to the action for damages, but refuses to plead thereto, and excepts to the allegation in that behalf.

The matter was referred to a referee, whose report, filed April 24, 1903, was to the effect, first, that the omission to schedule the half interest in the suit for damages for an illegal levy under a chattel mortgage upon property claimed to be exempt was because the bankrupt had been advised by his counsel that it was not an asset and should not be scheduled. With respect to the claim against the Waldheim Cemetery Company, the referee reported as follows: "It appears from the evidence that the bankrupt had an order from the Waldheim Cemetery Company for some \$40 worth of lumber shortly before his bankruptcy. At the time he filed his petition he was ignorant of the fact whether said lumber had been delivered from his yard to the said company or not. It is true, in my opinion, that he should have scheduled either the lumber or the claim against the said company. It appears, however, that he conferred with his counsel, Messrs. Guthrie & Palmer, concerning the said matter, and, as he was ignorant of the fact that the lumber was still in his possession, acting under their advice, he did not schedule. Although it appears that the said lumber was in his possession, and was taken away by the Waldheim Cemetery Company some two days after he filed the petition in bankruptcy, and the amount thereof was collected by him and turned over to his lawyers to apply on costs and attorney's fees, I consider the fact that he had submitted this question to his counsel, and they drew the papers in accordance with their views as to what should be properly scheduled, relieved the bankrupt of the fraudulent intent which would be necessary to substantiate the objection to his discharge on that ground."

On June 5, 1903, amended objections to the discharge of the bankrupt were filed by leave of court, and on the 30th of June the court ordered "that leave be, and it hereby is, given to amend said specifications on their face," but not otherwise specifying wherein they were to be amended. The matter would seem to have been re-referred, although no formal order for such reference appears by the record; but the referee, on September 8, 1903, made further report, in which he states that subsequently to his report application was made by the objector for permission to file amended specifications for the discharge, and that thereupon the court made an order as follows: "Ordered, that leave be, and it hereby is, given said objecting creditor to amend his specification by amplifying and enlarging the same, but no new matter to be introduced, without prejudice to the reference herein;" and that thereupon the objector filed a new and amended set of specifications. The referee reports that the amended specifications are 16 in number; that specifications 2, 4, 8, 10, 12, 13, 14, 15, and 16 set up new matter not embraced in the original specifications, and that the other specifications, while not new, are substantially covered by the original specifications; and that his report should stand. Upon exceptions to the report the matter was heard by the

court, the exceptions overruled, and the bankrupt discharged from his debts on October 6, 1903; from which decree this appeal is taken.

The case presented at the bar is based solely upon the omission of the account of the Waldheim Cemetery Company. The only evidence taken before the referee was that of the bankrupt himself, who testified that while he was engaged with his lawyers preparing the bankruptcy proceedings he arranged with the Waldheim Cemetery Company to sell to that company the lumber remaining in his yard. That at the time he verified his petition he did not know whether the company had obtained the lumber or not. He learned of it one or two days afterward, and within a week after filing the petition he obtained from the Waldheim Cemetery Company the money for the lumber. That in the original schedules he neither scheduled the lumber nor a claim against the cemetery company. That in so doing he followed the instructions of his attorneys; and to an interrogatory, "What did they say?" he answered, "If you are entitled to that, inasmuch as you have only got what you indicate, and you are entitled to an exemption of four hundred dollars;" and that is substantially all that was said. He further testifies that the \$50 paid to his counsel was paid partly in cash and partly by an order on Zahn, and this prior to August 8th.

William S. Corbin, for appellant.

William R. Moss, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). A discharge from one's debts is a privilege created by the bankruptcy act upon condition of a surrender to creditors of all the property of the bankrupt, except such as is exempted from execution by the law of his domicile. There must therefore be entire good faith upon the part of the bankrupt. He must surrender his property fully. He may not retain that which should go to his creditors. His duties are specifically set forth in section 7 of the act of July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]. He is not entitled to discharge if he has committed any of the acts specified in section 4 of the amendatory act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]. A discharge will be denied if he has committed an offense punishable by imprisonment, as prescribed by the bankruptcy act, or if he has concealed any of his property with intent to hinder, delay, or defraud his creditors. The act requires the fullest disclosure, the utmost good faith, the surrender of all his estate not exempt by the act. It is well observed by Judge Brown that "a discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would not be only a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy." In *re Baudouine* (D. C.) 96 Fed. 536, 539. If it be doubtful whether a specific item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge, concealing the fact, but it is his duty to disclose the transaction, that the bankruptcy court may determine the right. In *re Gailey*, 62 C. C. A. 336, 127 Fed. 538.

Without question the claim against the Waldheim Cemetery Company should have been scheduled. This the referee concedes in his report. It was knowingly and designedly omitted by the bankrupt. This is conceded by him. But he insists that it was so done upon the advice of counsel. But advice of counsel cannot excuse violation of law. It

may mitigate the act, according to the character of the advice and circumstances under which it is given. If the omission here were in the exercise of a supposed right under advice taken and given in good faith, the bankrupt might be absolved of the charge of making a false oath or of designedly concealing his estate from his creditors. To work such result, however, the facts must be fully and in good faith stated to counsel, and the act charged done innocently, and believing that he had been correctly advised. Whether the bankrupt here stands in such plight, depends upon the facts of the case, judged in the light of all the surrounding circumstances.

The bankrupt exhibits debts to the amount of \$5,775.70. His assets consisted of accounts receivable stated to amount to \$303.06, and not including the account against the Waldheim Cemetery Company, or against one Zahn, hereinafter referred to. Whether the scheduled accounts were collectible or not does not appear from the record. The bankrupt had also \$100 in cash, household furniture specified and said to be of the value of \$300, office and equipment of lumber yard described and stated to be of the value of \$800, wearing apparel \$75. All of this property except the accounts receivable and \$100 in cash is claimed to be exempt, and in the schedule of exemptions the property, otherwise stated to be of the value of \$1,100, is declared to be worth only \$400, the precise amount of exemptions allowed by the statute of Illinois (2 Starr & C. Ann. St. 1896, p. 1887, c. 52, § 13). It is also to be observed that the original schedule exhibited a single account receivable of \$13.75, the others being disclosed by the amended schedule filed 17 days after the filing of the original. These are circumstances, inconclusive, indeed, of themselves, but in connection with the other facts disclosed are not without weight in marking the purpose of the bankrupt in withholding a good receivable and appropriating it to his own use. The referee finds that the amount of the account of the Waldheim Cemetery Company was not scheduled, under the advice of counsel, and that the amount of it was collected by the bankrupt, and turned over to his lawyers to apply on their fees, and therefore the bankrupt is relieved of the fraudulent intent, although it is true, as the referee finds, that either the lumber or the claim against the company should have been scheduled. The finding is incorrect that the bankrupt turned over the amount of the account against the Waldheim Cemetery Company to his counsel. The bankrupt, in his formal answer to the objections to the discharge so states, and that he had transferred the account to his counsel before verifying the schedule; but upon his examination before the referee he tells a different story. He does not there claim that any transfer of the Waldheim Cemetery Company account was at any time made to his counsel. It appeared that the \$50 paid to counsel was paid partly in cash and partly by an order on one Zahn for \$25, and this before the filing of the petition; and the bankrupt afterward collected the money from Zahn upon the order, and paid it to his counsel. Nor, as we understand the bankrupt's evidence, was he advised by counsel that he had a right to retain this Waldheim account. He states that his recollection is that counsel advised him that he "was entitled to that in connection with what I had. It was represented to me that I was entitled to a preference of \$400, and that I was justified in making that



sale and not putting it in," and when requested to state the language employed by his counsel, he answered that they said, "If you are entitled to that, inasmuch as you have only got what you indicate and you are entitled to an exemption of \$400," and that that was substantially all that they said. The bankrupt knew that he was entitled but to \$400 exemptions. He also knew, for it was before him in writing in his schedules, which he verified, that he had specified the particular property not including the account which he claimed as exempt, and had stated its value at \$400; that that property was otherwise stated in other schedules as worth \$1,100. He knew that, retaining the Waldheim account as exempt, he would have a larger sum than the law allowed him, assuming that the property claimed as exempt was only worth the sum of \$400, as stated. This question of fact rests upon the statement of the bankrupt. It does not satisfactorily appear that he fairly presented the case to his counsel, or that his counsel advised him that he was entitled to retain the account as exempt, in addition to the \$400 of exemptions claimed, or that he could properly omit it from the schedules. We should be loath to believe that counsel could so have advised him, and he has not called upon them to verify his statement, weak and inconclusive as it appears. The facts here which are fully established lead us to the conclusion that the bankrupt purposely retained and concealed from his creditors that to which he was not entitled, and knowingly made false oath to his schedules. The amount involved, it is true, is small, but the design to conceal was deliberate and is clear. We are indisposed to give countenance in the slightest degree to any act which shall withhold from creditors any part of the estate of a bankrupt which lawfully he should devote to the payment of his debts.

The decree is reversed.

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#### HAWLEY v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,047.

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

Defendant railroad company had two switchyards in a city, and plaintiff's intestate had been employed for six months as a switchman in the east yards, having been sent during such time to work in the west yards on perhaps 20 to 25 days. In the west yards there were a number of tracks, and the corner of the roof of a freight house extended to the center of one of such tracks at a height of 3 feet 8 inches above the top of an ordinary freight car and of 1 foot 8 inches above the top of a furniture car. A furniture car was kicked upon such track through a switch 74 feet distant from the roof corner, and decedent, who had climbed on top of it to set the brake, was struck by the projecting roof and killed. Until 4 days previously he had not worked in such yards for 30 days. It did not appear how many times he had set the brakes on cars on such track, or that he had ever ridden a car past the roof projection, nor was

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¶1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

it shown that he had actual knowledge of the danger therefrom. *Held*, that he could not be charged, as matter of law, with having assumed the risk.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a switchman was knocked from the top of a car and killed by the corner of the roof of a freight house which projected over a switch track, and the evidence was conflicting as to his actions after mounting the car and his position when struck, the question of his contributory negligence was one for the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Samuel Alschuler, for plaintiff in error.

Albert J. Hopkins, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Action by administrator to recover damages for the alleged wrongful killing of his intestate. At the conclusion of the evidence the court directed the jury to return a verdict for defendant. On that verdict the judgment was rendered, to reverse which this writ of error is prosecuted.

In Aurora, Ill., defendant had switchyards east and west of the river. On the west side the yard contained several tracks. One of these, known as the "house track," ran north and south. Next east of this was a freight house. Defendant had built and maintained the house at an angle of 30 degrees to the track, and in such a manner that the northwest corner of the roof projected to the middle of the track at a height of 15 feet 8 inches above the rails. Ordinary freight cars are 12 feet high and furniture cars 14. By showing this situation, and proving that decedent was killed by being struck by the projection while in the discharge of his duties as freight brakeman on a furniture car, plaintiff made a prima facie case. *Railroad Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Hough v. R. Co.*, 100 U. S. 213, 25 L. Ed. 612.

Thereupon defendant took the burden of establishing affirmatively and (to warrant a directed verdict) conclusively assumption of risk or contributory negligence.

Assumption of risk. The Supreme Court said in *Hough v. R. Co.*, supra :

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation. \* \* \* But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk."

For the six months preceding the fatal injury decedent had been working for defendant as a yard brakeman. His usual place of employment was in the east yard. During those six months he had been sent on different days, estimated at 20 to 25, to take the place of some

absentee in the switching crew in the west yard. On four successive days, including the day of the accident, he had been in the west yard. Before that he was not shown to have been there for 30 days. Cars were kicked in on the house track once or twice a day. Sometimes a brakeman rode the car in and set the brake to hold it; sometimes the brakeman ran along by the car and blocked the wheels with a stone or piece of wood. On the occasions when decedent was present in the west yard, sometimes he, sometimes the other brakeman, and sometimes the foreman, attended to the car that was kicked in on the house track. Decedent had ridden ordinary cars on the house track, but not furniture cars. The distance from the switch through which the cars were kicked in on the house track to the projecting corner of the roof was 74 feet, or about 2 car lengths. The track was upgrade from the switch to the freight house and beyond, so that the kicked car had to be held by brake or block at the desired place, or it would coast back to the switch.

From the above-quoted declaration of the Supreme Court in *Hough v. R. Co.* it is very clear that decedent, on entering the service, did not assume the danger from the roof corner that projected over the track as needlessly as a pike or bayonet. When, if ever, did he assume it?

The record contains no evidence that any one had informed him of the danger, no statement or admission that he knew of it, nothing that conclusively forces the inference that he was aware of the peril that cost him his life.

Did the evidence wall in the jury with one inevitable conclusion, so that it was right for the court to tell them that the law charged decedent with knowledge of the danger and the assumption thereof? We think not. We are not now saying that it would be impossible for 12 reasonable men, under proper instructions from the court, to find as a fact that a prudent person, circumstanced as was decedent, would have known of the danger before undertaking the act, and would either have kept out or have gone ahead knowingly at his own risk. But, if any other finding was permissible under proper instructions, the case should have been submitted to the jury.

Decedent's regular work was not in the west yard. The things with which he regularly charged his mind in connection with his employment were in another locality. Prior to the four days ending with his death, he had not been in the west yard for a month. The house track was only one of several in the west yard. Once or twice a day a car or cars were kicked in on the house track. Seemingly the bulk of the work was on other tracks. Counting all the odd occasions (all but the last being a month before his injury), decedent had been in the west yard 20 to 25 times. The foreman and the other switchmen also attended to cars that were set in on the house track. How often did decedent? The evidence is indefinite as stated. One-third? That would be seven or eight times all told. Sometimes the brake was used; sometimes a block. How many times did decedent use the brake? The evidence does not distinguish. Half? Then three or four times. The distance from the switch to the roof projection was about two car

lengths, and the track was upgrade. When the car was kicked hard enough to send it up the grade to the desired point beyond the roof projection, at what point along the track, on the three or four occasions decedent used the brake, did he begin mounting the car? The evidence fails to show. Even if he started to catch the stirrup and climb the ladder at the switch, the car may have traveled twice its length before he reached the top to pass to the brake wheel, and his attention, engrossed in the proper performance of his duties, may never have been called to the danger of being knocked from the top of a high car by the uselessly projecting corner of the roof. When he was at work on other tracks, giving and receiving signals, opening and closing switches, running to catch and stop, couple and uncouple, moving cars, were his opportunities such that a prudent person diligently engaged in the master's service should have learned of the danger? The freighthouse was there as a visible object, but from other tracks the perspective may not have informed him that the roof corner projected to the center of the house track. When he glanced from his work on other tracks towards the freighthouse, if he did, he may not have appreciated, unless a box car were passing under the roof corner at that instant, the relative heights of the two. The knowledge, actual or constructive, that must have been brought home to decedent, was not knowledge that the freighthouse roof had corners, but knowledge of the danger from the possible relations between a roof corner that projected to the middle of the house track at a certain height, a car of a certain height moving at a certain speed under the roof corner, and a person on the top of the car in such a position as to be hit by the roof corner. A surveyor can now bring together the measurements that prove the danger was present. But decedent was not there as a surveyor. Actual knowledge was not proven. On this record we think defendant failed to discharge the burden of establishing conclusively a state of facts on which the law will charge decedent with having assumed the risk. Compare *Railroad Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Railroad Co. v. Swearingen*, 122 Fed. 196, 59 C. C. A. 31; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416.

Plaintiff further contends (citing *Dorsey v. Construction Co.*, 42 Wis. 583, and *Shearman & Redfield on Negligence* [4th Ed.] § 198) that the projecting roof corner in its relations to track and cars constituted such a deathtrap that neither constructive nor actual knowledge of the danger at some time before the injury would establish assumption of risk, that in law a servant is not bound to keep his memory constantly charged with the location and relations of such obstacles, and that his engrossment in his duties at the time of the injury might excuse his failure to recall the impending peril; but we deem it unnecessary to formulate any opinion thereon at this time.

Contributory negligence. On the occasion of his injury decedent, according to one witness, climbed to the top of the car, ran directly towards the roof corner, dodged in front of it, stooped as if to avoid it, and was struck; according to others, he mounted the ladder before the car reached the roof point, ran to the brake with his back towards the projection, stooped to seize the brake wheel, and was struck. The

quality of decedent's conduct at the time (and this might take some color from the inferences as to his constructive knowledge) being in dispute, the question of contributory negligence should have been submitted to the jury.

Judgment reversed; new trial ordered.

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CHAIN CHIO FONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,030.

1. CHINESE EXCLUSION—PERSON ENTERING ON CERTIFICATE—CHANGE OF OCCUPATION.

A Chinese person who entered the United States upon a certificate granted by the Chinese authorities in accordance with the provisions of section 6 of Act May 6, 1882, c. 126, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307], showing him to belong to one of the classes entitled to enter under said act, is subject to deportation under the subsequent exclusion acts, where it is shown that from the time of his entry, several years before his arrest, he has been a manual laborer.

Appeal from the District Court of the United States for the Northern District of California.

See (C. C. A.) 129 Fed. 585.

Henry C. Dibble & Dibble, for appellant.

Duncan E. McKinlay, Asst. U. S. Atty. (Marshall B. Woodworth, U. S. Atty., of counsel).

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was arrested upon a warrant issued by Commissioner E. H. Heacock upon a complaint charging the appellant with being a Chinese manual laborer within the limits of the Northern District of California, without the certificate of residence required by the act of Congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, and the act amendatory thereof approved November 3, 1893, 27 Stat. 25, c. 60, and 28 Stat. 7, c. 14 [U. S. Comp. St. 1901, p. 1319], and the act approved April 29, 1902, 32 Stat. 176, c. 641 [U. S. Comp. St. Supp. 1903, p. 188]. The following proceedings took place before the commissioner upon the hearing:

"Chain Chio Fong, the defendant, sworn.

"The Commissioner: Q. Where were you born? A. In Mok How. Q. When did you first come to the United States? A. In the 24th year of Quong Sue (1898). Q. What sort of paper did you bring with you, if any? A. Business paper, section 6. Q. Where is it? A. I gave it to the customs. Q. What did you do when you first arrived in the United States? A. I went to farming. Q. The first thing after you arrived? A. Yes, sir. Q. Have you continued farming ever since? A. Yes, sir. Q. You have been a manual

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¶ 1. Citizenship of Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. Same, 35 C. C. A. 332.

laborer, then, all the while you have been in the United States? A. Yes, sir. The Commissioner: I order you deported."

In the commissioner's docket appears the following:

"Having duly considered the evidence, and being fully advised in the premises, I find: That the defendant, Chain Chio Fong, is a Chinese person, and was born in and is a subject of the Empire of China. That he came to the United States from China in the year 1898, and was permitted to enter the United States as a merchant under the provisions of the treaty between the United States and China; that he was found in the city and county of San Francisco, in the Northern District of California, on the 27th day of October, 1903; and that he was then and there a manual laborer within the true intent and meaning of the Chinese exclusion acts, and that he has been such manual laborer at all times since his arrival in the United States. As a conclusion of law, I find that the defendant is unlawfully in the United States, and is not entitled to be and remain therein. It is therefore ordered, adjudged, and decreed that the defendant, Chain Chio Fong, be deported from the United States to China, and it is further ordered that he be committed to the custody of the United States marshal for the Northern District of California to carry this order into effect."

The case was thereupon appealed to the District Court, where the following proceedings were had:

"This case, being on appeal from the judgment of deportation by United States Commissioner E. H. Heacock, this day came on regularly for hearing. By agreement of Benjamin L. McKinley, Assistant United States Attorney, and H. C. Dibble, attorney for the defendant, the case was submitted to the court for decision without argument."

The District Court thereupon affirmed the judgment of the commissioner.

In support of the appeal to this court, it is contended that the order and judgment made and entered by the commissioner was contrary to the evidence, for the reason that it appeared from the evidence that said defendant was lawfully in the United States, having come into the United States with a certificate duly issued to him under the restriction acts. Section 6 of the act of May 6, 1882, c. 126, 22 Stat. 60, as amended by the act of July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307], provides as follows:

"That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: provided, that nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant' hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or ex-

portation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséed by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue, it shall be his duty to refuse to indorse the same. Such certificate viséed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts herein stated disproved by the United States authorities."

We are of the opinion that the commissioner was justified from the evidence before him in the conclusion that the appellant was unlawfully in the United States, and was not entitled to be or remain therein.

The judgment of the District Court is affirmed.

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#### HEID v. EBNER et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,061.

##### 1. PLEADING—DEMURRER TO ANSWER—ALASKA CODE.

Under Code Civ. Proc. Alaska, § 68 (Carter's Codes, p. 158, 31 Stat. 343, c. 786), which provides that "the plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim," a general demurrer to an answer on the ground that it did not state facts sufficient to constitute a defense was erroneously sustained where the answer consisted of two parts, the first of which denied the material allegations of the complaint, and the second pleaded a defense of new matter.

##### 2. SAME—SUFFICIENCY—AVERMENT OF TITLE THROUGH EXECUTION SALE.

An answer pleading title through an execution sale, which contains averments of the judgment, execution sale thereon, confirmation, and the execution and recording of the marshal's deed to the property, is sufficient, against a demurrer or motion to make more definite and certain, without setting out in detail the proceedings relative to the execution and sale, any irregularity in which was cured by the confirmation.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

This case is brought to this court upon appeal from a default judgment. The plaintiffs below (appellees here) instituted a suit in equity against the appellant to quiet title to their interests in certain mining claims near the town of Juneau, Alaska; alleging ownership and possession in themselves, and claiming title through one Willis Thorp, the grantee of the locators.

A demurrer to the complaint was overruled, and the defendant filed an answer denying that plaintiffs were ever the owners or in the possession, either actual or constructive, or entitled to the possession, of the premises in controversy. As a further defense, the defendant averred that while the said Thorp was the owner of said premises, on June 25, 1896, judgment was obtained against the said Thorp, and the said premises were sold by the United States marshal of the district, pursuant to said judgment, on June 2, 1898; that the defendant became the purchaser of said premises at this sale, and ever since has been, and now is, the owner thereof, and entitled to the possession of the premises; that on June 14, 1898, an order confirming the sale to defendant was duly made by the District Court; that since said June 2, 1898, defendant has held and occupied said premises as mining claims, and has caused the annual work upon them to be done during each year as required by law; that the plaintiffs have not during said time had actual possession of said premises, or done or caused to be done the annual work required, nor ever done any act or thing with respect to said premises tending to claim or exercise ownership over or possession of said premises; that on September 17, 1900, the United States marshal executed and delivered his deed for the premises to the defendant, which deed was recorded in the proper office on October 1, 1900; that this sale to defendant was made long before the plaintiffs acquired their pretended title from the said Thorp. To this answer the plaintiffs demurred generally, on the ground that it did not state facts sufficient to constitute a defense. This demurrer was sustained by the court; it being treated as a motion that the answer be made more definite and certain, and the defendant given time in which to amend, by showing the issuance and levy of execution, and sale thereunder, and the steps necessary to the validity of the said sale. At the expiration of this time the defendant failed to amend his answer, and stated in open court that he did not intend to further plead. The court thereupon adjudged the defendant to be in default of answer, and permitted the plaintiffs, at a stated time thereafter, to offer their evidence and proofs. Judgment and decree were entered in favor of the plaintiffs, quieting their title to the said mining claims.

John G. Heid, E. S. Pillsbury, Pillsbury, Madison & Sutro, and E. M. Barnes, for appellant.

W. E. Crews and Lorenzo S. B. Sawyer, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). The errors relied upon by the defendant are the action of the trial court in sustaining plaintiffs' demurrer to defendant's answer, and in entering the default of the defendant for failure to amend his answer. Defendant's answer consisted of two parts: First, a denial of the material allegations of the complaint; and, second, a defense setting up new matter.

The demurrer to the answer was general, on the ground that it did not state facts sufficient to constitute a defense. Section 68 of the Code of Civil Procedure of Alaska (Carter's Codes, p. 158, 31 Stat. 343, c. 786) provides that "the plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim." This provision is identical with that of section 78 of the Code of Civil Procedure of Oregon, from which Code the Alaska Code was copied. In *Toby v. Ferguson*, 3 Or. 28, the Supreme Court of Oregon had before it an action for false imprisonment. The defendant had denied some of the allegations of the complaint, and had made further answer. The plaintiff demurred to this further answer. The court found that a portion of this further answer was well pleaded and amounted to a defense, and



that, as the demurrer struck at the whole of the further answer, it should be overruled. In the present case the demurrer was to the whole of the answer, and should have been overruled, first, because the answer denied the material allegations of the complaint, and to that extent was good pleading; and, second, because the demurrer was not directed to the new matter set up in the answer, as required by the Code.

The order of the court sustaining this demurrer recited that the court treated the demurrer also as a motion to make the answer more definite and certain. But this recital did not dispose of the issue raised by the general denial of the answer, nor did it confine the demurrer to the new matter in the answer. Moreover, the direction of the court that the defendant should make his answer more certain, by alleging and showing the issuance and levy of execution and sale thereunder, and the steps necessary to the validity of the sale alleged in the answer, was error. It is the general rule in the United States that the confirmation of a judicial sale by a court of competent jurisdiction cures all irregularities in the proceedings leading up to or in the conduct of the sale, and that while such a sale will be set aside where fraud, mistake, or surprise is shown, mere irregularities in the preliminary proceedings do not render the sale invalid, and will not suffice to set it aside after confirmation. *Wills v. Chandler* (C. C.) 2 Fed. 273; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Ludlow v. Ramsey*, 11 Wall. 581, 20 L. Ed. 216; *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123. The laws of Alaska are in accord with this general rule. Section 283 of Carter's Codes of Alaska, pt. 4, provides, in subdivision 4 (31 Stat. 379) thereof, "An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action or proceeding whatever." In the present case, where the sale under which defendant claims title was not directly attacked on equitable grounds, but where the demand was merely that the defendant should set forth the nature of his title, the answer, containing averments of the judgment, execution sale thereon, confirmation thereof, and the execution and recordation of the marshal's deed to the property, under which he claims title, was sufficient.

It follows, therefore, that the default judgment was improperly rendered. The judgment is reversed, and the court below directed to set aside the default, overrule the demurrer to defendant's answer, and proceed with the trial of the cause.

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HARNISKA et al. v. DOLPH et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,041.

1. JUDGMENT BY CONSENT—AUTHORITY OF ATTORNEY—PRESUMPTION.

Where the attorney for defendants when the cause came on for trial admitted in open court that defendants could not sustain the defense pleaded, and that plaintiffs were entitled to the relief prayed for, and consented that judgment be entered in their favor, his authority from his clients to make such admission and to give such consent will be assumed, in the absence of any evidence to the contrary.

**2. SAME—VALIDITY.**

The validity of a judgment for plaintiffs in an action at law, entered by consent of defendants' attorney given in open court, and on admissions of fact made by him, is not affected by the fact that a jury trial was not formally waived, nor because no findings were made by the court; the consent to the judgment having rendered them unnecessary.

In Error to the District Court of the United States for the First Division of the District of Alaska.

Z. R. Cheney and Lorenzo S. B. Sawyer, for plaintiffs in error.

T. R. Lyons, E. S. Pillsbury, Madison & Sutro, and Alfred Sutro, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The defendants in error brought an action of ejectment to recover the possession of certain premises situate on Douglas Island, in the district of Alaska, and in their complaint claimed title through a patent issued by the United States to the Alaska Gold Company on October 1, 1892, and alleged ouster by the plaintiffs in error on January 1, 1899. The plaintiffs in error answered, denying on information and belief the averments of the complaint, and setting up, as an affirmative defense, adverse possession, and alleging that the patent so referred to "was obtained through fraud and misrepresentations." The record contains the following judgment entry:

"Now, on this day this cause coming on to be heard upon the complaint, answer, and reply filed herein, the plaintiffs appearing by Thomas R. Lyons, their attorney, and the defendants, and each of them, appearing by W. E. Crews, their attorney, and the defendants, by their said attorney, having admitted in open court that they were unable to sustain the allegations of their answer, and they, and each of them, being willing that judgment in favor of the plaintiffs, and each of them, be duly entered at this time for the possession and restitution of the premises described in plaintiffs' complaint herein, and said defendants, and each of them, by their said attorney, having acknowledged in open court that plaintiffs are the owners of, and entitled to the possession, of said premises described in plaintiffs' complaint \* \* \*."

It is assigned as error that the court rendered judgment upon the consent of the counsel for the plaintiffs in error, and without the introduction of testimony, and that neither findings of facts nor conclusions of law were made or filed separately.

The plaintiffs in error cite cases to sustain the doctrine that an attorney cannot, by virtue of his implied authority, and without the express consent of his client, compromise his client's case or surrender any of his substantial rights, such as the right of appeal, or make a confession of judgment. None of these decisions meets the question which is presented in the case at bar. A broad distinction is made by the authorities between the power of an attorney to confess judgment in vacation, and his power, on the trial of a cause in open court, to make admissions of fact and consent to a judgment. Said Cooley, J., in *Arnold v. Nye*, 23 Mich. 286-292:

"An attorney of the court assumed to answer for the defendant, and consented, in writing, that judgment might be entered against him. We must assume, in the absence of any evidence to the contrary, that he was duly

authorized, and it is not necessary for us to say in this case how the judgment would be affected by evidence that in fact the attorney had appeared in the case without authority."

This doctrine is well sustained by the weight of authority. *Wilson et ux. v. Spring*, 64 Ill. 14; *Webster v. Dundee Mortgage & Trust Company*, 93 Ga. 278, 20 S. E. 310; *Taylor v. American Freehold Land Mortgage Company*, 106 Ga. 238, 32 S. E. 153; *Pacific Railroad v. Ketchum*, 101 U. S. 289-296, 25 L. Ed. 932. The whole merit of the present writ of error is disposed of by the language of the court in the case last cited, where it was said:

"A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the court, as a fact, that the solicitor had authority to do what he did, and binds us on an appeal so far as the question is one of fact only."

So in the present case the judgment entry recites that the plaintiffs in error, by their attorney, admitted in open court that they were unable to sustain the allegations of their answer, and that they were willing that judgment in favor of the defendants in error be duly entered.

The consent of the plaintiffs on the trial of the cause in open court to the judgment so entered against them dispensed with the necessity of filing separate findings of fact or conclusions of law. The consent of the parties relieved the court of the necessity of finding the facts. *Saltonstall v. Russell*, 152 U. S. 628, 14 Sup. Ct. 733, 38 L. Ed. 576; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364. The point is made on the argument that there was no waiver of a jury trial in the method provided by statute. This alleged error, even if it had been properly assigned, would be no ground of reversal. There was nothing in the case for a jury to pass upon. The admissions of the plaintiffs in error took the place of a verdict of a jury, and left the case wholly to the court to enter judgment accordingly.

The judgment will be affirmed.

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### MARVEL CO. v. PEARL et al.

(Circuit Court of Appeals, Second Circuit. October 19, 1904.)

No. 210.

1. UNFAIR COMPETITION—SIMILARITY OF MECHANISM.

In the absence of protection by patent no person can appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency.

2. SAME.

Unfair competition is not established by proof of similarity in form, dimensions or general appearance alone, especially where such similarity is characteristic of the article in question, or appears to result from an effort to comply with the physical requirements essential to its successful operation, and not from any design to misrepresent its origin.

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

## 3. TRADE-NAMES—INFRINGEMENT—DESCRIPTIVE TERMS.

The adoption of the term "Whirling Spray" as the trade-name for a syringe, where it is distinctly descriptive of the mode of operation, does not deprive another manufacturer of a like article of the right to adopt and use the name "Whirlspray" therefor.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York dismissing bill alleging unfair competition in the manufacture and sale by defendant of certain syringes resembling those made by complainant, and in the use by defendant of the name "Whirlspray" to designate its syringes.

Duncan Edwards, for appellant.

J. P. Bartlett, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In disposing of the questions herein, the differences in form and appearance between complainant's and defendants' syringes may be disregarded, and it may be assumed that defendant manufactures a syringe so closely resembling that of complainant that the ordinary purchaser would not distinguish the one from the other. No question of complainant's right under a patent or of imitation of style of wrapper or of color of box or label is involved herein. The questions presented are as to the extent of the right of one person to appropriate to the exclusion of others the elements of a mechanical construction, and the limitation of the right of one person to manufacture an article like that of another manufacturer.

The article in question belongs to the old type of compressible rubber bulb syringes, and is constructed and adapted specially for use as a douche for the vagina by means of a whirling spray discharge. It is essential to the successful practical use and operation of such a syringe that it should be bulbous in shape, of dimensions such that it may be easily compressed and emptied by the pressure of one hand, and that it should have a soft rubber protecting guard sliding upon the tube of the syringe—features characteristic of this class of syringes.

Upon these facts the court below correctly found as follows:

"There is nothing about the article as made and sold by the defendants that is not necessary in the making and operation of such an instrument. It is made in the form that it must be made in order to accomplish its purpose, and, if the making in that form is any representation that the thing made came from the plaintiff, it is because of the extent to which the plaintiff had made and displayed and sold it before the defendants began."

In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted. Unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone.

¶ 3. Arbitrary, descriptive or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth v. Warner*, 50 C. C. A. 323.

Where such similarity consists in constructions common to or characteristic of the articles in question, and especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles, the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition. The enforcement of such a claim would permit unfair appropriation, and deny the exercise of the right of fair competition. The case at bar is an illustration of such an attempted perversion of the doctrine of unfair trade. The limitations of the right of one person to imitate an article made by another are illustrated by the case of *Enterprise Mfg. Co. v. Landers, Frary & Clark* (decided by this court at its last session) 131 Fed. 240. There the defendants had "not only conformed their goods to complainant's in size and general shape, which was to be expected, but also in all minor details of structure, every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a strikingly characteristic effect, while the goods are so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and details of ornamentation, that, except for the fact that on the one mill is found the complainant's name and on the other the defendants', it would be very difficult to tell them apart." We held that this was "a most aggravated case of unfair trading," and that such reproductions of unnecessary lines and curves and simulations of arbitrary designs and striking combinations of color would be restrained by a court of equity when they were so close as to show an intent to appropriate the trade of a competitor.

Defendant's right to use the word "Whirlspray" rests upon the evidence that the term "Whirling Spray," employed by complainant, is descriptive in fact, and upon complainant's own admissions to that effect. Complainant's and defendant's syringes are alike in mode of operation and result produced. They throw minute whirling streams of water, not in solid volumes, nor subdivided like the mist of an atomizer, but in small showers. These showers constitute spray within the definition in the *Standard Dictionary* of "water dispersed in particles, as by the wind or by force of impact." The evidence shows that defendant claims to have coined the word after complainant had used the term "Whirling Spray" both as a trade-mark and as descriptive of the function of its syringe. The specification of complainant's patent states that "it is the object of my invention \* \* \* to eject it [the fluid] in the form of a whirling spray." In complainant's advertisement it described its syringe as one which "cannot throw a solid stream," but which "discharges a half pint of hollow, whirling spray"; and one of its witnesses says, "I don't know how I can describe it better than to say it produces a whirling spray." In these circumstances we must accept complainant's statements as descriptive of the characteristics of this type of syringe. We should not feel justified, therefore, in granting an injunction against the use by defendant of the word "Whirlspray" as suggestive of the character of the discharge of syringes of the class to which both complainant's and defendant's syringes belong.

The decree is affirmed, with costs.

## UNITED STATES v. BUETTNER et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,065.

## 1. CUSTOMS DUTIES—CLASSIFICATION—BEADS TEMPORARILY STRUNG.

The provision in paragraph 408, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for "beads of all kinds not threaded or strung," was intended to exclude only beads permanently threaded or strung, as in the manufacture of fabrics and other articles, and is *held* to include metal beads intended for the manufacture of purses, threaded or strung temporarily for the purposes of transportation and sale only, on cheap, weak cotton threads, and arranged in bunches.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The decision in question reversed a decision of the Board of General Appraisers (G. A. 5,360, T. D. 24,512), which had affirmed the assessment of duty by the collector of customs at the port of Chicago on merchandise imported by T. Buettner & Co.

Note U. S. v. Morrison, 179 U. S. 456, 21 Sup. Ct. 195, 45 L. Ed. 275, and Steinhardt v. United States (C. C.) 113 Fed. 996.

The facts are stated in the opinion of the court.

Albert H. Washburn, for appellant.

William Brace, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion of the court.

The case before us involves the classification of an importation of metal beads entered at the port of Chicago, November 4th, 1901.

The portions of the act of 1897 involved are clause (a) and clause (b), of paragraph 408, and the whole of paragraph 193 of the Act. These sections are as follows:

"408. (a) Beads of all kinds, not threaded or strung, 35 per centum ad valorem.

"408. (b) Fabrics, nets or nettings, laces, embroideries, galloons, wearing apparel, ornaments, trimmings and other articles not specially provided for in this act, composed wholly or in part of beads or spangles, made of glass or paste, gelatine, metal or other material, but not composed in part of wool, 60 per centum ad valorem." Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

"193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, 45 per centum ad valorem." Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

The importation was liquidated by the collector at sixty per cent. ad valorem, under clause (b) of paragraph 408.

The importers protested on the ground that the beads were properly assessable at thirty-five per cent. ad valorem only, under clause (a) of paragraph 408. The Board of General Appraisers (G. A. 5360) held that the beads should have been classified "as manufactures of metal," under paragraph 193; but, that inasmuch as the importers

had failed to make claim under this paragraph, the classification applied by the collector should be affirmed.

Paragraph 193 is the catch-all paragraph, for all articles or wares composed wholly, or in part, of iron, steel, and the like, not specially provided for in the other paragraphs of the act. If the importation falls fairly within any of the clauses of the act specifically applicable, this paragraph is, of course, inapplicable.

The importation was of small, steel beads, used by ladies in the manufacture of bead purses, and other ornaments; and, for the purpose solely of packing, transportation, and sale, were strung into small bunches, by means of a cheap, weak, cotton string running through their eyelets. Thus strung they were caught up into loops, and tied together at a central point, forming a series of loose, dangling festoons or strands; and in this form sold, either by the bunch, or in numbers of bunches.

Brought into use in the manufacture of permanent fabrics or articles, the cotton strings were broken, and the beads thus released individually taken up and grouped, permanently, into certain shapes and forms. Manifestly in this form of stringing for transportation and sale, the beads are not yet a part of any fabric, trimming, or other article contemplated by clause (b) of paragraph 408.

It is clear to us that clauses (a) and (b), taken together, were intended to cover the subject matter of importing metal beads, both as beads composing parts of manufactured fabrics, and as beads individually, constituting the material, in part, for such fabrics. The difference in the duty laid—in the one thirty-five per cent. ad valorem, and in the other sixty per cent.—was intended undoubtedly as a differential in favor of the domestic manufacturers of such fabrics.

But clause (a) reads "beads of all kinds not threaded or strung," and it is said that, literally speaking, these beads were strung. The clause, as we interpret it, in view of the clause that follows, has application, not to beads temporarily strung or threaded for purposes of transportation, but to beads permanently threaded or strung, as beads are threaded or strung in the manufacture of the fabrics, nets, wearing apparel, and the like. In the interpretation of statutes, the letter must yield to the substance of the distinctions intended to be expressed; and it is our judgment that the classification here intended was between metal beads constituting permanently, a part of a fabric or article, and beads that in their individual state, may be worked into such manufactures. We see no reason why beads threaded, or strung, temporarily, for the purposes of transportation and sale only, on cheap, weak, cotton threads, should be subjected to a higher duty than if placed individually in pasteboard boxes, or some other kind of packing, convenient for transportation.

In *re Steiner* (C. C.) 66 Fed. 726, decided originally by District Judge Cox, and affirmed, but without opinion, by the Circuit Court of Appeals (79 Fed. 1003, 24 C. C. A. 690), is cited against the view just stated. That case was under the tariff act of October 1, 1890, c. 1244, § 1, Schedule N, par. 445, 26 Stat. 600, providing a ten per cent. ad valorem duty on "glass beads loose, unthreaded, or unstrung," and a higher duty upon "manufactures of glass." The court found, as a

fact, that the beads were threaded upon strings. This was the whole of the finding. It was not disclosed whether the threading was for purposes merely temporary, or was permanent. For all that appears, the beads in that case, may have constituted a completed article of manufacture.

The decree of the Circuit Court will be affirmed.

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BESSETTE v. W. B. CONKEY CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 859.

1. CIRCUIT COURT OF APPEALS—JURISDICTION AND MODE OF REVIEW—ORDER IMPOSING PUNISHMENT FOR CONTEMPT.

An order of a federal Circuit Court, entered in a pending suit intermediate between the granting of a preliminary injunction and final decree, adjudging a person who was not a party to the suit guilty of contempt for conspiring to violate the injunction, and imposing a fine and imprisonment upon him as a punishment, may be reviewed in the Circuit Court of Appeals by writ of error, but not by appeal.

Appeal from the Circuit Court of the United States for the District of Indiana.

For opinion below, see 111 Fed. 417.

Wm. V. Rooker, for appellant.

Jacob Newman, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. On August 24, 1901, The W. B. Conkey Company filed its bill of complaint in the court below against James K. Russell and many others, seeking, among other things, a restraining order, provisional and perpetual, against the defendants, their confederates, agents, and servants, restraining them from interfering with the operation of its printing and publishing house located at Hammond, in the state of Indiana. Upon the bill and certain affidavits in support thereof a temporary restraining order was issued on October 3, 1901. The preliminary injunction was continued in force, and upon final hearing on December 3, 1901, was made perpetual. On September 13, 1901, the complainant instituted proceedings as for a contempt and disobedience of the temporary injunction against the appellant, Edward E. Besette, who was not a party to the bill, and others, charging that he and they with full and actual notice and knowledge of the order, had disobeyed the injunction, stating the manner of violation. To that proceeding Besette appeared. Upon hearing on October 19, 1901, the court entered its judgment (111 Fed. 417) finding Besette guilty of contempt as charged, and imposing a fine, as punishment for the contempt, in the sum of \$250, payable to the United States, with

¶ 1. Orders, decrees, and judgments reviewable in Circuit Court of Appeals, see note to *Salmon v. Mills*, 13 C. C. A. 374.



the costs of the proceeding, and that he stand committed to the jail of Marion county until the fine and costs should be paid. From that judgment Bessette prayed an appeal to this court, which was allowed, and the cause was duly submitted upon hearing upon that appeal. We thereupon, on June 11, 1902, certified to the Supreme Court certain questions upon which we desired the advice of that tribunal; among them these:

1. Whether the act creating and establishing Circuit Courts of Appeals authorized a review of a judgment of the Circuit Court adjudging one guilty of contempt for violating an order of that court made in a suit pending therein and imposing a fine for contempt. To which question the Supreme Court has answered in the affirmative.

2. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can obtain such review by appeal. To which question the Supreme Court answered in the negative.

3. Whether the matter could be brought to this court by writ of error. To which that tribunal responded in the affirmative.

Bessette v. W. B. Conkey Company, decided May 16, 1904, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. See, also, In the Matter of the Petition of Christensen Engineering Company for a writ of mandamus, decided May 31, 1904, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

The judgment here appealed from was intermediate the preliminary injunction and the final decree, and against one not a party to the suit. The proceeding below was not remedial or compensatory to reimburse the suitor injured, but was imposed by way of punishment for an act done in contempt of the power and authority of the court. It was punitive, not remedial, and against one not a party to the suit, and therefore, under the decisions referred to could only be reviewed upon writ of error, and not by appeal.

We are therefore obliged to direct that the appeal be dismissed.

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#### MOK CHUNG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1904.)

No. 830.

##### 1. CHINESE EXCLUSION—HABEAS CORPUS—JURISDICTION OF COURT.

A District Court is without jurisdiction to review by habeas corpus proceedings the decision of a collector denying the right of a Chinese person to enter the United States, against his claim of citizenship, where he has taken no appeal from such decision to the Secretary of Commerce and Labor.

Appeal from the District Court of the United States for the Northern District of California.

George A. McGowan, for appellant.

Marshall B. Woodworth, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Mok Chung, a Chinaman, arrived at the port of San Francisco on the steamship San Jose, and applied to the collector of the port of San Francisco for permission to land, on the ground that he was a native-born citizen of the United States. Upon a hearing had before the collector of the port, his application was denied. He thereupon sued out a writ of habeas corpus in the District Court for the Northern District of California, alleging that he was a native-born citizen of the United States. Upon a hearing had upon that writ, and the return thereto, and the evidence taken, the court found the petitioner to be a subject of the empire of China, and not entitled to land in the United States, and ordered him deported. From that judgment an appeal was taken to this court.

The appellee now moves to dismiss the appeal on the ground that the District Court had no jurisdiction to issue the writ of habeas corpus, for the reason that the appellant had taken no appeal to the Secretary of Commerce and Labor from the decision of the collector of the port of San Francisco denying his right to land. On the authority of *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, the motion is overruled, but the judgment is affirmed.

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WESTINGHOUSE ELECTRIC & MFG. CO. V. STANLEY INSTRUMENT CO.

(Circuit Court of Appeals, First Circuit. September 9, 1904.)

No. 504.

1. PATENTS—INFRINGEMENT.

The Tesla patents, Nos. 511,559 and 511,560, for an improved method and means of operating electric motors, *held* valid and infringed.

2. SAME—PATENTABLE INVENTION.

*Watson v. Stevens*, 51 Fed. 717, 2 C. C. A. 500, and *DuBois v. Kirk*, 15 Sup. Ct. 729, 158 U. S. 58, 39 L. Ed. 895, applied to sustain as patentable a particular practical application of a known principle, which proved to be of advantage in the arts.

3. SAME—DECISIONS OF OTHER COURTS.

The history of the litigation in reference to the patents involved stated, and also the practice in this circuit with regard to following decisions of the courts of appeals in other circuits in regard to letters patent for inventions reviewed, and the method of practically applying the same restated.

4. SAME—ANTICIPATION.

On this appeal the defense alleged anticipation by prior publication. *Held*, that it was sufficient that the proof furnished by the complainant as to such alleged prior publication was "full, unequivocal and convincing," and that the case does not require that it should be "beyond reasonable doubt."

5. TRIAL—OBJECTIONS TO EVIDENCE.

When a portion of complainant's testimony in this case was taken before the examiner, the respondent noted the following: "Testimony objected to, in whole or in part, as incompetent and insufficient on the issue of priority of invention." No specific objection was taken as to the mere form in which the interrogatories were put and the evidence given. The rule is therefore applied that the substance of the testimony could not be

rejected on the ground that, if the respondent had desired to control the method of testifying according to the proper rules applicable thereto, he should have interposed specific objections at the proper time.

**6. PATENT—ACQUIESCENCE.**

Where a patent for an invention which promised and proved to be of great pecuniary value was granted after interference proceedings in the Patent Office, and was for years acquiesced in, or sustained when later brought into litigation, largely on the defense of anticipation, such facts have weight in favor of the patent, when the same issue is again raised on a bill in equity alleging infringement, although against new parties.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 129 Fed. 140.

William K. Richardson and Thomas B. Kerr (Kerr, Page & Cooper, on the brief), for appellant.

Charles E. Mitchell and William Houston Kenyon (Mitchell, Bartlett & Brownell, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. There is so much judicial literature bearing on this case that only a brief preliminary statement is required. The bill alleges an infringement of the two claims of letters patent for an invention, No. 511,559, issued to Nikola Tesla, on December 26, 1893, on an application filed on December 8, 1888, and of the first claim of No. 511,560, issued to Tesla on the same December 26, on an application filed on the same December 8. No. 511,559 is captioned "Electrical Transmission of Power," and opens with the statement that Tesla had invented "certain new and useful improvements in electrical transmission of power." No. 511,560 is captioned "Systems of Electrical Power Transmission," and opens with the claim that Tesla had invented "certain new and useful improvements in systems of electrical power transmission." The claims of No. 511,559 are as follows:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"(2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor and varying or modifying the relative resistance or self-induction of the motor circuits and thereby producing in the currents differences of phase, as set forth."

The claim of No. 511,560 in issue is as follows:

"(1) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase and an armature within the influence of said energizing circuits."

The bill was dismissed by the Circuit Court by an opinion passed down on March 11, 1903, 129 Fed. 140. The only reason for dismissal given was that the complainant had failed to establish by

sufficient proofs a conception of the invention by Tesla prior to April 22, 1888, the date of a certain publication in Italy known as the Ferraris publication. The opinion refers to one of the Circuit Court of Appeals for the Second Circuit (*Westinghouse Co. v. Catskill Co.*, 121 Fed. 831, 58 C. C. A. 167), passed down on February 25, 1903, wherein it was held that the proofs were insufficient to establish invention by Tesla prior to April 22, as rendering unnecessary an extended statement by himself. Thereupon the complainant appealed to us.

The patents in suit relate to the conversion of alternating currents of electricity into a continuous current. The latest condition of the prior art is shown by patents issued to Tesla under date of May 1, 1888, referred to over and over again in the judicial literature on this topic. These describe a system "of electrical power transmission in which the motor contains two or more independent energizing circuits through which were caused to pass alternating currents," "conveyed directly from the generator to the corresponding motor coils by independent lines or circuits." The improvement of the patents in suit dispenses with one of the lines, or circuits.

The fundamental nature of Tesla's invention in issue we think was clearly and correctly put by Prof. Main, an expert called by the complainant. He testified that in the patents in suit it was pointed out that, without the use of a commutator, an alternating current could be received from a single circuit, be subdivided, and then caused to react in such manner as to produce continuous and sufficient energy for practical power purposes. But he also testifies, and we accept this testimony as correct, as follows:

"I do not understand that in the patents in suit Tesla claims to be the first to discover that the phase could be split, either by induction or by the use of electrically dissymmetrical circuits. It is my understanding that Mr. Tesla, in his search for a method of driving a polyphase motor from a single circuit, availed himself of an item of merely philosophical knowledge, never before applied in driving motors, and that, for reasons explained, this application was not obvious, even in the light of his own prior patents."

We find nothing in the complainant's case, or in the patents themselves, which indicates that Tesla's application of principles scientifically known, as explained by Prof. Main, was found to involve any special difficulties requiring the exercise of the inventive faculty. Therefore the invention consisted in merely applying to practical uses facts that were known scientifically, but never before thus applied. Indeed, both parties have taken this view of Tesla's invention in issue here. The complainant says that the invention, "stated in its simplest form, was based upon the conception that, instead of employing two independent sources of current and two transmission circuits between the source and the motor, he"—that is, Tesla—"might employ but a single source, and a single circuit leading to the motor; at the latter, divide the circuit into two paths, and by artificial means retard the current in one of these paths to a greater extent than in the other." Also, at another place, it says that the invention did not in the slightest reside in any of the mech-

anism employed, and that, therefore, it might be described in a few words. The respondent took the same view until a different one seemed necessary in order to cover the issue of anticipating the Ferraris publication. In opening the case the respondent maintained as follows: The alleged invention of the patents in suit is not addressed to the utilization of two-phased currents in a motor, but to an alleged new way of producing the necessary two out-of-phase currents; this specific way of producing two out-of-phase currents was old and well known in the art, and was old and well known as an equivalent of the method set out in the May 1, 1888, patents; all the methods of producing two or more out-of-phase alternating currents set out in the Tesla patents were, in and of themselves, old and well known in the art as means and methods of producing such out-of-phase currents; and their laws and limitations had been known and set out in a way not even approximated in accuracy or fulness in any of the Tesla patents. The respondent then further maintained that Dr. Kennelly, on pages 207 and 209 of this record, explained the fact that the alleged invention in the patents in suit involved merely the substitution of one means of obtaining two-phase currents for another means, and that on pages 234 to 249, inclusive, he shows that these two means were old and well-known equivalents. Of course, all this was with the purpose of maintaining that there was no invention in any view of the patents now in issue. It unavoidably concedes, however, that, if there were invention, it was of the fundamental and simple nature which we have described. It is true, as already said, that subsequently the respondent took a different position; but, as the one we have just explained was the one into which it naturally fell, we are safe in affirming, as we do, that the experts on each side, and the parties themselves, have accepted the invention in issue as we have stated it.

When, under special circumstances like those referred to by Prof. Main, a particular practical application of a known principle proves to be of advantage in the arts, and yet the thought of making it had not occurred to those expert therein, such application, at times, involves invention. This, within a somewhat narrow range, was shown by us in *Watson v. Stevens*, 51 Fed. 757, 2 C. C. A. 500, in *Heap v. Tremont & Suffolk Mills*, 82 Fed. 449, 27 C. C. A. 316, and in some other cases. More striking illustrations are found in *Western Electric Company v. Larue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294; *National Cash-Register Company v. Boston Company*, 156 U. S. 502, 15 Sup. Ct. 434, 39 L. Ed. 511; *DuBois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; and many other decisions of the Supreme Court. Neither of these strikes the imagination, or demands a verdict in favor of inventive genius, to such an extent as does the application in the case at bar of electrical principles already philosophically known.

The corollary of this proposition, which we will apply later, is that in cases of this character, where the originator has boldly struck out into a practical application, and stated it, though only in general terms, he has, for the most part, made his conception

clear, even though the mechanical details have not been expressed or thought out. The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863. Therefore, Prof. Main was right in testifying to the effect that, if Tesla made clear his conception in a general way, he made clear his invention, leaving the artisan skilled in electrical science to work out the practical details required in applying what was previously within the bounds of philosophical knowledge. The importance of this last proposition will become more clear when we take up the testimony offered by the complainant to show that Tesla anticipated Ferraris.

It must be admitted that Ferraris, in the publication of April 22, 1888, disclosed alternating currents transformed by derivation, so called, and also by induction. Tesla's conception was in this respect at least as broad as Ferraris's. Nevertheless, he proceeded in a singularly fragmentary way. As the result of an application filed on May 15, 1888, which was subsequently divided, he secured two patents—one No. 511,915, issued on January 2, 1894, and one No. 555,190, issued on February 25, 1896. No. 511,915 we need not further trouble ourselves about. No. 555,190 claims the combination which represents the alleged invention of Tesla as practiced by the method of induction. We may observe that, although both of these patents were applied for before the patents in suit, yet they issued after them, and it is not claimed that those in suit are invalidated by them. We have no occasion to enlarge on this proposition. There is no claim that the respondent uses the method by induction. On the other hand, it is conceded that, if it infringes, it is by the derivative method. Therefore, patent No. 555,190 comes in here on the part of the complainant solely for establishing certain dates to which we will hereafter refer, and on the part of the respondent as leading up to the proposition to which we will again refer, that Tesla's original conception was limited to the inductive method, and that his broadening out so as to cover the derivative method did not precede the filing of the application of May 15, 1888.

It may be plausibly maintained that the first claim of No. 511,559 should be construed to cover Tesla's broad invention. The second claim covers only the method by derivation. The self-induction spoken of in it means, of course, the peculiar results which come from inserting a coil in an electric conductor, in consequence of the various portions of the coil reacting on each other, and thus delaying the current without necessarily diminishing its ultimate force. No. 511,560 must be construed broadly to cover Tesla's entire conception, except that it is limited by the word "connected" to the method by derivation, or self-induction. We must refer to this topic again.

The patents now in issue were sustained by Judge Thompson in the Circuit Court for the Southern District of Ohio in *Westinghouse Company v. Dayton Company*, in an opinion passed down on February 6, 1901, reported in 106 Fed. 724. Judge Thompson was affirmed on appeal by the Circuit Court of Appeals for the Sixth Circuit, in an opinion passed down on November 15, 1902, and

reported in 118 Fed. 562, 55 C. C. A. 390. This opinion was rendered by Judges Lurton, Day, and Severens, all judges of high repute. The relations of the Ferraris anticipation to this decision we will explain further on. The patents were also sustained by Judge Lacombe in *Westinghouse Company v. Catskill Company* (C. C.) in an opinion passed down on August 22, 1901, and reported in 110 Fed. 377. This was reversed on appeal by the Circuit Court of Appeals by an opinion passed down on February 25, 1903, reported in 121 Fed. 831, 58 C. C. A. 167. This opinion was unanimously concurred in by three judges, also of high reputation, Wallace, Townsend, and Cox. It rested wholly on the Ferraris anticipation. The proofs are claimed to have been substantially the same as in the case at bar, but we will show hereafter that at least one very important fact was not formally in the case, and therefore was not thoroughly considered. Afterwards, in the same circuit in the Western District of New York, in *Westinghouse Company v. Mutual Life Insurance Company*, by an opinion of February 9, 1904, reported in 129 Fed. 213, Judge Hazel reviewed the proofs which were before the Circuit Court of Appeals for the Second Circuit, in connection with the testimony of Tesla himself, reached a conclusion overruling the Ferraris defense, and sustained the patents. In the Eastern District of Pennsylvania, in *Westinghouse Company v. Roberts*, in an opinion passed down on September 10, 1903, reported in 125 Fed. 6, Judge Archbald reached the same conclusion as reached by Judge Hazel. The proofs in behalf of the complainant had been strengthened by a reference to the interference proceedings between Tesla and Ferraris, and, also, apparently, by the testimony of Tesla. In the Northern District of Illinois, in *Westinghouse Company v. The Electrical Appliance Company*, by an opinion passed down on March 26, 1904, reported in 133 Fed. 396, Judge Kohlsaat sustained the patents, following Judge Archbald and Judge Hazel. Judge Kohlsaat did not make clear what evidence he considered, and he merely said that the difficulty which the Circuit Court of Appeals for the Second Circuit found had been overcome. Also, in the Western District of Pennsylvania, in *Westinghouse Company v. Jefferson Company*, by an opinion passed down on March 28, 1904, 128 Fed. 751, Judge Buffington stated that infringement was conceded, and that the difficulties which the Circuit Court of Appeals for the Second Circuit found had been successfully met. He granted an ad interim injunction.

The result is that, as the decisions now stand, a Circuit Court to which an application might be made for an ad interim injunction against an alleged infringer of the patents now in issue would perhaps refuse it in all the districts in the Second Circuit except the Western District of New York, but would grant it in the last-named district, and also in the Third, Sixth, and Seventh Circuits, while elsewhere the question would probably need to be litigated as litigated before us. On several occasions we have explained our disposition to follow the decisions of the Circuit Courts of Appeals in other circuits, recognizing them as carrying practically the same weight as our own. We have especially shown the propriety of this

with regard to decisions touching letters patent for inventions, in *Beach v. Hobbs*, 92 Fed. 146, 147, 34 C. C. A. 248, and *Hatch Storage Battery Company v. Electric Company*, 100 Fed. 975, 976, 41 C. C. A. 133. The Supreme Court laid down a like practical rule in *Hobbs v. Beach*, 180 U. S. 383, 388, 389, 21 Sup. Ct. 409, 45 L. Ed. 586. In the present case, however, while the Circuit Court might well have felt constrained to follow the result in the Circuit Court of Appeals for the Second Circuit, the body of prior judicial decisions is of such an inharmonious character that we may well make an independent investigation, based on the evidence before us. Yet, of course, our judicial foresight will not enable us to determine whether by so doing we will clarify the condition or increase the confusion.

Inasmuch, however, as we must examine the prior decisions to a certain extent in reaching whatever conclusions we may reach, it is necessary that we should point out the principles which should guide us in doing so. How are the cases to be brought together for this purpose? An answer based on necessary rules of procedure seems clear. It is essential that the facts brought out in the earlier litigation should be proved in the pending cause independently and according to the ordinary rules of evidence, and that thereupon the court in the pending cause should advise itself as best it may of what appeared to the courts making the prior decisions from the opinions rendered by them, or from an informal ascertainment otherwise of what was laid before them. As this ascertainment is merely to inform the conscience of the court in the pending cause, and to enable it to follow the lines of reasoning and the conclusions of the tribunals rendering the earlier decisions, it involves only a gathering of the history thereof from any reliable source. This may be done by the informal production of the records in the earlier cases, as well as by a perusal of the opinions of the courts. The court in the pending suit may accept the statements of counsel so far as they are not controverted, or, if controverted, so far as the court can, by informal methods, satisfy itself in regard thereto. In these ways we have discovered that the proofs on which the Circuit Court of Appeals for the Second Circuit proceeded were substantially the same as those in the record before us, with the exceptions we will discuss, including the fact that the only reference by that court to the application of May 15, 1888, was incidental. It is true that it twice referred to this application and Mr. Page's testimony concerning it; but we use the word "incidental" because neither the application nor the patent on which it issued was formally put in evidence, and apparently they were not pressed on the court so carefully as they have been on us. In one other respect the proofs essentially differ, and that is in the omission here of the facts in regard to the relations of Tesla to the Mather Electrical Company, proved, as we understand by the testimony of a witness by the name of Anthony. The Circuit Court of Appeals for the Second Circuit evidently gave great weight to this testimony. It is not before us, and how it would have appeared after being tested a second time it is impossible to



estimate. Especially in view of the decisions of other courts to which we have referred, there is enough in the two facts: First, that the application of May 15 was not under close consideration by the Circuit Court of Appeals in the Second Circuit as we have been compelled to consider it; and, second, that we have not the proofs in regard to the Mather Electrical Company to compel us to give this case an independent investigation.

We must next consider the nature and amount of the proofs which the complainant was required to give to meet the alleged Ferraris anticipation. *Smith & Griggs v. Sprague*, 123 U. S. 249, 264, 8 Sup. Ct. 122, 31 L. Ed. 141, laid down the rule that where a prior use for more than two years is set up in defense, and where this defense is met only by an allegation that the prior use was not a public use in the sense of the statute, proof on the part of the patentee in reference thereto "should be full, unequivocal and convincing." Sometimes the Supreme Court has used the expression "beyond reasonable doubt." In *Clark Thread Company v. Willimantic Linen Company*, 140 U. S. 481, 492, 11 Sup. Ct. 846, 35 L. Ed. 521, where the question was exactly that which we have before us, namely, dating back the invention prior to a publication anterior to the application for the patent in suit, it was ruled that it was incumbent on the patentee to show to the satisfaction of the court that the invention had priority. The more forceful language has been uniformly applied by the Supreme Court wherever an alleged infringer undertook to prove by oral proofs prior public use or prior invention. Thus that court to that extent gives to a patentee the practical benefit of the presumption arising from the grant of his patent.

The more stringent expression is exceptional in civil cases, and, if applied to a patentee who must meet an alleged anticipation by publication, it would be a very hard one when many years have elapsed. Publication stands always, and proves itself. "*Litera scripta manet.*" In case of a judicial issue made early after the granting of a patent, the patentee might have abundant oral proofs, or proofs partly oral and partly by drawings and models, which would easily meet the alleged anticipation, but which would ordinarily become clouded, or to a large extent lost, when the issue is made after many years. Therefore, when we touched on this topic in *Brooks v. Sacks*, 81 Fed. 403, 405, 26 C. C. A. 456, where there was a question, nevertheless, between two patentees, each of them having the favorable presumption which arose from the grant of his patent, we said, at page 407, 81 Fed., page 460, 26 C. C. A., that the complainant had come far short of proving his prior right "as satisfactorily as required by the authorities." Even there we did not go any further than to use that milder form of expression, and we do not think that we are now required to go beyond the expression in *Clark Thread Company v. Willimantic Linen Company*, to the effect that the alleged anticipation must be met by proofs which satisfy the court.

In *Brooks v. Sacks* we made it evident that unsupported recollection with reference to events occurring many years prior would

ordinarily be regarded as insufficient for the purposes we are now considering. In the present record, however, we have one fact of an indubitable character to which the testimony of one witness, Mr. Page, can be anchored beyond doubt so far as concerns one crucial date. We mean the patent issued on the application of May 15, 1888, to which we have already referred.

The claim is made that we should reject the testimony offered by the complainant on the issue of anticipation, on the ground that it was within its power to have strengthened it. Among other things in this direction, the omission to call Tesla is relied on; also the omission by Mr. Page to investigate and produce the account books of the legal partnership in which he was a member, bearing out certain entries on his diary to which we will refer; also the omission to prove by independent witnesses certain journeys and conferences testified to by Mr. Page as having occurred during the summer and early autumn of 1888, which journeys and conferences he said had relation to the preparation of the applications on which the patents in suit issued. The facts about these journeys and consultations, even if supported by definite independent proofs to a demonstration, would not affect the substance of Mr. Page's testimony, because they were brought out with reference to the delay which ensued between the alleged time when Tesla first explained his invention to Mr. Page, in April, 1888, and the date of the filing of the applications for the patents in suit, December 8, 1888. It is true that, if definitely proven in a hostile direction, they might impugn Mr. Page's veracity or general accuracy of memory; but no real attempt of this nature has been made. It is not claimed anywhere that Mr. Page does not stand at least as an honest witness, or that his memory is peculiar or exceptional one way or the other. The attack on the complainant's case in reference to the Ferraris publication does not truly rest on any peculiarity of this kind, but on the general rules stated by us in *Brooks v. Sacks*. Therefore the only weight which the delay in filing the applications for the patents in issue could carry in favor of the respondent, if any, would come from the mere fact of delay. The experimental state of the art at the time in question, and the legal questions involved in drawing specifications and claims where the art is new, or progressive, or complicated, would well account for the intervening period between April and December; and in any view, and under any circumstances, impressions based on delays on the part of busy lawyers or of hard-pressed courts count for little against positive evidence. It is true that Mr. Page testifies that during the intervening period he was making investigations; but this is easily reconciled with his positive statement that he fully understood the invention, because in the then existing state of the art, and the then supposed importance of the patents, a careful solicitor would have made every possible preparation for drawing these specifications and claims.

With reference to the apparent lack of supporting proofs on the part of the complainant to which we have referred, and which has been very much pressed against it, the position of the complainant

is a hard one. It is stated by Mr. Page that he testified on an interference in the Patent Office between Ferraris and Tesla. This must, of course, have been before the patents in suit issued, resulting favorably to them. It also appears, by the decisions of the various courts with regard to Tesla's patents, that from the time of the issue of the patents now in suit, in December, 1893, until the decision of the Circuit Court of Appeals for the Second Circuit, according to the opinion passed down on February 25, 1903, a period of nearly 10 years, they had prevailed in whatever litigation they had been subjected to. The very question of anticipation which we are considering, submitted on proofs all of which, so far as favorable to the complainant, are before us, was, after apparently a thorough and careful examination, decided in favor of the complainant by Judge Lacombe in the opinion passed down on August 22, 1901. The same defense was abandoned after proofs were taken in the case in the Sixth Circuit, which terminated in the opinion filed on November 5, 1902. It is true that the respondent says the Ferraris publication was neither in issue nor in evidence in the Sixth Circuit. Judge Lacombe, however, says the evidence was taken there, but that the point was not argued, thereby implying that it was abandoned, as we have said. Therefore, under the circumstance of submitting the present case to the Circuit Court at a date following litigation which had resulted favorably to the complainant, but preceding the adverse decision of the Circuit Court of Appeals for the Second Circuit, it is not singular that the complainant was led to the belief that it might rest securely on the proofs previously produced; and it affords no reasonable presumption against it that it did so rest, or that it did not strengthen its case in the way in which the respondent claims it might have done.

Inasmuch as the respondent did not make specific and clear objections at the time when it should have made them, if it intended to rely thereon, we give no weight to the general objection interposed at the close of Mr. Page's testimony, in the following language:

"Testimony objected to, in whole and in part, as incompetent and insufficient on the issue of priority of invention."

In no view of the rules relating to objections with reference to testimony produced in federal courts can one so sweeping as this have effect, unless it is apparent that the facts intended to be proved in whatever form produced, could have no weight. The reason for this will be illustrated as we examine the specific propositions in regard to Mr. Page's testimony which are brought to our attention by the respondent, and which this general objection may possibly have had somewhat in contemplation. One was as follows: We are pressed with the fact that instead of stating what Tesla said to him, or the substance of it, thus giving details from which the court could draw its own inference whether or not Tesla's exposition was a sufficient one, Mr. Page testified as follows: "Mr. Tesla also described to me the plan of operating these motors," etc. Again he testified: "Mr. Tesla thereupon disclosed to

me his scheme for operating the motors," etc. Undoubtedly, according to the rules of the common law with reference to the production of evidence, under which some are restless because they seem to them too strict, but which, nevertheless, are just because adapted to elucidate the facts, and to separate them from mere theory or speculation, this method of testifying would not be admissible. Mr. Page should have been asked what Mr. Tesla said to him. If he could not remember that exactly, then what was the substance of what he said. Yet, if the respondent had desired to control the method of testifying according to those rules, it should have interposed specific objections at the proper times.

So, also, with regard to a diary entry of April 18, 1888, testified to by Mr. Page as covering a charge for services in the matter of the invention in issue, thus absolutely preceding the Ferraris publication. It is true that, according to the proper rules of testifying, he should have stated, so far as he could remember, the precise words that appeared on his diary, or, failing that, the substance of them. But, as no seasonable proper objection on this point was made by the respondent, it stands precisely as the testimony of Mr. Page concerning Tesla's disclosure. Under the circumstances we would do injustice, and would co-operate with the respondent in depriving the complainant of substantial rights by reason of its being lulled into this peculiar method of questioning of this important witness, unless we assume that, on an examination of him in accordance with the proper rules of educing evidence, the substance of his testimony would not have been changed. Of course, we cannot assume this. No substantial attempt was made to impugn Mr. Page on cross-examination or by contradictory proofs. Therefore, so far as he has testified positively, we must accept his evidence, notwithstanding the unsatisfactory form in which it appears, subject only to the general safeguards required in *Brooks v. Sacks*, 81 Fed. 403, 405, 406, 407, 26 C. C. A. 456, already stated. Consequently we have only two questions here: Are there any such safeguards in the record? and did Tesla disclose such a conception as the rules of law require should be disclosed in order to anticipate the Ferraris publication?

As to the first proposition, we have, as we have already said, the positive date fixed by the application of May 15, 1888. This not only proves what occurred on that specific day, but it carries with it all the reasonable probabilities which give effect to Mr. Page's evidence as to connected or related events. The patent applied for on May 15 leaves no doubt that, on or before that date, Mr. Page had been advised by Tesla fully of the method by induction, and so fully as to meet any possible criticism. Of course, the respondent at once suggests that which naturally suggests itself to every one—the failure to include the entire conception. The fact that in that application nothing was said about the method by derivation, or self-induction, creates an impression against Tesla. This impression, however, is met by the positive testimony of Mr. Page that, when Tesla first described to him his scheme covered by the application of May 15, he also described the plan of operating motors

which involves the splitting of a circuit into two branches of different electrical characters. This can mean nothing except the method by derivation, or self-induction. Therefore, as against this adverse impression, and every adverse impression, so long as they rest on mere probabilities, we have the direct, uncontradicted testimony of Mr. Page, which should ordinarily prevail. The date of May 15 is established beyond doubt; so that, under the circumstances we have stated, we can reject neither the date nor the substance of what was said. In other words, to use the language of the decisions to which we have referred, and to describe the state of our own intellectual condition, we are satisfied, we may say beyond a reasonable doubt, that the whole substance of the entire subject-matter of the two patents in issue was disclosed by Tesla to Mr. Page as early at least as May 15, 1888.

Mr. Page drew the application of that date; and, looking at all the circumstances, to any one cognizant of the preparation which a solicitor would naturally apply to that particular work, it would seem in accordance with the probabilities that the disclosure made by Tesla on which the application was based was a matter at least of weeks prior thereto. It might well be presumed of months. Therefore the reasonable probabilities support any statement by Mr. Page that this disclosure was made at least as early as the date he names, April 18. Consequently, we have a date which he claims to fix by his diary, April 18, with the reasonable probabilities in its favor. Agreeing, as we have shown that we must agree, that Tesla disclosed to Mr. Page his entire invention at the same time he disclosed it so far as it related to the method by induction, it would be almost contrary to good sense to maintain, against even the slightest degree of proof otherwise, that the disclosure by Tesla did not antedate the Ferraris publication, the gap being only 23 days. Therefore, in view of the fact that we have a positive date, May 15, which cannot be controverted, and an alleged date, shown by Mr. Page's diary, of April 18, which he directly connects with this particular topic, the presumptions are so strong in favor of a date at least as early as April 18 that, in the absence of any weighty contradiction, Mr. Page's statement in reference thereto must certainly stand.

We must also bear in mind that Mr. Page's testimony is not properly within the spirit of the characterization which has been given it, to the effect that it related to events which occurred 12 years before, accompanied with the statement that the only means which the witness had for refreshing his recollection was a diary which had been lost. On the other hand, the witness testified that he refreshed his recollection from his own evidence given on previous occasions, the first of which was with the diary in his hand on the interference in the Patent Office between Ferraris and Tesla. That testimony, according to the practice of the Patent Office, was carefully preserved, and might well have been accepted by Mr. Page at any subsequent date as stating correctly all the facts as they stood in his memory when it was presumably clear in reference to them. Also he testified in the case decided by Judge

Thompson, heretofore referred to, and again in the case decided by Judge Lacombe. Therefore his evidence is subject to the observation which we made in regard to the testimony of Mr. Cox in *Brooks v. Sacks*, 81 Fed. 403, 406, 26 C. C. A. 456. As to that we said that as his account of the facts was continuous from the time he first saw the device in question, and as he had an interest in the matter from that time, his testimony would be very convincing, provided there was anything by which it could be ascertained from collateral events that he had not confused the dates. This condition is met here with reference to Mr. Page's testimony, as we have shown.

In addition to all the above, there is a certain atmosphere of probability in support of Tesla's invention which materially strengthens the complainant's case and supports it throughout. Here was an invention which, if it was an invention, was of such a character that, notwithstanding the parties are at issue in regard to the extent of its practical value, it promised and accomplished great pecuniary advantage. Yet it must be conceded, as is apparent from the general tone of the whole record, and from the way in which the case has been developed before us, that the patent was long acquiesced in. It is also certain from the testimony in the case that an interference was declared between Ferraris and Tesla, and decided in favor of the latter. While, of course, such decisions are not formally operative as between other parties, as we have shown in *Wilson v. Consolidated Store Service Company*, 88 Fed. 286, 31 C. C. A. 533, especially when, as in the present case, courts are not advised what the nature of the contest was, or even whether it was a real one, yet such issues, when determined, necessarily contribute, with other adjudications, to make up the body of expert and legal opinion which goes to show that the patent has been approved or acquiesced in by those who understand its relations to the art. Although such general judgment cannot be measured by the law, yet it must be conceded that it has its weight, especially with regard to the state of the art at a period some years remote. In some cases, after a long lapse of time, it is the most reliable test in reference thereto; and, in any event, it affords material support to the patentee on issues of fact of the kind at bar, relating to occurrences as to which so many years have gone by. In the present case there is sufficient of this to balance all the mere probabilities in favor of respondent to which we have referred, and to give support to the evidence of Mr. Page; so that, taken all in all, we are secure in accepting the latter as stating the substantial truth of the situation.

The respondent insists that, conceding that Mr. Page is correct in his dates, and that Tesla disclosed to him all he says he disclosed, yet it was not a sufficient disclosure under the rules of law. The opinion of the Circuit Court of Appeals in the Second Circuit seems to tend in the same direction, although, from the standpoint of that court, it was not necessary that it should carefully consider this proposition. We have made no reference to Mr. Brown's testimony because, under the rules of *Brooks v. Sacks*, and in view of

some statements which Mr. Page says Tesla made to him, it may be that Mr. Brown did mistake the dates. But, referring both to Mr. Brown's testimony and Mr. Page's, the respondent claims, in effect, that Tesla's disclosure was unavailing unless made so concrete and specific, and with such particularity in detail, that it might be studied and understood, and, if desired, reproduced and tested. The respondent, also, observes that Tesla did not describe any specific structure or specific result, and did not negative very clearly that he had got beyond a wholly experimental stage. The language of the Circuit Court of Appeals for the Second Circuit is substantially to the same effect, namely, that all which Mr. Page learned from Tesla was the general features of the invention involved at bar. It meets all this to a demonstration to say, in view of the nature of the Ferraris publication, that his disclosure also was academic if Tesla's was. But the nature of Tesla's broad invention, as we have explained, to the effect that it consisted in the conception of making practical use of a single current, and that the rest concerned merely working that out by well-known and equivalent methods, was such that when he disclosed that conception he made a complete disclosure. Moreover, we have shown that, in the way in which the respondent was satisfied to leave Page's testimony, we must accept his statement on this topic exactly as he made it. This was to the effect that Tesla described to him, and that he understood fully from his description, the practical and essential features of the invention involved in the patents in suit, and that Tesla also described to him the particular method of operating motors by derivation.

A broader view might be taken of this topic. Undoubtedly, the application filed on May 15, 1888, to which we have fully referred, clearly made known Tesla's single circuit operated by the method of induction. It is almost incredible that Mr. Page could have prepared this application without a disclosure necessary therefor having been made to him several weeks before it was filed, and, therefore, as we have said, almost against common sense to dispute a date not earlier than April 18. So far the path seems entirely clear. Both parties, as we have shown, have stated emphatically that the method by induction and the method by derivation, or self-induction, were at that time well-known equivalents. If Tesla had rested on the patent issued on the application of May 15, it would seem, therefore, according to well-known rules, that the respondent would infringe by using the method by derivation, or self-induction. If, therefore, the patents in suit had not been taken out, the defenses of anticipation and noninfringement, so far as infringement relates to the method by derivation, would fail. In view, however, of the fragmentary method of taking out the Tesla patents to which we have referred, and in view of the possibility that Tesla and his assignees may thus have estopped themselves from adopting this simple line of maintaining their positions, we have felt it safer to examine Page's testimony as we have, and to state our conclusions therefrom. In either view, we must express ourselves entirely satisfied that whatever was disclosed by the patents in

suit covers patentable invention and anticipated Ferraris. This leaves us only the question of infringement.

It was stated at bar that the original infringing machine was manufactured under a patent to Otto Titus Blathy, No. 423,210, issued on March 11, 1890, and that it is marked as manufactured under that patent, and was made in accordance therewith. It is therefore safe to refer to that patent for a statement of its substantial elements and operative principles. It is entitled "Electric Meter for Alternating Currents." Subject to the single topic which we will discuss hereafter, it does not seem to be denied that the respondent uses what distinguishes the patents in suit from the Tesla polyphase patents issued on May 1, 1888. The proposition of the defense seems to be that the patents in suit involve a combination with the motors described in the earlier patents. It seems impracticable for the respondent to take any other position. The specification of the Blathy patent describes his invention as follows:

"This meter, essentially, consists of a metallic rotating body (such as a disk or cylinder, for instance) which is acted upon by two magnetic fields or two groups of fields displaced in phase from one another. The said displacement of phases results from the fact that a field or one group of fields is produced by the main current, while the other field or group of fields is excited by a coil of great self-induction shunted from those points of the circuit between which the energy consumed is to be measured."

Compare this with the claim of patent No. 511,560, in suit, already quoted by us, as follows:

"(1) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits."

Inasmuch as the extract we have made from the Blathy patent shows the method by self-induction, admittedly the equivalent of that by derivation, and inasmuch as, in view of the word "connected" in the claim quoted from patent No. 511,560, the latter may well be held to be limited to the same method, as we have already said, that claim and our extract from Blathy literally read into each other if a motor is supplied to the latter. This is done by Blathy's claims, each of which contain the element of a counting apparatus operated by the rotating body described by him.

But a distinction is attempted between Blathy and the infringing device in accordance with what further appears in his specification, following what we have already quoted, thus:

"The magnetic fields, however, do not cross one another within the solid of revolution, as in the well-known arrangement of Ferraris, but pass the different parts of the same independent from one another."

In view of the fact of the parallelism between the description of the Blathy invention shown by the extract which we first made from his specification, and of the further fact that the respondent attempts no distinction except in the direction thus afterwards particularized, it becomes necessary for the respondent, in order to escape the charge of infringement so far as this topic is con-



cerned, to maintain two propositions: First, that the so-called Tesla motors are necessarily involved in the patents of May 1, 1888; and, second, that the invention covered by the patents in suit, as expressed in the claims of those patents, make such Tesla motors an essential element. If the respondent fails to maintain either one of these propositions, it is apparent that the defense of infringement, so far as this topic is concerned, fails.

The first patent of the series to which those now in suit relate is No. 555,190, issued to Tesla on the application filed on May 15, 1888, to which we have several times referred. It is sufficient as to that to say that, while possibly the words "as set forth" in each claim might be construed to refer to the various drawings which exhibit the Tesla motors, yet this is not a just construction in view of the breath of the conception shown in that part of the specification wherein Tesla stated that he was "the first to produce any kind of a motor adapted to be operated by alternating currents, and characterized by any arrangement of independent circuits brought into inductive relation so as to produce a rotary effort or effect, due to the conjoint action of alternating currents," "and this without reference to the specific character or arrangement of the currents in the motor." Clearly, this phraseology has no relation to any particular form of motor. The words "as set forth" in the claims may grammatically refer to anything which precedes them. Therefore, in view of the just and liberal rules of construction stated in *Reece Button-Hole Co. v. Globe Button-Hole Co.*, 61 Fed. 958, 10 C. C. A. 194, they should not be held as restrictive, or as limiting anything in the claims, so as to render ineffectual any part of the conception involved in the portion of the specification which we have quoted.

Coming now more particularly to the patents now in issue, the first claim of No. 511,560 contains in its letter no reference to any particular motor, and thus the letter of the claim corresponds with the sense of the invention. Tesla was the first to use for practical purposes, with reference to any kind of a motor, what is called in this case the "split-phase," or a single current from the generator producing two energizing currents on the methods of derivation or induction. This novel feature is, of course, equally applicable to Baily or Blathy, or to any other person using two energizing alternating circuits, without regard to the peculiarity of the motor in other respects; and we repeat that the sense of the invention is equally broad. It is true the specification mentions Tesla's system of electrical power transmission, but it contains no expression which would justify any court in limiting the clear language of this claim, fully capable of supporting itself, except so far as it uses the word "connected," which may well limit it to the method by derivation, as we have already said. Therefore, in order to maintain the proposition that the invention as set forth in claim 1 of this patent is as broad as the natural sense of the language declares it to be, it is not even necessary to refer to the just rules of construction given in *Reece Button-Hole Co. v. Globe Button-Hole Co.*, ubi

supra. It is asking altogether too much of a court of law to demand of it that it should inject into this claim words which it does not contain for the purpose of limiting it as the respondent seeks to do.

An elaborate discussion of the patents issued to Tesla on May 1, 1888, is not necessary. It is necessary to examine them, but only so far as they show the state of the art; and in this respect, for the purposes of the patents in suit, the Baily publication and all the other references of the respondent are equally a part of the state of the art at the time those patents originated. We are to consider the invention in issue at bar as though it were made by somebody other than Tesla, having knowledge of the state of the art in reference to putting into a motor currents of different phases. The complainant defines it with sufficient accuracy for all present purposes when it maintains thus:

"This invention, stated in its simplest form, was based upon the conception that, instead of employing two independent sources of current and two transmission circuits between such source and the motor, one might employ but a single source, and a single circuit leading to the motor; at the latter, divide the circuit into two paths, and, by artificial means, retard the current in one of those paths to a greater extent than the other." "No useful application of the principle of artificially retarding alternating currents had ever been proposed until Tesla conceived the possibility of operating a two-phased motor from a single circuit, turned the principle to a useful account, and demonstrated that the retardation, so fatal to the successful operation of the ordinary alternating current systems, was the keystone of success in a great engineering problem."

It is not necessary for us to discuss whether what Tesla applied his inventive ability to was a "great engineering problem," as described by the plaintiff; but it was a problem practically unsolved in the then state of the art, and of such a character that its solution was certainly a useful one. Therefore the invention, according to settled rules, is to be protected to its fullest extent unless something of a positive character, either in the patent itself or elsewhere, prevents. It is true that Tesla's specification indicates strongly that he probably had not in mind the application of his invention to any motors except his own. Possibly he valued no other two-phased alternating current motors, or he conceived that there were no others, so that naturally the practical application which he had in mind was limited accordingly. Nevertheless he is entitled to the advantage of the well-settled rule by virtue of which an inventor who has patented his invention is entitled to all the uses to which it may be applied of the class to which he himself practically applied it. Therefore we do not perceive how, on any rule relating to the fundamental nature of inventive conceptions, or to the construction and effect to be given to specifications and claims in patents for invention, it can be held that the respondent can escape, for any reason we are now discussing, the charge of infringement.

Our observations so far have been more particularly with reference to the phraseology of the only claim of patent No. 511,560 in issue. The claims of patent No. 511,559, so far as the topic we are discussing is concerned, are as broad as the single claim of patent No. 511,560.

It is true they contain the words "as herein set forth," which are not found in the other patent; but these words connect directly with the words "independent energizing circuits," and they do not necessarily relate, either grammatically or by any reasonable demands of the rules of construction, to any particular description of motors. Therefore, within the rules stated in *Reece Button-Hole Co. v. Globe Button-Hole Co.*, *ubi supra*, by virtue of which all expressions in specifications or claims are to be held to sustain the actual invention so far as they can reasonably be so construed, this one does not stand in the way of our giving, so far as the topic we are discussing is concerned, as broad a construction to patent No. 511,559 as to the claim of patent No. 511,560 in issue.

The difficulty which presses itself upon us on the question of infringement grows out of the fact that the amount of power used by the respondent is approximately what is described by it as negligible; that is, very minute. Nevertheless it is power developed, as set out by Blathy's claims, by "a metallic rotating body," and transmitted to a "suitable counting apparatus, operated" by the same rotating body. If the device stopped with "a metallic rotating body," and some method other than a counting machine operated by it was used for determining the number of its revolutions, we might not be able to charge the respondent with infringing. We might then well apply the proposition of the respondent that a mere meter is in a different art from a motor; but, as it does not stop there, we must look further.

The Tesla invention in issue, as already explained by us, derives its right to recognition from the fact that it was applied to the production of power. In that respect it falls within the limited class referred to or described by us in *Davey Co. v. Isaac Prouty & Co.*, 107 Fed. 505, 509, 510, 511, 46 C. C. A. 439. The adaptation of the tortional spring which laid the basis of *Western Electric Company v. Larue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, was a marked instance of this class of cases. The ingenuity of Tesla was displayed in the conception of an adaptation to a particular use, and any adaptation which did not involve that conception could hardly infringe. Therefore, as it may well be that, if the counting mechanism was of a kind not operated by the "metallic rotating body," we should not be compelled to find infringement, we hesitate in view of the minute amount of energy exerted. But Blathy did not merely reproduce the academic experiments which must have preceded Tesla. While Tesla uses the word "power," he makes no maximum nor minimum; and it is entirely conceivable that for certain fine work, or work of a peculiar character, the minimum may be of the utmost value. Therefore we are unable to make any distinction on this account.

Probably we ought to refer to what is spoken of by the parties as *Baily and Deprez*. We apprehend that *Deprez* is disclosed by what is known as "*Deprez French Patent of 1879*," and that *Baily* is represented by the article in the *Philosophical Magazine* of October, 1879. These are each relied on by the respondent. *Baily* was seeking simply a revolving disk, and not looking beyond that. He did not attempt to transmit that electrical power which, as we have shown, was the soul

of Tesla's invention, and which we have also shown is involved in the infringing device, although perhaps to a minimum. It is apparent, also, that Baily did not concern himself about alternating currents as such, and it is not at all clear that he proposed to make use of them at all. Deprez, on the other hand, made commutators necessary elements in his device, which essentially distinguishes him from both the complainant and respondent, and lays him out of the case without the necessity of further discussion.

Possibly, relating to some other infringers than those at bar, we might be compelled to determine more positively than we have the construction of some of the claims which are put in issue here pertaining to the two patents in suit. For the present case, however, any further investigation or discussion relating to them would be purely academic and of no practical importance. The infringement by the respondent relates entirely to the method by derivation, or self-induction, which, for present purposes, are the same; and, so far as that is concerned, it can make no possible difference as to practical results whether the injunction and accounting relate to all the claims in issue or only to one or two of them. Therefore, in view of the construction which we are now inclined to give the claims, as already stated, we hold that the relief granted should relate to all.

We wish to call attention to the fact that at various points the respondent has referred to the affidavits filed in connection with the motion to the Circuit Court to reopen the case, as though they were adverse to the complainant, and especially as though contradicting, in one important particular, the testimony of Mr. Page. On the other hand, at some points, the complainant has undertaken to strengthen its case by reference to the same affidavits. We reject all these, and open the record only so far as it is properly before us. To do otherwise would be to enter on a field which has not been explored by the parties according to proper rules of procedure.

The decree of the Circuit Court is reversed; the case is remanded to that court, with instructions to enter a decree in favor of the complainant for an injunction and an accounting, and to take such further proceedings as may be required not inconsistent with this opinion; and the appellant recovers the costs of this appeal.

**BOWLING GREEN TRUST CO. v. VIRGINIA PASSENGER & POWER CO.  
et al. JOHN A. ROEBLINGS SONS CO. v. SAME.**

**CENTRAL TRUST CO. v. SAME.**

(Circuit Court, E. D. Virginia. October 11, 1904.)

**1. RECEIVERS—OBJECTIONS TO APPOINTMENT—RELATIONSHIP TO PARTIES IN INTEREST.**

Where the appointment of a person as one of the receivers for a railway corporation in foreclosure suits is asked by the trustees in the several mortgages affecting the property and by other creditors, and favored by practically all of the parties in interest, and is opposed by only a small minority of the bondholders, who make no charge against his integrity or ability, and he is specially fitted for the position by reason of his familiarity with the property and its operation, the appointment will not be refused because of his relationship to certain of the large stockholders and bondholders, nor because of his prior connection with the defendant company as an officer and director.

In Equity. Suits for foreclosure of mortgages and liens. On application to make appointment of temporary receivers permanent.

Goodwin, Thompson & Vanderpoel, Munford, Hunton, Williams & Anderson, Christian & Christian, Butler, Nottman, Joline & Mynderse, Leake & Carter, Davis & Davis, Alexander Hamilton, William B. McIlwaine, and L. L. Lewis, for several complainants and petitioners.  
Miles M. Martin, for defendant companies.

WADDILL, District Judge. The question raised as to the propriety of making permanent the appointment of William Northrop, one of the temporary receivers heretofore appointed herein, has been duly considered by the court, and the conclusion reached is, under the facts and circumstances of this case, taking into account the manner of his selection and in which he has discharged his duty since the appointment, his admitted eligibility from the standpoint of character, qualification, and experience for the discharge of the difficult duties in hand, that he should not be displaced, and another person named in his stead; but, on the contrary, he should be made a permanent receiver along with his co-receiver, Henry T. Wickham. The objections made to Mr. Northrop in no manner affect his character as a man. On the contrary, it is admitted, and the proofs abundantly show, his thorough integrity, his high order of intelligence, and his entire familiarity with the duties required to be performed. But it is said that because of his relationship to two of the parties in interest (Frank J. Gould and Miss Helen Miller Gould), and his connection with the company as a director (its assistant secretary and assistant treasurer), and because of his acts as an officer of the company in reference to a particular transaction affecting a portion of its property, and also his conduct as trustee respecting another interest therein, he should not be placed in the position of receiver, and that he would not be an impartial receiver in dealing with the affairs of the company. Generally, it may be said that there is no claim that the financial embarrassments of the company in any way arose as a result of anything that Mr. Northrop did, or that was done after his advent into the business of the company. On the contrary,

upon his coming in, and through the instrumentality of those who caused him to be connected with the company, large pecuniary assistance was rendered the company, by reason whereof its financial disaster was for a considerable time averted. The familiarity with the company's affairs acquired by him during this period, and the experience thus gained in the operation and management of the several properties under the control of the court, tend rather to strengthen the reason for his appointment than otherwise. So far as the two specific objections above urged against him in the management of the company's affairs and the discharge of his duty as trustee are concerned, it is admitted that as to those he was guilty of no moral turpitude, and that in what he did, however imprudent or unwise it may have been, there was no fraud or wrong intended. An investigation of those transactions quite clearly demonstrates that the utmost good faith prevailed in what was done, not only on the part of the said Northrop, but the other parties participating therein; and that, in so far as he acted as an officer of the company, what was done was the joint work of the entire directory of the company, and their judgment as to the proper course to be pursued in reference to a business transaction of the company in an emergency in which it was then placed. In so far as the charge of relationship to two of the parties in the litigation is concerned, that of itself should not suffice to sustain the objections, particularly where the request for appointment comes from practically every person in interest, save a comparatively small number of bond and stock holders, some of whom are particularly hostile to the interest of those in the company to whom Mr. Northrop is related. The selection was originally made upon the request of the trustee in the consolidated mortgage of \$15,000,000, covering the entire property of the defendant company, and acquiesced in by the company itself. In a word, the trustee, speaking for all the bondholders of that issue, and the defendant company, speaking for its stockholders, asked the appointment; and now, in addition to those originally making the request, the trustees in the several underlying mortgages on the different properties included in the consolidation, with the single exception of the trustee in the second mortgage on part of the property covered by a \$3,000,000 first lien, join in the request for the appointment of Mr. Northrop, and the trustee in the second mortgage referred to raises no objection thereto. The trustee in the \$3,000,000 mortgage referred to has filed its bill in this court seeking to foreclose its mortgage, and in that proceeding makes the request for such reappointment; and the trustees in the several other underlying mortgages, before having formally intervened, have appeared in these causes already instituted, and joined in the request. In addition thereto, numerous creditors of the company, unsecured, and those who have filed supply liens for large amounts, also join in the request; making it thus to appear that Mr. Northrop is the choice practically of all the parties in interest, save the small number of bondholders and stockholders hereinbefore referred to. The court would be glad to select some person entirely agreeable to every single interest in the company, but this is next to impossible, and, the secured as well as the unsecured creditors by overwhelming voice having asked the retention of Mr. Northrop as the person in every way best suited to subserve their

interests and to discharge the duties of an office of this court, to which he has been appointed, the court does not feel inclined in any event to substitute its judgment for theirs, and select another person; particularly in view of the fact that in selecting the other receiver a person of its own choice was named, without conference with or request of any party in interest, and to whom no objection has been made. To decline to appoint Mr. Northrop under the circumstances would practically be to deny to the parties interested any voice in the selection of a receiver.

The appointment, therefore, of Mr. Northrop, and also of his co-receiver, Henry T. Wickham, will be made permanent.

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### WAY v. NEW JERSEY STEAMBOAT CO.

(District Court, S. D. New York. November 4, 1904.)

#### 1. COMMERCE—TONNAGE DUTIES—CONSTITUTIONALITY OF STATE STATUTE.

Laws N. Y. 1897, p. 701, c. 592, § 63, which provides that "the master, owner or consignee of every steamboat or vessel entering the port of Albany or loading, unloading or making fast to any wharf therein, shall, within forty-eight hours after the arrival thereof, pay to the harbor master for his services the sum of one and one-half cents per ton per annum, which shall be computed upon the registered tonnage of such steamboat or vessel," is void as imposing a tonnage tax, in violation of article 1, § 10, of the Constitution of the United States.

In Admiralty. Action by harbor master to recover statutory fees.

Hyland & Zabriskie, for libellant.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This action was brought by Edward P. Way, Harbor Master of the Port of Albany, N. Y., against the New Jersey Steamboat Company, owner of the steamboats Dean Richmond, Adirondack, C. W. Morse and the barge True American to recover double his statutory fees as provided for by chapter 592, p. 700, of the Laws of New York of 1897, which provides:

"§ 61. Powers and duties.—Such harbor master shall regulate and station all steamboats, vessels, wharves and piers within such port and remove such steamboats and vessels as are not employed in receiving and discharging their cargoes and prevent them from obstructing for an unreasonable time the passage or entrance into the basin of the city of Albany. He may determine how far and in what instances masters having charge of steamboats or vessels should accommodate each other in their respective situations, and may, if no one has charge of the same, remove any steamboat or vessel lying within such port, at the expense of the master or owner thereof. If any master or person having control of any vessel within the limits of such port shall neglect or refuse to obey the directions of such harbor master in any matters within his authority, or if any person shall resist or oppose him in the execution of his duties, he shall forfeit to the city of Albany the sum of fifty dollars for every such neglect or refusal or for any such resistance or opposition; and all money so collected shall be applied to the support of the poor of said city and county.

§ 63. Fees.—The master, owner or consignee of every steamboat or vessel entering the port of Albany or loading, unloading or making fast to any wharf therein, shall, within forty-eight hours after the arrival thereof, pay

to the harbor master for his services the sum of one and one-half cents per ton per annum, which shall be computed from the registered tonnage of such steamboat or vessel. If such fee is not paid within such time and after due demand, the master, owner or consignee, upon whom such demand is made, shall pay double the amount of such fees to be sued for and recovered, together with costs by the harbor master. The harbor master may employ assistance to collect such fees, and in case of his sickness, inability or absence, he may, by and with the assent of the mayor of the city of Albany, appoint some proper person to act in his stead and perform the duties of his office during such sickness, inability or absence. This section shall not apply to boats navigating the state canals which enter tide water for the purpose of being towed out of such port, unless receiving or discharging cargoes, or portions thereof, in tide water within the limits of such port, or unless navigating the canals of private companies or corporations."

The libel alleges:

"Second:—That before and at the times hereinafter mentioned, your libellant was and is now the duly appointed Harbor Master for the Port of Albany in the State of New York as provided for by the laws of the State of New York, to-wit, Laws of 1897 (page 700), chapter 592, § 60, which Port comprehends within its limits all that portion of the Hudson River situate in front of the city of Albany, and extending northerly two miles above and southerly two miles below the boundaries of such city, together with all the wharves, slips and basins connected with such river within the above described tide water limits.

Third:—That the respondent is now and at the times hereinafter mentioned was a foreign corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey having an office for the regular transaction of business in the Borough of Manhattan, New York City, N. Y., and was and is the owner as your libellant is informed and believes of the following vessels:

Steamboats Dean Richmond, Adirondack, C. W. Morse and the barge True American.

Fourth:—That said steamboats 'Dean Richmond,' 'Adirondack' and 'C. W. Morse' ply regularly during the summer season between the ports of Albany and New York in the State of New York and that said steamboats 'Dean Richmond' and 'Adirondack' frequently within the year 1903 and said steamboats 'Dean Richmond,' 'Adirondack' and 'C. W. Morse,' together with the said barge 'True American' frequently within the year 1904 entered the Port of Albany, N. Y., loading, unloading and making fast to a wharf or wharves therein.

Fifth:—That by section 61 of the statute above referred to the powers and duties of your libellant as such Harbor Master are defined and described as follows:

'Such Harbor Master shall regulate and station all steamboats, vessels, wharves and piers within such port and remove such steamboats and vessels as are not employed in receiving and discharging their cargoes and prevent them from obstructing for an unreasonable time the passage or entrance into the basin of the city of Albany. He may determine how far and in what instances masters having charge of steamboats or vessels should accommodate each other in their respective situations, and may, if no one has charge of the same, remove any steamboat or vessel lying within such port, at the expense of the master or owner thereof.'

Sixth:—That during the years 1903 and 1904 and up to the date hereof your libellant has exercised and performed all the powers and duties named in said statute above cited in the Port of Albany with reference to such steamboats, vessels, wharves and piers within such port.

Seventh:—That by section 63 of said act it is provided as follows:

'The master, owner or consignee of every steamboat or vessel entering the port of Albany or loading, unloading or making fast to any wharf therein, shall, within forty-eight hours after the arrival thereof, pay to the Harbor



Master for his services the sum of one and one-half cents per ton per annum, which shall be computed from the registered tonnage of such steamboat or vessel. If such fee is not paid within such time and after due demand, the master, owner or consignee, upon whom such demand is made, shall pay double the amount of such fees to be sued for and recovered, together with costs by the Harbor Master.'

And that by reason of the premises and of said act your libellant became and now is entitled to receive and collect from the respondent as its share, part or portion of the compensation for such services of your libellant, the sum of 1½ cents per ton per annum upon the registered tonnage of each of said steamboats or vessels.

Eighth:—That the registered tonnage of such vessels are as your libellant is informed and believes as follows:

Steamboat 'Dean Richmond' 2322; steamboat 'Adirondack' 2848; steamboat 'C. W. Morse' 2800; barge 'True American' 150, thus making the compensation to your libellant for such services as follows:

Season 1903:

For the steamboat 'Dean Richmond' .....	\$34.83
" " " 'Adirondack' .....	42.72

Season 1904:

For the steamboat 'Dean Richmond' .....	34.83
" " " 'Adirondack' .....	42.72
" " " 'C. W. Morse' .....	42.00
" " barge 'True American' .....	2.25

\$199.35

Ninth:—That said respondent did not within 48 hours after the arrival of said vessels or any one of them, or at any other time, pay your libellant for his said services, the said sum or sums above named or any part thereof, and that prior to the commencement of this action payment of said sum of \$199.35 was duly demanded on the part of the libellant from the respondent and by the latter refused, and that by reason of the premises the respondent became liable to pay double the amount of such fees, to wit, the sum of \$398.70, which sum your libellant is now entitled to sue for and recover, together with the costs of this suit according to the statutes in such case made and provided and as above set forth.

Tenth:—That demands have been made upon the respondent on the part of your libellant, for said damages and claim, and payment thereof has been refused."

The respondent excepts to the libel upon the ground that it does not state facts sufficient to constitute a cause of action because this court is without jurisdiction in the premises. It urges that the Act is unconstitutional and that the libellant does not state a cause of action showing the maritime services necessary to invoke the powers of this court.

The contention in the first respect is that the law which is sought to be enforced is in contravention of article 1, § 10, of the Federal Constitution which provides:

"Art. 1, § 10. 'No State shall without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress.'

'No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'"

It is said that the law now under consideration is practically the same as a somewhat similar law relating to New York, which has been held to be unconstitutional on the ground that the tax was a tonnage duty. *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118.

The law there held to be obnoxious to the constitution, was as follows:

"The following fees shall be collected under this act, and no others: All ships or vessels of the United States of one hundred tons burden or more, except lighters, tugs, barges, and canal-boats, sound and river steamboats employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the said port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one-half of one per cent per ton, to be computed from the tonnage expressed in the registers of enrolments of such ships or vessels respectively; all other foreign ships or vessels which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton to be computed on the tonnage expressed in the registers or documents on board. Where difficulties arise between vessels of less than one hundred tons burden, and the captain of the port or a harbor-master shall be called upon to settle the same, the vessel, canal-boat, barge, or lighter in fault shall pay two dollars. Such fees shall be paid by the masters, owners, or consignees of such ships or vessels, at the office of the captain of the port, or to persons authorized by him to collect the same, within forty-eight hours after the arrival of such ship or vessel. In default of such payment, the same having been duly demanded, such masters, owners, or consignees, on whom such demand shall have been previously made, shall pay double the amount of such fees, to be sued for and recovered, in the name of the captain of said port, in any court having cognizance thereof. All fees under this act shall be paid to the captain of the port, or upon his written order; and he shall have power to employ the necessary assistance in making collections of the same, at an expense of not exceeding five per cent upon the amount collected, which expense shall not be considered as the ordinary expense of the office. The captain of the port shall have power to designate some harbor-master as his deputy, who may, during his absence, or in case of a vacancy in his office, perform all the duties belonging to the office of captain of the port; and the acts of said harbor-master so performed, shall be valid and binding."

The libellant here attempts to distinguish this case from the *Inman-Tinker* case on the ground that in the latter the act itself appeared on its face to make an unjust discrimination between different vessels and constituted a mere tax upon commerce, in the shape of a tonnage tax and further that the act now under consideration provided in terms that the fees charged against vessels should be for services rendered. The contention on behalf of the libellant is that the act was passed after the decision in the *Tinker* case and has the objectionable features of that act eliminated and that it is practically the same as the wharfage and pilotage laws which have been upheld as constitutional.

The law under consideration, though of 1897, is a re-enactment of a prior law apparently first passed in 1837 (Laws N. Y. 1837, p. 388, c. 356) and again in 1866 (Laws N. Y. 1866, p. 836, c. 374). It is said by the exceptant, with apparent truth, that no record of the enforcement of these laws appears in the courts, which is a fact of some significance.

The two laws seem to be practically the same in their salient features, and I find no such distinction as the libellant seeks to point out. There does not seem to be any substantial difference between this and the *In-*

man-Tinker case. There it was said (pages 243, 244, 245, 94 U. S., 24 L. Ed. 118):

"Tonnage, in our law, is a vessel's 'internal cubical capacity in tons of one hundred cubic feet each, to be ascertained' in the manner prescribed by Congress. Act of May 6, 1864, c. 83, 13 Stat. 70-72; Rev. St. U. S. p. 804. § 4153 [U. S. Comp. St. 1901, p. 2812]. 'Tonnage duties are duties upon vessels in proportion to their capacity.' Bouv. Law Dict. 'Tonnage.'

The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: "Tonnage (*tonnagium*) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV. c. 3; 6 Hen. VIII. c. 14', &c. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself.

In this law of the State there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed."

\* \* \* \* \*

"The State, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the Constitution. In that particular the law is, therefore, void. This view is sustained by the rulings of this court in the State Tonnage Tax Cases, 12 Wall. 204, 20 L. Ed. 370, and Cannon v. New Orleans, 20 Wall. 577, 22 L. Ed. 417. See, also, Steamship Company v. Port Wardens, 6 Wall. 31, 18 L. Ed. 749, and Peete v. Morgan, 19 Wall. 581, 22 L. Ed. 201.

The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs."

The act provided for a vicious method of compensating a public officer. After the determination of that question by the Supreme Court, the Legislature of New York provided for a salary to the officers cut off from fees by the Inman-Tinker decision. A history of the subsequent legislation will be found described in *Cole v. The State of New York*, 102 N. Y. 48, 6 N. E. 277, by which it appears that a compensation allowed to such officers was approved by the Court of Appeals of New York as within the legislative powers.

I see no way of escaping from the conclusion that the act in question here should be deemed unconstitutional.

This obviates the necessity of considering the question of the jurisdiction of this court, urged by reason of the maritime nature of the services which are the subject of the action.

The exception is sustained and the libel dismissed, unless the libellant moves within ten days for an amendment.

## FULTON v. WILMINGTON STAR MIN. CO.

(Circuit Court of Appeals, Seventh Circuit. October 11, 1904.)

No. 1,045.

**1. MINING—LIABILITY FOR DEATH OF MINER—ILLINOIS STATUTE.**

Under the coal mine law of Illinois (Laws 1899, p. 325, § 33), which makes a mine owner liable in damages for any injury to person or property or for death "occasioned by any willful violation of this act or willful failure to comply with any of its provisions," as construed by the Supreme Court of the state, a knowing and intentional failure to comply with the requirements of the act is a "willful" failure within its meaning, and a wrongful or evil intent is not necessary to give a right of action thereunder for the death of a miner.

**2. SAME—CONTRIBUTORY NEGLIGENCE.**

Under the decision of the Supreme Court of the state contributory negligence is not a defense to an action against a mine owner to recover for the death of a miner under the coal mine law of Illinois (Laws 1899, p. 325, § 33), and such construction of the statute is binding on a federal court.

**3. SAME—LIABILITY OF OWNER FOR ACTS OF MANAGER.**

The provision of the coal mine law of Illinois (Laws 1899, pp. 308, 309, §§ 7, 8) requiring all mine managers to obtain certificates of competency from a state board of examiners, and prohibiting mine owners from employing any person as manager who does not hold such certificate, does not exempt mine owners from liability for the defaults of their managers, nor does such construction render it unconstitutional.

Jenkins, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

P. C. Pegler, for plaintiff in error.

Wm. P. Sidley and Holt, Wheeler & Sidley, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the court below was to recover compensation for the loss occasioned to the plaintiff in error, by the death of her husband, Samuel Fulton, killed by an explosion of gas, January 27th, 1901, in the mines belonging to the defendant in error. The action was brought originally in the Circuit Court of Grundy County, Illinois, but was removed to the United States Circuit Court by the defendant in error, a citizen of the State of Wisconsin, the plaintiff in error being a citizen of Illinois.

At the conclusion of the plaintiff in error's testimony, defendant in error moved for a verdict, and thereupon a verdict was, by direction of the court, entered for the defendant in error. To this ruling the plaintiff in error excepted; and on this is based the principal assignment of error.

The Wilmington Star Mining Company, at the time when Fulton lost his life, owned and operated two coal mines near Coal City, in Grundy County, Illinois. The explosion occurred in the mine known as "Mine No. 6." Into this mine two shafts extended, one used for hoisting purposes, and the other intended as an air shaft. From the bottom of the former, four roadways diverged east, west, north and south, each running to the face of the mine, where the coal was being

excavated. There were in all, six or eight rooms, along and at the end of these roadways, in which the work of excavation was going on.

Fulton lost his life on a Sunday. The mine was not, on that day, in operation, and had not been worked during the preceding night. Fulton had descended on this Sunday, with one Wilson, the company's mine manager, to put in some switch tracks in the west roadway. Other men, by the direction of Wilson, were in the mine also, to put in some air boxes in aid of ventilation.

Fulton and Wilson descended together. The fan shaft had not been operated since about half past four the preceding afternoon. Wilson undertook to start the fan; but there being no means to turn the necessary valve, except by the use of monkey wrench, and a monkey wrench not being in the mine, Wilson ascended for that implement, and then came back; Fulton in the meantime remaining at the foot of the shaft.

Wilson knew that when the fan was not in operation gas gathered in the mine. He testifies that having started the fan, he told Fulton not to hurry up—to take his time, and let the fan clear out the gas—after which he, Wilson, “would run up with the lamp, and see what it was like.” Having thus spoken, according to his evidence, Wilson went immediately into the south roadway, where the other men were at work, Fulton and one Schmitz proceeding to the point in the west roadway where Fulton's work was to be done. All at once, without warning, as Schmitz testifies, the explosion of gas occurred, Schmitz saving himself by throwing himself down, and covering his mouth with his hands. But Fulton was killed.

Plaintiff in error accepts Wilson's testimony to the extent that it shows that Wilson knew there was gas in the west roadway, but denies, and on the trial introduced evidence in our opinion tending to support such denial, that Wilson told Fulton to remain where he was. The insistence of plaintiff in error is, that the testimony of Schmitz taken by deposition, tended to show that Wilson ordered Fulton and Schmitz to go ahead, and not to wait. That testimony is as follows:

Edward Pierard's duty in the mine was to watch the gas, chase away the gas. I saw him go down that morning before I did.

Q. State whether Mr. Wilson, the mine manager, or Mr. Pierard, the fire boss, told you to wait and not go in the place where you were going with Sam Fulton with the car.

Objection by defendant as immaterial. Sustained. To which ruling of the Court, the plaintiff by her counsel then and there duly excepted.

Q. While you and Wilson and Fulton were at the bottom of the shaft before you pushed the car, did Mr. Wilson tell Fulton or you to wait until the gas was out?

Objected to by defendant as leading immaterial and incompetent on redirect examination. Objection sustained.

Q. What did Wilson say to Fulton? A. Boss no tell to wait, but told to go.

Q. State whether or not Wilson the boss said anything else to you and Fulton except to go?

Objection by defendant as immaterial.

Q. What statement, if any, was made to Fulton by Wilson?

A. Just tell me to go, that all.

Schmitz testifies further, that when he and Fulton started toward the west roadway, Wilson was so near the car, that Schmitz had to push him back with his hands, so the rails would not touch him.

It is not our province, on a record such as this, to determine whether Wilson told the whole truth, or only part of the truth—whether Wilson, knowing that under the circumstances gas would gather in the west roadway, asked Fulton to remain until the fan had removed it, or, spite of that knowledge, ordered Fulton into the roadway at once. That is a question of fact for the jury. The question for us to determine is, whether assuming that Wilson ordered Fulton into the roadway when he knew, or ought to have known that gas had gathered there, the defendant in error was, notwithstanding, entitled to a verdict.

The act of the General Assembly of the State of Illinois, in force July 1st, 1899 (Laws 1899, p. 317, § 19), providing for the health and safety of persons employed in coal mines, provides among other things that "Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan, or some other artificial means"; also,

"For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action should accrue to the party injured for any direct damages sustained thereby; and, in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of \$5,000." Laws 1899, p. 325, § 33.

Plaintiff in error's declaration counts upon this duty of defendant in error to maintain, throughout the mine, currents of fresh air; and avers, that in the case of Fulton, it was wilfully violated; whereby a right of action for the loss of his life accrued to the plaintiff in error.

In *Odin Coal Company v. Effie Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45, the Supreme Court of Illinois had occasion to construe the statute of 1889, and the meaning to be given to the word "wilful" as used in that statute. The case grew out of a coal miner having been killed by falling down a shaft at the top of which the company had failed to maintain a sufficient light, as required by the act. Construing the word "wilful" as used in the portion of the act giving a civil cause of action, the court said:

"The appellant company stood charged with knowledge of the provisions of the law, and with the duty of complying therewith. \* \* \* The omission was not through mere inadvertence, but was intentional. There was no evil intent operating to induce the failure, but that element is not a necessary ingredient of willfulness within the correct meaning of the word 'wilful' as employed in this statute. As used in criminal and penal statutes, the word wilful has frequently been interpreted to mean, not merely a voluntary act, but an act committed with evil intent, etc. The statute here involved is not a penal statute. The recovery awarded is not a penalty in the nature of a fine or a forfeiture, nor is it awarded as a punishment, but is confined by the express terms of Sec. 14 of said Chap. 93 to 'the direct damage sustained' by reason of the omission or failure of which complaint is made. Compensation for injuries inflicted—not punishment—is the ground of recovery. 'Willful' is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally as used in courts of law, implies nothing blamable, but merely, that the person of whose act or default the expression is used is a free agent and that what has been

done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. 29 Am. Eng. Ency. of Law, 113. An act *consciously* omitted is *willfully* omitted, in the meaning of the word 'willful' as used in these enactments of our legislature relative to the duty of mine owners. In *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131, we said (page 502, 181 Ill., page 134, 55 N. E.): 'Where an owner, operator or manager, so constructs or equips his mine, that he *knowingly* operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein.'

Following this interpretation of the act, it is plain that the question of fact in the case was, whether Wilson, mine manager for the company, directed Fulton to remain where he was until the gas had been blown out, or whether, conscious at the time that the current of fresh air required by the statute was not then being maintained, Wilson directed Fulton, notwithstanding such condition, to go into the west roadway of the mine.

Counsel for defendant in error insists (a) that assuming that Wilson gave the direction claimed, Fulton having knowledge himself of the presence of gas in the roadway, was guilty of contributory negligence—even a wilful violation of the statute—in obeying the direction of Wilson; and (b) the company was not liable for the negligence or default of Wilson, because under the statute, the company had no choice in the employment of mine masters, except from those who had first passed a satisfactory examination as provided in the act of 1899.

Contributory negligence on the part of the injured, as an exemption from what would otherwise be the liability of the employer for injury caused by his negligence, is a rule of the common law; but a rule within the competency of the legislature to change. No question is raised but that in all actions for personal injuries the legislature might, if it saw fit, remove by statute, contributory negligence as a defense.

The act of 1899 is an Illinois act that has been construed by the Illinois Supreme Court. Under the authority of *Carterville Coal Company v. Abbott*, 181 Ill. 496, 55 N. E. 131, the act was intended to create civil liability to which contributory negligence, upon the part of the injured, would not be a defense. We might not, were the case here one of first impression, take the same view of what the legislature meant; but we feel ourselves bound to follow the construction given the statute by the Supreme Court of the state. All question of contributory negligence is thus taken out of the case.

Paragraph (d) Section 7, of the act of 1899 (page 308) provides:

"For Mine Managers. Persons coming before the board for certificates of competency as mine managers must produce evidence satisfactory to the board that they are citizens of this State, at least twenty-four years of age, that they have had at least four years of practical mining experience, and that they are men of good repute and temperate habits; they must also submit to and satisfactorily pass such an examination as to their experience in mines and in the management of men, their knowledge of mine machinery and appliances, the use of surveying and other instruments, the properties of mine gases, the principles of ventilation and the specific duties and responsibilities of mine managers, as the board shall see fit to impose";

and paragraph (e) of Section 8 (page 309) provides:

"Unlawful to employ other than Certified Mine Managers. It shall be unlawful for the operator of any coal mine to employ, or suffer to serve, as

mine manager at his mine, any person who does not hold a certificate of competency issued by a duly authorized Board of Examiners of this State: **Provided, that whenever any exigency arises by which it is impossible for any operator to secure the immediate services of a certificated mine manager, he may place any trustworthy and experienced man, subject to the approval of the State inspector of the district, in charge of his mine, to act as temporary mine manager for a period not exceeding thirty days."**

Because the selection of a mine manager is thus restricted to a class of men who have passed an examination—cutting off from employment by the proprietor, the whole body of the population who otherwise would be eligible—it is urged upon us, either that the legislature meant to exempt the employer from liability for the defaults of such mine manager, or that the act, to the extent that it compels a selection from such class, at the same time holding the owner liable for defaults arising therefrom, is unconstitutional; and in this connection *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801; *Homer Ramsdell Company v. La Campagne Generale Trans-Atlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; *Crisp v. The United States, etc., Co.* (D. C.) 124 Fed. 748, and other cases, are cited. Some of these cases were under the pilotage laws, requiring that a ship nearing port, should take on the first pilot who hailed the vessel, or be liable for full compensation for such pilot. The ship master's choice was thus limited, not to a class, but to an individual. This difference creates a substantial distinction between those cases and the case under consideration.

The Pennsylvania cases we are unwilling to follow. The authority of Illinois is against them. *Consolidated Coal Company of St. Louis v. Frank Seniger*, 179 Ill. 370, 53 N. E. 733; *Riverton Coal Company v. John E. Shepherd*, 207 Ill. 395, 69 N. E. 921; as also the substantial considerations underlying the act. The Illinois act was passed under a mandate of the constitution of Illinois of 1870 (article 4, § 29), making it the duty of the legislature to pass laws for the protection of operative miners. It grew out of the public's wish that every precaution should be taken against the unusual hazards and dangers incident to the inhabitancy of mines. It was intended, and intended rightly, to protect with all known expedients, every person whose occupation required him to labor in these subterranean rooms and roadways.

The requirements imposed upon the owner are not unnecessarily numerous, strict, or otherwise burdensome. If it be not unreasonable, as certainly it is not, that mine inspectors, mine examiners, and mine managers be competent men, it is equally not unreasonable that they be able to prove by examinations as provided for, the possession of such competency. The restriction on the owner limits him, it is true, to selection from a class; but in practice, if the law be faithfully carried out, the class will include all the available men competent; so that, in its practical outcome, the act of 1899 simply requires that the owner's mine manager shall be a competent man, his competency to be determined according to standards fixed by the state authority; and within this area of proven competency—and the spirit of the common law gave no larger area—the owner is at liberty to employ and discharge as he chooses.



For the reason then that a question of fact, material to the issue and fairly presented by the evidence, was erroneously taken from the jury, the judgment below must be reversed.

JENKINS, Circuit Judge (dissenting). The cases of *Carruthers v. Sydebotham*, 4 Maule & S. 77, 85; *Homer Ramsdell Transportation Company v. La Compagnie Generale Trans-Atlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; *Crisp v. United States & Australasia S. S. Company* (D. C.) 124 Fed. 748; *Durkin v. Kingston Coal Company*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801; and *Williams v. Thacker Coal and Coke Company* (W. Va.) 30 S. E. 107, 40 L. R. A. 812—are distinguishable from the case in hand in this one respect: that by the terms of the statute laws there considered it was obligatory upon the master to employ the servant for whose act he was sought to be held liable, while here the obligation to employ a mine manager or boss is not rendered obligatory by the express terms of the statute. Is not, however, the distinction more imaginary than real? By the act in question the Legislature was dealing practically with a practical subject, the operation of mines, known of all men necessarily to require the aid of men and in divers service. Is it just to assert that the owner may himself serve as mine manager? The same argument would hold with respect to hoisting engineer and others engaged in service about the mine. The owner could not act in either capacity unless licensed by the state, subject to revocation at the discretion of the State Mining Board. The mine owner, whether individual or corporation, desiring to use the property, could not possibly do it without employment of servants in the different departments specified in this act. Practically, therefore, the act is an inhibition upon the owner to operate the property unless he employ men of the class selected for him and licensed by the state. If the master is to be held for the act of his servant, he should have free choice in the selection of that servant. Liability for omission of duty by the servant cannot rightfully be an incident of employment under compulsion. The principle of law that justly holds one liable for the act of his agent within the scope of his employment implies voluntary action upon the part of the master in engaging the agent, and unrestrained choice in his selection. Such unrestrained choice seems wanting here.

The mining cases cited differ from the one in hand in another respect. There the statute provided that for an injury occasioned by violation of the act, or failure to comply with any of its provisions by the mine foreman, a right of action should accrue to the party injured against the owner or operator; touching which provision the Supreme Court of Pennsylvania said:

"This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner, 'You cannot be trusted to manage your own business. Left to yourself you will not properly care for your own employes. We will determine what you shall do. In order to make it certain that our directions are obeyed we will set a mine foreman over your mines with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employes. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your

mines you shall pay for. If notwithstanding our certificate he turns out to be incompetent or untrustworthy you shall be responsible for his ignorance or negligence.' Under the operation of this statute the mine foreman represents the commonwealth. The state insists on his employment by the mine owner, and in the name of the police power turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him, but, if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is a civil responsibility without blame and for the fault of another. The same conclusion may be reached by another road. It has been long settled that a mining boss or foreman is a fellow servant with the other employes of the same master engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss. *Lehigh Valley Coal Company v. Jones*, 86 Pa. 432; *Delaware & Hudson Canal Co. v. Carroll*, 89 Pa. 374; *Waddell et al. v. Simoson and Wife*, 112 Pa. 567 [4 Atl. 725].

"The duty of the mine owner is to employ competent bosses or foremen to direct his operations. When he does this he discharges the full measure of his duty to his employes and he is not liable for an injury arising from the negligence of the foreman. *Waddell v. Simoson and Wife*, supra. A vice principal is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible because the duty is his own. As to the acts of the workmen and the manner in which they do their work, the duty of the employer is to employ persons who are reasonably competent to do the work assigned them, and, if he finds himself mistaken in regard to their competency, to discharge them when the mistake is discovered. But he is not responsible for the consequences of their negligence as these may affect each other. *Ross v. Walker*, 139 Pa. 42 [21 Atl. 157, 159, 23 Am. St. Rep. 166]. Now, the act of 1891 undertakes to reverse the settled law upon this subject, and declare that the employer shall be responsible for an injury to an employe resulting from the negligence of a fellow workman. Prior to the act of 1891 the man whose negligence caused the injury was alone liable to respond in damages. He might not always have property out of which a judgment could be collected, but the plaintiff must in any case take his chances of the solvency of the defendant against whom his cause of action lies. The act of 1891 undertakes to furnish a responsible defendant for the injured person to pursue. Passing over the head of the fellow servant at whose hands the injury was received, it fastens on the owner of the property on which the accident happened, and declares him to be the guilty person on whose head the consequences of the accident shall fall. To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory under heavy penalties by the same statute. Finally, we must remember that it is the negligence of this fellow servant whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: 'He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employes.' It then says in effect: 'If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence.' We have no doubt that so much, at least, of section 8 of article 17 of the act of 1891 [P. L. 207] as imposes liability on the mine owner for the failure of the foreman to comply with the provisions of the act which compels his employment and defines his duties is unconstitutional and void."

The statute here in question imposes unusual and divers duties, not alone upon the owner, but upon the hoisting engineer and the mine manager or boss. The specific duties of each are detailed with exactness and care, and differ in quality. Clearly the purpose and inevitable result of the act is to compel the owner in the employment of his men to employ servants, and only such as should be licensed by the state. The management of the mine is most effectually taken out of the hands of the owner and committed to officers created by the state; none others being suffered to serve, under penalty. At common law the master is not liable for the default of the mine manager or boss, except for the latter's failure to perform a duty committed to him by the master, and which the law imposed upon the master, and which could not be delegated to the exemption of liability. These many novel duties are imposed by the act upon the mine manager or boss, and not upon the master. Considering the subject of the statute, the many peculiar duties imposed upon these employés, and how effectually the management of the mine is withdrawn from the owner, it would require precise language to convince me that the Legislature designed to impose liability upon the master for the neglect of duty by the servant, which was, by the statute, imposed upon the servant. I find no such language in this statute. It provides that "for any injury to person or property occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured." I concede that the term "wilful," as here employed, means that the person charged knows what he is doing, and intends the act, and is a free agent, and that an act consciously omitted within the meaning of this statute is wilfully omitted. The act for which the defendant in error is sought to be charged was an omission by the mine manager or boss in the discharge of a duty imposed upon him by the statute, of which act the defendant in error had no knowledge and could not have been conscious. The servant had been licensed and certified by the state to be in every respect competent to perform the duty which the statute had created and imposed upon him. The master was compelled under penalty, if he employed any manager or boss in this mine, to employ one of the class so certified and licensed by the state. His duty to his employés in this regard was fully performed when he hired a person so certified and licensed. The statute does not in terms impose upon the master liability for such omission of duty by the servant. It is imposed upon the one who has wilfully failed to comply with the provisions of the act. The failure was in respect of a duty that neither by the common law nor by the statute in question was imposed upon the master. The liability by the statute is fixed upon him who has offended, who has been consciously derelict in duty, not upon him who has been compelled to employ the offender. I am unwilling to believe that the Legislature designed to impose such extraordinary liability. Thus, for illustration, by section 20d of the act (Laws 1899, p. 319) it is provided that "a miner who is about to explode a blast with a manufactured squib shall not shorten the match, saturate it with mineral oil nor ignite it except at the extreme end; he shall see that all persons are out of danger from the probable effects of such shot, and shall take measures to prevent any one approaching,

by shouting 'Fire' immediately before lighting the fuse." Will my brethren say that for failure of such duty by any one of the numerous miners employed, occasioning injury to a fellow servant, the owner is liable by this law? Has the whole doctrine of fellow servant and of master and servant been swept away by this statute; and is the master made a guarantor of the safety of all of his employes, and a warrantor of their acts? I think not. This action is under the statute, and not under the common law. It is to enforce the specific liability of the statute, and the cause must stand or fall according to the statute. I think the liability asserted is one imposed upon the offender, and not upon the master.

For the reasons stated I am constrained to dissent from the judgment of the court.

The judgment is reversed, and the cause remanded, with a direction to the court below to award a new trial.

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LANG et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 11, 1904.)

No. 1,064.

1. IMMIGRATION LAWS—PROSECUTIONS FOR VIOLATION—SAVING CLAUSE IN AMENDATORY ACT.

The provision of section 28 of the immigration act of March 3, 1903 (32 Stat. 1220, c. 1012 [U. S. Comp. St. Supp. 1903, p. 183]), that "nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act or any acts hereby amended, but such prosecution and other proceedings, criminal or civil, shall proceed as if this act had not been passed," is not limited in its application to prosecutions or proceedings which had been "begun" before the passage of the act, but applies to those thereafter begun under the old law, based on acts committed before its repeal or amendment.

2. CRIMINAL LAW—FEDERAL PROSECUTIONS—RULES OF EVIDENCE.

Questions relating to the admissibility of evidence in criminal prosecutions based on violations of the statutes of the United States are governed wholly by the general rules of law applicable to the conduct of trials, and not by the statutes or decisions of the particular state in which the court is sitting, except so far as the same may be persuasive.

3. SAME—IMPEACHMENT OF DEFENDANT AS WITNESS—FORMER IMPRISONMENT.

It is within the discretion of a trial court to permit a defendant in a criminal case, when on the stand as a witness, to be asked on cross-examination if he has not been confined in a state prison.

Jenkins, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

The plaintiffs in error were found guilty, December 8th, 1903, in the United States District Court, for the Northern District of Illinois, of violating section three of the act of March 3, 1875, c. 141, 18 Stat. 477 [U. S. Comp. St. 1901, p. 1286], which reads as follows:

"Sec. 3. That the importation into the United States of women for the purposes of prostitution is hereby forbidden and all contracts and agreements in relation thereto, made in advance or in pursuance of such illegal importation

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¶ 2. See Courts, vol. 13, Cent. Dig. § 908.

and purposes, are hereby declared void; and whoever shall knowingly and willfully import or cause any importation of women into the United States for the purposes of prostitution, or shall knowingly or willfully hold, or attempt to hold, any woman to such purpose, in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony, and on conviction thereof, shall be imprisoned not exceeding five years and pay a fine not exceeding \$5,000."

On March 3, 1903, the above section was repealed and superseded by the following section:

"Sec. 3. That the importation into the United States of any woman or *girl* for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or *girl* into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or *girl* for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding \$5,000." 32 Stat. 1214, c. 1012 [U. S. Comp. St. Supp. 1903, p. 172].

"Sec. 28. That nothing contained in this Act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing Act or any Acts hereby amended, but such prosecutions and other proceedings, criminal or civil, shall proceed as if this act had not been passed." 32 Stat. 1220, c. 1012 [U. S. Comp. St. Supp. 1903, p. 183].

Both were sentenced to the penitentiary at hard labor, Lang for the period of three years, and Lewis for the period of two years, and each to pay a fine of one hundred dollars and costs of suit. The petition in error is to reverse these judgments.

The assignment of errors is predicated, First on the court's refusal, at the close of the evidence, to instruct the jury to find the plaintiffs in error not guilty; Second, the admission of evidence on cross-examination of plaintiff in error Lang, bringing out the fact that defendant was at one time in the penitentiary at Trenton, New Jersey; the cross-examination on that subject, being as follows:

Mr. Bethea: Q. What were you doing at Trenton? A. I refuse to answer.

Q. Why do you refuse? A. I have got ground to refuse.

Q. Trenton, New Jersey, has a penitentiary, has it not?

Mr. Bachrach: I object on the ground that if the Government intends to try to prove a conviction for an infamous offense, the record of conviction would be the best evidence.

Mr. Bethea: We will prove it at the proper time. We have a right to show where this man was.

Mr. Bachrach: I object to it. They have no right to bring out indirectly what they cannot do directly.

The Court: He has a right to require the personal history of the witness, within the discretion of the Court.

Mr. Bachrach: But when it becomes perfectly apparent from what he states here, that the penitentiary is there at Trenton, that he wants the witness to admit that he has been in the penitentiary without proving such a conviction, that is one of the things that he must prove by the record.

The Court: Do you contend that he may not ask that question straight out?

M. Bachrach: Whether he has been in the penitentiary?

The Court: Yes.

Mr. Bachrach: Indeed I do. He has no right to ask that question. He may ask him if he has been convicted of a felony or infamous crime, but has no right to ask a man if he has been in the penitentiary.

Mr. Bethea: I have a right to show where he has been living all the time.

The Court: The objection will be sustained to that question.

Mr. Bethea: Q. How long were you in Trenton, New Jersey?

A. I can't remember exactly how long.

Q. Weren't you in the State Penitentiary during the time you were in Trenton, or most of it?

The Court: You may answer.

A. Yes, sir.

Mr. Bethea: Q. For what crime?

Objected to by the defendants, on the ground that the record of conviction of an infamous offense would be the best evidence. Which objection was overruled by the Court. To which ruling the defendants' counsel duly save an exception.

A. I had been tending bar in the saloon, and they claimed the house was an ill famed house.

Q. Weren't you convicted there of an infamous offense, the crime of importing prostitutes from a foreign country, the same crime as this? A. No, sir.

Q. Wasn't it for keeping a girl in a house of prostitution that was under age?

Objected to. Objection overruled.

A. No sir.

Mr. Bethea: What do you say the charge was?

Objected to upon the same ground,—that the record of conviction of an infamous offense would be the best evidence. Objection overruled by the Court. Defendants' counsel duly saved an exception.

A. The charge was for tending bar in a house of ill fame.

Third: In admitting testimony of correspondence by telegram and letter, between the agent of the Grand Trunk Railroad at Chicago, and the General Passenger Agent at Montreal; and Fourth: In entering judgment and sentencing the defendants upon a prosecution under a statute that had been repealed.

The further facts are stated in the opinion of the court.

Benjamin C. Bachrach, for plaintiffs in error.

S. H. Bethea, U. S. Dist. Atty.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). The act of March 3rd, 1875, c. 141, 18 Stat. 477 [U. S. Comp. St. 1901, p. 1286], under which plaintiffs in error were indicted, was superseded by the act of March 3rd, 1903, the third section of which reads as follows:

"Sec. 3. That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding \$5,000" (32 Stat. 1214, c. 1012 [U. S. Comp. St. Supp. 1903, p. 172]).

The twenty-eighth section of the act reads as follows:

"Sec. 28. That nothing contained in this Act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing Act or any Acts hereby amended, but such prosecutions and other proceedings, criminal or civil, shall proceed as if this act had not been passed" (32 Stat. 1220 [U. S. Comp. St. Supp. 1903, p. 183]);

and the thirty-sixth section reads as follows:

"That all acts and parts of acts, inconsistent with this act, are hereby repealed" (32 Stat. 1221 [U. S. Comp. St. Supp. 1903, p. 185]).

It may be doubted whether the third section of the act of 1903, reenacting in an enlarged way the third section of the act of 1875—both sections being unaffected by any repealing clause except the one above quoted—constitutes a remission of all penalties for violations of the earlier section committed before the passage of the act of 1903. On that question, however, we express no opinion.

It will be observed that section twenty-eight of the act of 1903, provides "that nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act or any acts hereby amended." The prosecution under review was commenced after the passage of that act. Counsel for plaintiffs in error would have us construe the twenty-eighth section as if it read that nothing contained in the acts should affect any prosecution or other proceeding, criminal or civil, already begun, under any existing act. To make good their point, they must convince us that the saving clause was intended to save only prosecutions then pending.

We do not thus interpret the saving clause. The word "begun" as here employed, is not the preterit of begin, expressing that verb in its past tense; it is, in our judgment, the past participle, performing solely the function of a connective—the verbal adjective, qualifying any prosecutions in mind, pending or future, its sole purpose being to show that such prosecution is one under the act of 1875.

It was not the purpose of Congress in the employment of the word "begun" in the connection here used, to provide that there should be no prosecutions under the old statute unless they had been already begun. Congress presumably, was looking to the future, as well as the past. It meant that in the matter of importations of this character, there should be no interim of non-criminality. The amendatory statute only enlarged and tightened the preceding statute. No prosecutions could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecutions begun under that statute, whether they were then pending, or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word "begun" is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought.

The other questions raised need little discussion. The verdict, in our judgment, is supported by sufficient evidence; the correspondence that passed between the agent at Chicago, and the agent at Montreal, was admissible as a part of the *res gestæ*—bearing on the fact of importation; and the cross-examination of Lang, as to his incarceration in the New Jersey penitentiary, was not carried beyond permissible limits.

Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as state statutes or decisions may be persuasive, to the statutes or decisions prevailing in the particular state where the court happens to sit; otherwise each state would have a substantial part in determining the manner in which the courts of the United States should enforce, not the law of the state, but the national laws.

Chief Justice Cooley, in *Clemens v. Conrad*, 19 Mich. 170, laid down the rule covering the cross-examinations of witnesses in relation to their conviction and incarceration for crime, as follows:

"The right to inquire of a witness on cross-examination whether he has not been indicted and convicted of a criminal offense, we regard as settled in this state by the case of *Wilbur v. Flood*, 16 Mich. 40 [93 Am. Dec. 203]. It is true that in that case the question was, whether the witness had been confined in state prison; not whether he had been convicted; but confinement in a state prison pre-supposes a conviction by authority of law, and to justify the one inquiry and not the other would only be to uphold a technical and at the same time point out an easy mode of evading it without in the least obviating the reasons on which it rests. We think the reason for requiring record evidence of conviction has very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight, that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule on this subject. *Priddle's Case*, Leach, C. L. 382; *King v. Edwards*, 4 T. R. 440; and for the reasons which were stated in *Wilbur v. Flood*."

The rule thus stated is reenforced by *Thompson on Trials*, § 458; *Greenleaf on Evidence* [16th Ed.] 461; *Notes to Taylor's Evidence*, vol. 3, p. 978, and the cases there cited, and many other cases at hand.

We are content to adopt this rule. It has done the plaintiff in error, in the case under review, no injustice; and if, in its application to the particular circumstances of future cases, any injustice be done, a correction thereof will follow under the right of a court of review to set aside the abuse of discretion by the trial court.

BAKER, Circuit Judge (concurring). Joining in the judgment of affirmance, and agreeing in substance with the reasons just now announced, I desire to consider further only one feature of the case.

If I were to concede that the interpretation is incorrect which says that "prosecutions begun" is an elliptical expression, that the ellipsis might have been filled by intersetting "which have already been," or "which may hereafter be," or "which have already been and may hereafter be," and that, in the absence of an expressed choice by Congress between the narrower, it is fair for the courts to assume that the broader, which includes both, was intended; and if I were further to concede that it is right (the object of all interpretation being to ascertain the legislative will) to apply the common-law canon of construction, which gives to the repeal of a penal statute the effect of forgiving the unconvicted, to a situation where Congress did not say that "the importation of women for the purposes of prostitution" shall no longer be an offense, but declared that hereafter "to import or to attempt to import women, or girls, for the purposes of prostitution," shall be an offense, nevertheless I should be unable to agree to the prisoners' discharge.

Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], enacted in 1871 (Act Feb. 25, 1871, c. 71, 16 Stat. 432), provides that:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."



Of course, one legislative body cannot tie the hands of its successors with respect to either subject-matter or method of subsequent legislation. But section 13, as I view it, evinces no such attempt. The Congress of 1871 was not addressing itself particularly to succeeding Congresses, but particularly to the courts. The courts are commanded by section 13 to treat a repealed statute as still remaining in force for punishment of violations thereof unless the courts shall find that the repealing act "expressly provides" that such repealed act shall not sustain any prosecution for its violation. The case of *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480, readily distinguishable from the present case in its facts, is useful here only as showing the Supreme Court's recognition (1) of what the common-law rule of construction was; (2) of the right of Congress to legislate upon the subject-matter of rules of construction; and (3) of the fact that Congress by the enactment of section 13 abrogated the common-law canon of interpretation, hereinabove stated, respecting the effect of a repeal.

If section 13 is in force in its entirety, it is the court's duty to apply the rule of interpretation therein laid down, and to treat the penal statute of 1875 as being alive for the purpose of sustaining every proper prosecution for the enforcement of its penalties, unless the amendatory and enlarging act of 1903 be found to contain an express provision for the forgiveness of the unconvicted. There is no pretense that the act of 1903 expressly so provides.

If section 13 is in force in its entirety, an argument along this line: The act of 1875 was superseded by the act of 1903; the effect of the supersession was to exempt all unconvicted violators of the act of 1875 from punishment unless Congress has provided for their prosecution; Congress in the act of 1903 has only provided that unconvicted violators against whom prosecutions were begun before March 3, 1903, may be punished; therefore unconvicted violators against whom prosecutions were begun after March 3, 1903, shall go free—is false, I think, because its keystone is the abrogated common-law rule of construction.

Has section 13 been repealed in whole or in part? That section furnished a complete enactment respecting one method of interpretation. Subsequent Congresses were left at liberty to legislate on that subject, as on every other within their constitutional right, and in any manner they might choose. They could amend or repeal the previous legislation. They could repeal it expressly or by implication, in whole or in part. No claim is made of an express repeal. No claim is made of a general repeal by implication. An argument is advanced, as I understand it, that section 13, has been partially repealed by implication (but only in its relation to the penal acts of 1875 and 1903) in this way: Section 13, in its application to the acts in question, provides that unconvicted violators of the act of 1875, against whom prosecutions were begun before March 3, 1903, may be punished, and also that unconvicted violators of the act of 1875 against whom prosecutions were begun since March 3, 1903, may be punished; the act of 1903 provides that unconvicted violators of the act of 1875 against whom prosecutions were begun before March 3, 1903, may be punished, but is silent respecting the fate of those unconvicted violators of the act

of 1875 against whom prosecutions had not been begun by March 3, 1903; therefore that part of the general law embodied in section 13 which by its terms would be applicable to the unconvicted violators of the act of 1875 against whom indictments were returned after March 3, 1903, has been impliedly repealed. And the maxim, "*Expressio unius est exclusio alterius*," is invoked as clinching the argument. It strikes me as a queer doctrine that silence should accomplish a repeal. It seems to me that, instead of adverting to the maxim quoted, which may properly be applied where one must choose between alternatives, attention should be given to those principles which declare that repeals by implication are not favored, that new legislation does not supersede the old by implication unless the new covers the whole subject of the old, and that the new may reaffirm (though reaffirmation is a needless work), amend, or supplant parts of the old without affecting the force and validity of those parts concerning which the new is silent. It is a forced and perverted interpretation, I think, which attributes to the Congress of 1903 the deliberate intention to pardon these offenders.

JENKINS, Circuit Judge (dissenting). The statute of the United States passed in 1871 (Rev. St. § 13 [U. S. Comp. St. 1901, p. 6]), provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

This, without doubt, prescribes a rule of construction to be applied to every subsequent act, in the absence of an expression of a different intent in such subsequent act. *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480. But as one Legislature cannot bind a subsequent Legislature to a particular mode of repeal, where the subsequent act contains a provision with reference to a prior act superseded by the new act, we must apply the recognized canons of construction to the language employed to ascertain the intent of the Congress.

By the act of March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1903, p. 172], the act of March 3, 1875, c. 141, 18 Stat. 477 [U. S. Comp. St. 1901, p. 1286], was undoubtedly repealed or superseded, and was no longer operative (*U. S. v. Tynen*, 78 U. S. 92, 20 L. Ed. 153; 32 Stat. 1221, § 36 [U. S. Comp. St. Supp. 1903, p. 185]), unless it remained in force for the purposes of prosecution for penalties incurred for violation of it by virtue of section 13 of the Revised Statutes. The new act, by section 28 (32 Stat. 1220 [U. S. Comp. St. Supp. 1903, p. 183]), provided:

"That nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act, or any acts hereby amended, but such prosecution and other proceeding, criminal or civil, shall proceed as if this act had not been passed."

What did the Congress mean by this provision? If nothing had been said, the old statute might have remained operative for the purpose of punishment of infraction of it, but the present act says that

it shall remain in force for the purposes of prosecutions, or other proceedings, begun under the act superseded. It limits the life of the superseded act to criminal or civil proceedings begun under that act; and so limited, under recognized canons of construction, it is clear that the Congress did not intend to save prosecutions which had not then been begun. "*Expressio unius est exclusio alterius*." If it were designed to save prosecutions not begun for offenses committed under the superseded act, as well as proceedings then begun, there was no necessity of speaking to the subject at all, for the general statute (Rev. St. § 13 [U. S. Comp. St. 1901, p. 6]) would have saved all prosecutions.

We are compelled to assume that the Congress understood this. We are compelled to assume that they spoke to a purpose. The natural import of the language used, as with deference I think, can bear no other construction than that the Congress intended to say what it expressly said should be saved, and nothing else. It is not permitted to the court to say that the Congress spoke unadvisedly or unwisely, nor should violence be done to recognized rules of construction to avoid supposed mischievous results, or supposed careless legislation. "*Ita lex scripta est*." The law has so spoken. The courts should follow and obey. If injury results the responsibility is upon the Legislature, not upon the court.

The case of *United States v. Reisinger*, supra, is relied upon by the government to sustain this prosecution, but is readily distinguishable from the case in hand. There the proviso to the act is to the effect that the rights of parties "shall not be abridged or affected as to contracts in pending cases," but there was no proviso with reference to criminal prosecution for offenses committed under the repealed act. The Supreme Court ruled that the question whether the prosecution of offenses was saved was determined by general statute (Rev. St. § 13 [U. S. Comp. St. 1901, p. 6]), and because the Legislature had not spoken in the new act to the question of offenses committed under the old act evidenced clearly an intention that with respect to that subject the general statute should control. The act saved contracts in pending causes, because there was no general statute of construction which would save them, and rights would have been lost by the repeal except for the proviso. The court recognized the general rule that the repeal of a penal statute acts as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after the repeal. The case of *State v. Showers*, 34 Kan. 269, 8 Pac. 474, is a case on all fours with the one in hand and contains an able, and, as I think, conclusive, argument in support of the position here assumed.

I fail to be impressed with the subtlety of grammar by which, as I think, the plain meaning of the language employed is distorted, and "prosecution begun" is held to mean a prosecution to be begun. Such interpretation does violence to that canon of construction which requires words of common use to be taken in their natural, plain, obvious, and ordinary significations, and imputes to the Congress a needless use of language, since, if it were designed to save prosecutions thereafter to be begun, it was unnecessary to speak to the subject at all, because, in the case of *United States v. Reis-*

inger, *supra* (decided 15 years before the present act, and with which we are bound to assume Congress was familiar), it was ruled that failure to speak to the question clearly indicated the intent that the general statute of construction (Rev. St. § 13 [U. S. Comp. St. 1901, p. 6]) should govern, and should be read into the act. That would result to save all prosecution under the former act, begun or to be begun. When, therefore, the Congress by the present act spoke to the subject, and saved prosecutions begun under the former act, the intent is clearly manifested to absolve for all offenses committed under the prior act, prosecutions for which had not then been begun.

The act for which the plaintiffs in error were convicted was done under the former act. No prosecution was commenced until after the enactment of the present statute. I think, therefore, that the prosecution cannot be maintained; and upon that ground I am constrained to dissent from the judgment of the court, without an expression of opinion upon the other questions considered.

The judgment will be affirmed.

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SHEA et al. v. NILIMA et al.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1904.)

No. 1,012.

1. MINING—PARTNERSHIP AGREEMENT FOR LOCATING CLAIMS—STATUTE OF FRAUDS.

An agreement between two or more persons to explore the public domain, and to locate a mining claim or claims for the joint benefit of the contracting parties, is not within the statute of frauds, and need not be in writing; and if, in pursuance of the agreement, one of the parties locates the claim in his own name, he holds the legal title to the interests of the others in trust for them.

2. PARTNERSHIP—EVIDENCE TO ESTABLISH—ORAL AGREEMENT.

In determining whether the relation between the parties to an oral agreement constitutes a partnership, their intention as disclosed by the nature and effect of the whole agreement and acts done thereunder must govern.

3. PLEADING—SUFFICIENCY OF COMPLAINT.

Where a complaint states the substantial facts which constitute a cause of action, or they can be inferred by reasonable intentment from the matters set forth, it will be held sufficient, in the absence of a motion to make it more definite and certain, notwithstanding imperfections of form or the omission of specific allegations.

4. EQUITY—QUESTIONS ARISING ON APPEAL—LACHES.

The defense of laches may be considered by an appellate court, although not made the subject of an assignment of error.

5. SAME—RIGHT OF RELIEF—LACHES.

A delay of from one to two years before commencing suit to recover an interest in a mining claim after complainant's right had been denied

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¶ 1. Mining partnerships, see note to *G. V. B. Min. Co. v. First Nat. Bank*. 35 C. C. A. 515.

¶ 2. See Partnership, vol. 38, Cent. Dig. § 3.

does not alone constitute such laches as will bar him of relief in equity, where it does not appear that the defendants have been prejudiced thereby.

#### 6. MINING CLAIMS—LOCATION BY ALIEN—VALIDITY.

The fact that a mining claim is located by an alien does not render the location illegal or void, but, at most, it is only voidable at the instance of the government; and a subsequent declaration of intention to become a citizen by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location or acquisition of the alien's interest, and validates the transaction.

#### 7. SAME—AGREEMENT BETWEEN ALIENS TO LOCATE CLAIMS—VALIDITY.

An agreement between two aliens to acquire or locate mining claims in Alaska for their joint benefit is not void; nor does the fact of their alienage prevent one, who subsequently declared his intention to become a citizen, from enforcing the contract by recovering his interest in a claim located in the name of the other pursuant to such agreement.

#### 8. PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

An order granting a preliminary injunction which merely keeps the property in litigation in statu quo will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

This is an appeal from an order of the court allowing an injunction pendente lite. The record contains over 589 pages of printed matter, and the briefs of counsel cover 222 pages, citing 250 or more authorities, upon which they rely. The testimony was all objected to by the respective counsel, and every thread thereof is elaborately discussed in the briefs. Upon all points there is a minute detail of every fact in the case, whether relevant or not. It has required considerable labor to digest the case, and so state it as to make the points raised by the appeal intelligible.

There are eight assignments of error, which read as follows: "(1) The court erred in making and entering said order granting said injunction, for the reason that the alleged contract of partnership sued on by plaintiffs is not in writing, and therefore void and invalid, under the provisions of sections 1044 and 1046 of chapter 101 of the Alaska Code of Civil Procedure, tit. 2 (31 Stat. 493). (2) \* \* \* Because plaintiffs' alleged partnership contract was entirely in parol, and is therefore void under the statute of frauds and said chapter 101. (3) \* \* \* Because it does not appear by the complaint and proofs made at the hearing that the plaintiffs are entitled to the relief demanded in their complaint as last amended, or any relief whatever. (4) \* \* \* Because it appears that, under the pleadings and proofs considered, that plaintiffs cannot recover, and the alleged contract on which this action is brought is void. (5) \* \* \* Because by the pleadings and proofs introduced in evidence at the hearing it appears that the plaintiffs are not entitled to any relief or judgment whatever. (6) \* \* \* Because it appears by the pleadings and proofs that defendants are entitled to judgment dismissing this action. (7) \* \* \* Because no probable cause was shown for the issuance of an injunction. (8) \* \* \* Because there was no competent or sufficient evidence of the partnership contract relied on by plaintiffs." These assignments do not reveal the innumerable points and objections raised by counsel in the discussion thereof.

The pleadings are numerous, frequent amendments having been made thereto. Appellants question the sufficiency of the evidence, and also claim that the amended, supplementary, and substituted complaint does not state facts sufficient to constitute a cause of action, and is therefore wholly inadequate to support the application for the injunction. It is, among other things, claimed that the theory deducible from the complaint is insufficient to warrant the application for an injunction; that the facts alleged in the complaint are insufficient to establish either the creation or existence of a

mining partnership or of a common-law partnership. The specific objections urged thereto are numerous. Some of them may be briefly stated as follows: (1) The particular date of the location of the claim is not stated; (2) the time of the existence of the partnership is limited to the year 1899, without any statement of facts that it was ever extended beyond that period; (3) that it states mere conclusions of law; (4) that no consideration for the partnership contract is alleged; (5) that it is not alleged that any partnership business was carried on between them prior to the location of the claim; (6) that it is not specifically alleged that there should be a sharing of profits and losses.

The facts as claimed by appellees, and set forth in their brief, are as follows: "Alfred Nilima and Johan P. Johansen were reindeer herders brought over from Norway by the United States government to Alaska. News of the finding of gold at Nome was brought to Eaton Station, District of Alaska. On or about the 20th day of March, 1899, Nilima and Johansen made a parol agreement that they would then and there become partners for the purpose of locating and operating mining property in the Nome Mining District, each to share with the other in whatever they found, and each putting an equal amount of capital into the partnership enterprise. After they had come to this understanding, they built a sled together, bought grub together, each paying half, and started together for Nome; each doing his share of pulling the sled, which contained their store of partnership property. When they reached Nome they were compelled to work separately, as they were both short of money, but they never abandoned the idea of prospecting together as soon as their circumstances would permit. Finally, on the 28th day of May, 1899, they went together to Glacier creek, and staked a claim, described as No. 1, above Snow Gulch, second tier of benches. There was only one claim staked for the two men that day, though they helped stake another claim for two other men who were with them. In the work of cutting stakes, prospecting for gold, marking out the lines, and setting up the stakes, both men did practically an equal amount of work. The location notice was signed by Johansen. The cost of recording the location notice was borne equally by Nilima and Johansen. The assessment work on the claim for the year 1900 was done by Nilima and his employé, Stenfjeld. Johansen, after gold was struck on an adjoining claim, repudiated the partnership right of Nilima to a half interest in the claim, and early in September, 1900, he refused to convey to Nilima his interest as a partner. Stenfjeld and some of the other appellees who derived title from Nilima began negotiations with appellants Erickson, Price, Guinan, and Soderberg about the sale of their interest in the claim. Negotiations with Stenfjeld et al. having ceased on July 25, 1901, Nilima et al. began suit against Johansen to establish their rights in the claim, and on the next day, July 26, 1901, a lis pendens was filed for record. On July 27, 1901, Johansen entered into a written contract to sell the claim to said appellants for \$6,000, and \$1,200 was then paid. The deed from Johansen to appellants, contemplated by the contract of sale above referred to, was not executed or recorded until September 26, 1901, and the balance of the purchase money, \$4,800, was then paid to Johansen. The appellees demanded to be let into possession of the claim, and the demand was refused by appellants. The property is a very rich gold-bearing placer mine, and when water is available it can be worked rapidly. A large amount of gold has already been taken from the ground, and the appellants could, if permitted, work out the entire claim in one or two seasons, after which the claim would be valueless."

Johansen died March 5, 1902. George A. Shea was thereafter appointed administrator of the estate, and substituted for Johansen as a defendant. Stenfjeld and Olson purchased an interest in the property from Nilima.

The appellees have made condensed extracts from the testimony of Nilima, which, upon an examination of the entire record, we find to be substantially correct, as follows: "A. We said that Otto Greiner and Thorulf Kjelsberg would keep the one claim, and we keep the other. Q. Which claim was to be owned by Greiner and Kjelsberg? A. The one that had Kjelsberg's notice on. Q. Where you say, 'That other claim was to belong to us,' who do you

mean by 'us'? A. To me and Johan Peter Johansen. Q. Was you acquainted with any other persons living on Snow Gulch at that time? A. Thorulf Kjelsberg. Q. Are you acquainted with Otto Greiner? A. Yes, sir. Yes; on the 29th day of May I knew Thorulf Kjelsberg and Otto Greiner. They came to number one together. Q. Who was Otto Greiner and Thorulf Kjelsberg talking to? A. To me and to Johan Peter Johansen. They had heard that somebody had staked claims on the other side of Glacier, and asked us if we wanted to go with them. They asked if we wanted to go with Thorulf Kjelsberg and Otto Greiner to stake. Q. Now, then, when you started to go to stake the claims, who all went along? A. I and Johan Peter Johansen, Otto Greiner, and Thorulf Kjelsberg. Q. After you got through staking the first claim that you have spoken of, then what did you do? A. We began on the other claim, the other claim that me and Johan Peter Johansen had. Q. In staking the second claim, who did the staking? A. Johan Peter Johansen and I and Thorulf Kjelsberg and Otto Greiner. Q. Did you put any notice on the second claim you located? A. Yes, sir. Q. Who wrote the notice? A. Thorulf Kjelsberg. Q. Who signed the notice? As locator? A. Johan Peter Johansen. We spoke that, if there is anything in these two claims, there is enough, and, if there is nothing, it would do no more good to have the whole hill staked. Thorulf Kjelsberg and Otto Greiner were to have the other claim. It was agreed that Thorulf Kjelsberg and Otto Greiner were to have the one claim, and Johan Peter Johansen and I was to have the other. That we had already agreed to that before. Q. Now, when Johansen first came to you at Eaton Station, and asked you to go to Nome with him, what did he say to you? A. He said that, whatever we staked in one or another's name, it should be one-half to each. He asked me that, if you wouldn't come with him to Nome—come with him as a partner to Nome. Q. What did you say in reply to said Johan Peter Johansen's request that you go to Nome with him on this business? A. I promised to go. Q. What was then done with reference to the matters concerning which you had been talking with Johansen? A. We started to get ready for the journey. We made a sled and bought provisions. We bought \$40 each, and we had some before. We made the sled ourselves, but we paid \$2.50 for irons for the runners. We went to the woods and chopped the trees. We pulled it [sled] ourselves. We had no deer or dogs. Johan Peter Johansen came to me and asked me if I wouldn't give him one and a quarter for my share for recording of the claim. Q. And what did you do? A. I gave one dollar and twenty-five cents—one-half of my share. Q. Who did you give it to? A. To my partner Johan Peter Johansen. I hired Ole Stenfeld. Q. What to do? A. Do the assessment work on the claim, and look after other things. Q. What claim? A. The one that my partner located was one; the same that my partner's location was on. Q. What do you mean by your partner's location? A. I mean that the claim that we staked with my partner. Q. Did you ever pay any money to any one for doing assessment work on the claim on Glacier creek for the year 1900? A. Yes, sir. Q. Who did you pay money to? A. Ole Oleson. Q. What was the usual fee charged in June, 1899, for recording a location notice? A. Two dollars and a half. I was working because I had interest in the claim. I employed a man to do our part of the work. Q. Why did you do this? A. I did the work so as to keep the claim for myself and Johan Peter Johansen. Q. Who did you employ for this purpose? A. Ole Stenfeld."

This general statement is deemed sufficient to present the legal questions raised by counsel.

R. R. Bigelow, J. W. Dorsey, R. M. F. Soto, James E. Fenton, N. Soderberg, and Ira D. Orton, for appellants.

Albert H. Elliott, John L. McGinn, and William T. Love, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). It will be our endeavor to confine the discussion in this case to as few points as possible, and at the same time to cover all material questions that have been properly raised and presented by counsel. It may be said generally that the evidence of Nilima, and the facts set forth in the amended, supplementary, and substituted complaint, make out at least a prima facie case on the part of the appellees; and, unless the legal objections raised thereto by appellants destroy the force and effect thereof, there is enough in the record to sustain the action of the court below in issuing the injunction. Some of the reasons which sustain this view will be hereafter referred to.

1. The agreement of partnership, as alleged and proven, does not fall within the character of contracts required by the Alaska Code to be in writing in order to be valid. The agreement does not come within the provisions of the statute of frauds. The rule is well settled that an agreement between two or more persons to explore the public domain, and discover and locate a mining claim or claims, for the joint benefit of the contracting parties, does not fall within the statute of frauds, and need not be in writing. If, in pursuance of the agreement, one of the parties locates the claim in his own name, he holds the legal title to the interests of the others in trust for them. *Murley v. Ennis*, 2 Colo. 300; *Hirbour v. Reeding*, 3 Mont. 15, 20, 23; *Meylette v. Brennan*, 20 Colo. 242, 38 Pac. 75; *Meagher v. Reed*, 14 Colo. 335, 351, 367, 24 Pac. 681, 9 L. R. A. 455; *Gore v. McBrayer*, 18 Cal. 582, 587; *Settembre v. Putnam*, 30 Cal. 490; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229; *Welland v. Huber*, 8 Nev. 203; 2 Lind. on Mines, § 797. This is not a partnership to deal in lands. It is alleged in the complaint to be a "prospecting and mining partnership." But it matters not what name is given to it by the parties; it must be left to the court to determine its general nature from the facts. Whether it is called a "contract," an "agreement," or a "partnership," the law steps in, and from the facts determines the rights of the respective parties thereunder. It will not be necessary to follow the counsel as to when or at what place the agreement was executed. In the very nature of the case, no independent argument can be based on the talk at Eaton Station. The entire steps taken by the parties must be considered. Whatever was done in furtherance of the common purpose, understanding, and agreement must be treated as an entire or continuous transaction, so far as their rights and obligations in respect to the enterprise are concerned. If by words, acts, and deeds they joined together in a common purpose, and agreed to share equally in the enterprise, they were, in a certain sense, partners, and such a partnership may be formed without any written articles between the parties. In determining whether the relation between the parties to an oral agreement constitutes a partnership, their intention, as is disclosed by the nature and effect of the whole agreement, and acts done thereunder, must govern. The mutual agreement between Nilima and Johansen was not, strictly speaking, a mining copartnership, in the full sense of that term, or an ordinary common-law partnership, or a "grubstake" agreement; and some of the principles of law announced in such cases are not specially applicable to the case in hand, and need not be discussed.



2. We are of opinion that the complaint states facts sufficient to constitute a cause of action in equity; that the objections urged thereto are more to the form than to the substance. Some of the objections made thereto are purely technical; others are based upon the theory of appellants that the suit was a mining copartnership, pure and simple; and others, that the existence of a partnership and date of location of the claim are uncertain. A motion to have made it more certain and definite would doubtless have been allowed.

In Pomeroy's Code Rem. (3d Ed.) § 549, the author said:

"The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective—such insufficiency pertaining, however, to the form rather than to the substance—the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment. \* \* \* If, instead of alleging the issuable facts, the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer."

Section 97 of the Alaska Code of Civil Procedure (31 Stat. 347) declares that:

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

3. It is claimed that appellees were guilty of laches in commencing and in prosecuting the suit. What are the facts? The complaint does not state the time when the Columbia claim (in controversy) was located, but it does show that it was located prior to August 20, 1900. Nilima and Johansen left Eaton Station in the spring of 1899. The complaint was filed July 25, 1901. It may have been within one year, and could not have been over two years, from the time of the location of the claim. The application for the injunction was made June 9, 1903. These facts as to time do not seem to bring the case within the rule of laches, and no question as to laches seems to have been urged in the court below. There is no assignment of error upon this point. It has, however, been held that the objection of laches may be taken without pleading the same as a defense. *Sullivan v. Railroad Co.*, 94 U. S. 806, 811, 24 L. Ed. 324; *Richards v. Mackall*, 124 U. S. 183, 187, 8 Sup. Ct. 437, 31 L. Ed. 396; *Penn Ins. Co. v. Austin*, 168 U. S. 685, 697, 18 Sup. Ct. 223, 42 L. Ed. 626. It may therefore be assumed that it may be considered without reference to the assignments of error. It is well settled that if the delay in the assertion of rights is not adequately explained, and if such circumstances have intervened in the condition of the adverse party as to render it unjust to them, a court of equity might afford relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. From the record in this case, it does not appear that the relative positions of Nilima and Johansen had in any way been changed to the prejudice of appellants by the delay. *Townsend v. Vanderwerker*, 160 U. S. 171, 186, 16 Sup.

Ct. 258, 40 L. Ed. 383; 18 Am. & Eng. Ency. L. (2d Ed.) 101, and authorities there cited. The suit was brought before Johansen's death, and appellants purchased the property from Johansen with knowledge of Nilima's equitable claims, and they ought not to be allowed to plead laches for a less time than prescribed by the statute of limitations. They were all, with the exception of R. L. Price, encouraging Johansen in his refusal to execute the deed of a one-half interest in the property to Nilima.

4. The next contention of appellants is that the contract in question was made between aliens, and cannot be enforced; it being claimed that the enforcement of the contract involves the violation of the statutes of the United States as to who can locate mining claims. If the contract between the parties was illegal, having for its object a violation of the law, it cannot be judicially enforced. 15 Am. & Eng. Ency. L. (2d Ed.) 935, and authorities there cited. The record shows that, at the time the Columbia claim was located, both Nilima and Johansen were aliens. It also shows that on April 28, 1900, Nilima, in the superior court of the city and county of San Francisco, Cal., in accordance with the provisions of law upon the subject, regularly declared his intention to become a citizen of the United States. At this date Johansen still recognized Nilima as his partner, and no intervening rights of others to the claim had accrued.

The statute of the United States provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase \* \* \* by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law." Rev. St. § 2319 [U. S. Comp. St. 1901, p. 1424].

The fact that a mining claim is located by an alien can only be taken advantage of by the government. The location is not illegal or void, but, at most, is only voidable by the act of the government. A subsequent declaration of intention by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location, or acquisition of the alien's interests therein, and validates the transaction. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 619, 3 L. Ed. 453; *Craig v. Radford*, 3 Wheat. 594, 599, 4 L. Ed. 467; *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332, 356, 6 L. Ed. 488; *Osterman v. Baldwin*, 6 Wall. 116, 122, 18 L. Ed. 730; *Manuel v. Wulff*, 152 U. S. 505, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; *St. Louis M. Co. v. Montana M. Co.*, 171 U. S. 650, 655, 19 Sup. Ct. 61, 43 L. Ed. 320; *McKinley M. Co. v. Alaska M. Co.*, 183 U. S. 563, 572, 22 Sup. Ct. 84, 46 L. Ed. 331; *Croesus M., M. & S. Co. v. Colorado L. & M. Co. (C. C.)* 19 Fed. 78, 82; *Billings v. Aspen M. & S. Co.*, 51 Fed. 338, 342, 2 C. C. A. 252; *Lone Jack M. Co. v. Megginson*, 82 Fed. 89, 93, 27 C. C. A. 63; *Tornanses v. Melsing*, 109 Fed. 710, 47 C. C. A. 596.

In *McKinley M. Co. v. Alaska M. Co.*, *supra*, the court said:

"The meaning of *Manuel v. Wulff* is that the location by an alien, and all the rights following from such location, are voidable, not void, and are free from attack by any one except the government."

In *Lone Jack M. Co. v. Megginson*, supra, this court said:

"But if the right of Hanley as a locator could now be brought in question upon the ground that he was an alien at the time when the location was made, we are of the opinion that his subsequent declaration of intention to become a citizen related back to the date of his location, and, in the absence of adverse rights attaching prior to the date of the actual declaration of intention, operated to validate the location."

The laws applicable to Alaska declare that aliens may acquire and hold lands. By the act of Congress of March 2, 1897, c. 363, 29 Stat. 618 [U. S. Comp. St. Supp. 1903, p. 336], which was in force at the time the agreement in question was made, aliens, or persons who shall become bona fide residents of the United States, were authorized to acquire title to lands or mining claims by purchase. There is nothing in these acts which in any manner attacks the validity of the agreement in question.

Under the views we have expressed, and the principles of law announced in the decisions we have cited, the agreement of the parties, the location of the claim, and the enforcement of Nilima's rights therein, were not and are not in violation of the law. The position of appellants upon these points cannot be sustained. Courts of equity will not declare illegal or void a contract or agreement to do that which the law does not prohibit, but in fact expressly admits.

5. In the consideration of the questions involved in this case, we have not lost sight of the fact that the appeal herein is taken from an order of the court allowing an injunction pendente lite; that in such cases it is not necessary to make such a complete and perfect showing as would entitle the applicant to full relief at the final hearing of the case upon its merits; that it is enough, if the court can find from the pleadings, the evidence, and affidavits in support thereof, a case which presents a proper subject for investigation in a court of equity. The court is then authorized to exercise its sound discretion in issuing an injunction. Especially is this true in a case like the one in hand, where the issuance of an injunction only keeps the property in statu quo during the litigation, until the final hearing. In all such cases appellate courts are not inclined to interfere unless it clearly appears that the court below abused its discretion. *Blount v. Société*, 53 Fed. 98, 101, 3 C. C. A. 455; *Workingmen's Amalgamated Council v. United States*, 57 Fed. 85, 6 C. C. A. 258; *Duplex P. P. Co. v. Campbell P. P. Co.*, 69 Fed. 250, 252, 16 C. C. A. 220; *Thompson v. Nelson*, 71 Fed. 339, 18 C. C. A. 137; 16 Am. & Eng. Ency. L. (2d Ed.) 345; 10 Ency. Pl. & Pr. 983-985, and authorities there cited; 2 High on Inj. § 1696.

We have purposely refrained from reviewing the evidence offered at the trial, or expressing any opinion as to the weight thereof. These are matters to be determined upon the final hearing.

Our conclusion is that the court below was authorized by the pleadings and the proofs, as shown by the record herein, to act in the premises, and that in granting the injunction it did not violate any established rule of law or principle of equity.

The order appealed from is affirmed, with costs.

## COPLAND et al. v. WALDRON.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1904.)

No. 1,058.

**1. APPEAL—OMISSION OF NECESSARY PARTY—AMENDMENT.**

Where an appeal was taken by two of three defendants, against whom a joint decree for a sum of money was rendered, and the record fails to show that the third defendant, who made default in the court below, was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, under Rev. St. § 1005 [U. S. Comp. St. 1901, p. 714], but is fatal to jurisdiction of the appeal.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

On motion of appellee to dismiss, and on appellants' motion for leave to amend appeal.

This is a libel in personam by C. W. Waldron against George H. Copland, George Morrill, and James Pirie. It is alleged in the libel that Copland, Morrill, and Pirie, as joint owners of the schooner Laurel, contracted with Waldron, among other things, to carry upon said schooner a certain cargo of merchandise from Puget Sound, state of Washington, to Golofnin Bay, or Nome, Alaska; that the cargo was furnished, accepted, and loaded on board; that the Laurel sailed and began her voyage, but that by reason of her unseaworthiness, known to the appellants when they entered into the contract, she failed to deliver the goods at the port of destination. The libel further avers that a considerable portion of the cargo was utterly lost, and that the remainder thereof was discharged upon the Colman Dock, in Seattle, where at the time of filing the libel it still remained. Copland and Morrill appeared, excepted, and answered; but Pirie, although served with process, did not appear, and his default was taken. The trial court, after receiving and considering evidence, rendered its decision in favor of the libellant. Waldron, and on September 23, 1903, made its decree "that the said C. W. Waldron, the above plaintiff, do have and recover of and from the defendants, George H. Copland, George Morrill, and James Pirie, in the sum of \$5,000," etc. This decree was entered on September 26, 1903. On March 7, 1904, Copland and Morrill filed their petition for an order allowing an appeal, together with their assignment of errors. On the same day an order allowing an appeal by Copland and Morrill was obtained by them, and on March 21, 1904, notice of appeal by Copland and Morrill was served and filed, and a bond on appeal given by the same parties. The record fails to disclose that James Pirie is in any way joined in the attempted appeal, and it nowhere appears that he was ever in any manner notified to join, or severed for failure or refusal to join after notice or at all. Before this cause came on for hearing, the appellee moved to dismiss the appeal attempted by Copland and Morrill, who, on their part, on May 6, 1904, made a counter-motion "for an order allowing amendment of the citation therein so as to include the name of James Pirie as a party to this appeal, or that the court direct a citation to be issued from the clerk's office of this court directing him (the said James Pirie) to appear in this court upon the hearing of this appeal." The motion to amend is based on the facts above stated, under the provisions of section 1005 of the Revised Statutes [U. S. Comp. St. 1901, p. 714], which reads as follows: "The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by

reference to the accompanying record, and in all other particulars of form: provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error."

S. D. King and G. Meade Emory (Frederick Bausman, of counsel), for appellants.

Charles Page, E. J. McCutchen, and Samuel Knight, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The motions herein made will be considered together. Appellants admit that the decree appealed from is joint, and that a joint decree should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court has the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.

We are of opinion that the facts of this case bring it within the rule announced by the Supreme Court in *Estis v. Trabue*, 128 U. S. 225, 229, 9 Sup. Ct. 58, 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression "& Co.," was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes [U. S. Comp. St. 1901, p. 714], the court said:

"But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their 'forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. \* \* \* It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. \* \* \* Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. \* \* \* It will then, of its own motion, dismiss the case, without awaiting the action of a party."

This case is directly in point. It is, however, argued that since the rendition of the decision the Supreme Court has changed its ruling, and accepted the views contended for by appellants; and our attention has been called to *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572, 10 Sup. Ct. 1063, 34 L. Ed. 539, which it is claimed is "strikingly illustrative" of their contention. The facts in that case were dissimilar from the case at bar. There Tolson recovered damages in the Supreme Court of the District of Columbia. The *Inland & Seaboard Coasting*

Company was the sole defendant therein, and gave an undertaking with four sureties, and took an appeal to the general term, where the court, in accordance with its rule in such cases, when it affirmed the judgment of the special term, also entered judgment against the sureties in the undertaking. The writ of error, having been sued out without mentioning the sureties, was dismissed. In moving to rescind the judgment of dismissal, the plaintiff in error argued that the judgments of the general term "were in fact and in law two judgments, and that the sureties were not parties to the tort suit." The court contented itself by a simple order granting the motion to rescind the dismissal, and allowed the writ of error to be amended so as to include the sureties. We are not prepared to say that in making this order there was necessarily any departure from the rule announced in *Estis v. Trabue*, and it is fair to presume that none was intended. Within five months after the decision in the Tolson Case the Supreme Court decided *Mason v. United States*, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 345, where a postmaster and his sureties were sued jointly for a breach of the bond, and he and a part of the sureties appeared and defended, the suit was abated as to one of the sureties, the others made default, and judgment of default was entered against them. The sureties who had appeared and defended the suit sued out a writ of error. A motion was made to amend the writ by adding the omitted parties, and the motion was denied.

*Walton v. Marietta Chair Co.*, 157 U. S. 342, 346, 15 Sup. Ct. 626, 39 L. Ed. 725, furnishes an illustration of the character of cases where amendments to the writ of error should be allowed under the provisions of section 1005 of the Revised Statutes. They are cases where "the statement of the title of the action or parties thereto in the writ is defective," or where the defect, whatever it be, "can be remedied by reference to the accompanying record." This is also made clear by reference to the language of the statute. This is not a case where the appeal is merely defective in form.

The truth is that the rule must be determined by the particular facts in each case as they arise. In the present case the record does not, as mentioned in the statement of facts, disclose that James Pirie, who was one of the three parties against whom the suit was brought to recover damages for breach of a joint contract, and against whom judgment was rendered, was in any manner joined in the appeal, or that he was ever notified to join, or severed for failure or refusal to join. These things must appear to give this court jurisdiction of the appeal. As was said by the court in *Inglehart v. Stansbury*, 151 U. S. 68, 72, 14 Sup. Ct. 237, 38 L. Ed. 76:

"This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter."

The motion to dismiss is granted, and the motion to amend denied.

**TAUSSIG v. ST. LOUIS VALLEY TRANSFER RY.**

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,059.

**1. RAILROADS—RIGHT OF EMINENT DOMAIN—ILLINOIS STATUTE.**

Hurd's Rev. St. Ill. 1889, c. 114, § 49, which authorizes any railroad company of the state having a terminus on any navigable river bordering on the state to own and operate water craft for the carriage across the river of passengers or property transported or to be transported over its lines, but provides that "no right shall exist under this act to condemn any real estate for landing for such water craft, or for any other purpose," does not deprive a railroad company organized under the general provisions of such chapter of the right given it thereby to condemn real estate for right of way and terminal purposes merely because its line terminates at the Mississippi river, and its engineer states that the purpose of the line is to there construct an incline and operate a ferry; there being nothing in the charter to show any corporate purpose to operate under said section 49, nor any evidence to show such an intention.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Charles W. Thomas, for plaintiff in error.

W. S. Forman and L. D. Turner, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The defendant in error, the St. Louis Valley Transfer Railway, is a corporation organized under the laws of the State of Illinois, authorized to construct, maintain, and operate, among other lines, a line of railroad from a point near the intersection of the Waterloo and East Carondelet Turnpike Road with the St. Louis Valley Railway, in a westerly direction to the Mississippi River. Also a branch beginning on Lot 23 of Prairie due Pont Commons, and running in a northwesterly direction to a point near Dupon on the St. Louis Valley Railway.

The case before us is a condemnation suit brought originally in the County Court of St. Clair County, Illinois, against the plaintiff in error, and others, all of them citizens of Missouri, and removed by them into the Circuit Court of the United States, for the Southern District of Illinois. The purpose of the case is to condemn a right of way across lands, belonging to the plaintiff in error and the others, and embraced within the survey and location of the road as authorized by the articles of its incorporation. The lands sought to be taken are in several lots, one bounding on the Mississippi River, and the others lying back from the river, and separated from the first by a public road.

It is not questioned that but for the testimony of the railroad's engineer, in the hearing in the Circuit Court, the railway company would be entitled to the decree of condemnation asked. The company is organized under chapter 114 of Hurd's Revised Statutes of Illinois of 1889, section 18 of which reads as follows:

"If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its incorporation, or

the transaction of its business, or for its depots, station buildings, machine and repair shops, or for right of way or any other lawful purpose connected with or necessary to the building, operating or running of said road, such corporation may acquire such title in the manner that may be now or hereafter provided for by any law of eminent domain."

The power of eminent domain provided applies, unquestionably, to lands lying on navigable waters, to which riparian rights may attach, as well as to lands lying away from such streams.

But on the hearing in the Circuit Court, one Jacobs, the railroad's engineer, was called by the company as a witness, who, after identifying a plat of the plan and place of location of the road, on cross-examination testified, as the bill of exceptions puts it, that "the purpose of this whole railroad as located by me, is to go to the Mississippi River and construct an incline and operate a ferry." It is upon this evidence, standing entirely alone, that plaintiff in error grounds his contention that the railway company is not entitled to an exercise of the right of eminent domain. The argument is that an act of the General Assembly, passed in 1877, to facilitate the carriage and transfer of passengers and property by railroad companies, takes away, under the circumstances stated, what would otherwise be the railway's rights. The portion of the act relied on, is as follows:

"That all railroad companies incorporated under the laws of this state, having a terminus upon any navigable river bordering on this State, shall have power to own for their own use any water craft necessary in carrying across such river any cars, property or passengers transported over their lines or transported over any railroad terminating on the opposite side of such river to be transported over their lines: Provided, that no right shall exist under this act to condemn any real estate for landing for such water craft, or for any other purpose. And this act shall only apply to such railroad companies as own the landing for such water craft: Provided also, that nothing in this act shall be held to impair any right or privilege granted any ferry company incorporated under the laws of this state; and that all the powers and rights herein granted said railroad companies shall be subject to whatever rights and privileges may have heretofore been granted to any ferry company in this state: and that nothing in this act shall prevent said railroad companies from being subject, in the use of such water craft to all laws of the state regulating ferries now in force or hereafter to be in force: and Provided further, that nothing in this act shall be held or constituted to authorize any railroad or railway company doing business under any charter granted by this State to consolidate with any railroad or railway company out of this state, so as to form one continuous line of railroad, or otherwise to alter, modify or repeal any provision of any such charter granted by this state: or to impair the rights of this state as now reserved to it in any such charter." Hurd's Rev. St. 1899, c. 114, § 49.

We cannot concur in this view. The testimony of the engineer must be taken as simply his view of the enterprise as a physical entity. It may very well have been true, that the enterprise, as a physical entity, contemplated a railroad to the river, to be operated in connection with a ferry across the river. But this would not necessarily, or even probably, delineate the corporate purposes of the railway company. It may have been intended that the railway thus terminating at the river should connect with a ferry already established—the ferry of some other road—or an independent ferry, or a ferry to be operated by a separate company to be organized by the same parties under a ferry charter. Nothing in the law, so far as we can see, prohibits any



such arrangement, and nothing in the evidence discloses that there was anything more in mind than to carry out some such arrangement. The corporate purpose of the railroad company is to be judged, not by what one of its engineers may have remarked, but by the corporate purposes as shown in its charter; and there is no corporate purpose thus disclosed that shows to us that the railroad is to operate under the act of 1877.

The judgment of the Circuit Court will be affirmed.

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YEE YUEN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. Oct. 3, 1904.)

No. 1,019.

1. CHINESE EXCLUSION—FAILURE TO PROCURE CERTIFICATE—EVIDENCE TO EXCUSE.

Evidence considered, and *held* insufficient to establish clearly that a Chinese laborer who testified that he was a resident of the United States on May 5, 1892, and who failed to procure a certificate of residence, was unable to do so "by reason of accident, sickness or other unavoidable cause," as required by the Chinese exclusion act of May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320], and a judgment ordering his deportation affirmed.

Appeal from the District Court of the United States for the Northern District of California.

Bell & Straus, for appellant.

Marshall B. Woodworth, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The principles announced by this court in *Tsoi Yui et al. v. United States* (C. C. A.) 129 Fed. 585, as to the right of Chinese defendants in cases of this character to take an appeal to this court from the decision of the District Court, have been affirmed by the Supreme Court. *United States, Petitioner*, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931. The appeals will be considered upon the facts presented in each case.

This appellant was arrested upon a warrant charging him with being a Chinese manual laborer within this district "without the certificate of residence required by the act of Congress entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892 (Act May 5, 1892, c. 60, 27 Stat. 25), and the act amendatory thereof approved November 3, 1893 (Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]), and the act of Congress approved April 29, 1902 (Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1891])." The entries from the commissioner's docket contained in the record in this case show that on September 29, 1903, ap-

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

pellant was brought before the commissioner, and was then "informed of the charge against him, and of his right to the aid of counsel"; and the cause was then set for hearing on October 1st at 10 a. m., and on motion of the United States attorney the cause was set for hearing at 2 p. m. of said day. The defendant was then sworn and examined, and testified as follows:

"The Commissioner: Q. Where were you born? A. In China. Q. When did you first come to the United States? A. In the fifth year of Kwong Sue. Q. What have you been doing since you came? A. Laundry. Q. Have you always been a laborer? A. Yes, sir. Q. Were you registered? A. No, sir; I was sick at the time of the registration. Q. Where were you? A. Here in San Francisco. The Commissioner: I order you deported."

This was all the testimony that was offered.

The commissioner held that appellant had not "clearly established that by reason of accident, sickness, or other unavoidable cause he has been unable to procure such certificate." Thereafter, on October 14, 1903, the case having been regularly brought before the District Court by an appeal from the commissioner's decision, appellant appeared by counsel, and asked leave to introduce additional testimony. This motion was denied. The case was then heard upon the record from said commissioner, and the court ordered "that the judgment of deportation by U. S. Commissioner E. H. Heacock be, and the same is hereby, affirmed," to which order the appellant then and there excepted. The appeal herein is taken from said judgment. Numerous assignments of error are made, all of which have been carefully examined.

Section 3 of the act of May 5, 1892, c. 60, under which appellant was arrested, provides "that any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]. In the amendatory act of November 3, 1893, c. 14, it is made the duty of the District Judge "to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness other than Chinese, that he was a resident of the United States on the fifth of May, eighteen hundred and ninety-two." 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]. The evidence given by appellant was insufficient to establish clearly that, by reason of sickness, appellant was unable to procure his certificate. There is nothing in the proceedings had before the commissioner or in the District Court showing that any of the steps taken were inconsistent with the treaty obligations between the United States and China of December 8, 1894 (28 Stat. 1210).

Appellant was not refused the assistance of counsel. He had the opportunity to employ counsel, and there was granted to him sufficient time for that purpose. When first brought before the commissioner he was, through an interpreter, fully informed of his rights in this regard.

He did not at the time of the hearing ask for any continuance in order to enable him to employ counsel. Moreover, when the cause came before the District Court, appellant was represented by counsel. It appears that a motion was then made to introduce additional testimony, but there is nothing in the record to show its nature or character. The facts, whatever they were, were presented to the court; and it is fair to presume, in the absence of any showing to the contrary, that the court did not err in refusing to reopen the case.

The appeal herein is without merit. The judgment of the District Court is affirmed.

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UNITED STATES v. COUGHANOUR.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,037.

1. APPEAL—REVIEW—ERRORS RENDERED HARMLESS BY VERDICT.

Where the jury, in an action by the United States to recover for timber alleged to have been unlawfully cut from public lands, found against the defendant on the defense pleaded by him that the timber was cut from mineral land not subject to entry except as such, and was lawfully taken as authorized by Act June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], and returned a verdict for plaintiff, but for the value of the timber as it stood instead of the value of the logs, any error in the admission of evidence as to the mineral character of the land or in giving or refusing instructions on that subject was without prejudice to plaintiff.

In Error to the Circuit Court of the United States for the District of Montana.

Marsden C. Burch, U. S. Atty., and R. V. Cozier, for the United States.

Fremont Wood and W. E. Borah, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brought an action against the defendant in error to recover the value of 702,533 feet of saw logs, alleged to be of the value of \$3.50 per thousand feet, and to have been cut by the defendant in error from timber growing upon certain described lands belonging to the United States, situate in three townships in the state of Idaho. The defendant in error answered, denying that he had unlawfully cut said timber, and alleging that it was cut by bona fide residents and citizens of Idaho upon lands which were unoccupied mineral lands of the United States, and not subject to entry under existing laws except for mineral entry, and that the timber so cut was to be manufactured into lumber to be used exclusively for building, agricultural, mining, and domestic purposes within the state and mining district in which it was cut, and that in cutting the same all lawful rules and regulations then in force promulgated by the Secretary of the Interior for the protection of the timber under the act of Congress of June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], were observed; and the defendant in error denied that the value of the timber was, before it was cut, of the value of more than 35 cents

per thousand feet. Upon these issues the case was tried, and the jury returned a verdict for the plaintiff in error, and assessed the damages in the sum of \$300. Upon the verdict, judgment was rendered for the plaintiff in error. The plaintiff in error, not content with this assessment of damages, brings the case before this court by writ of error to review certain alleged errors of the trial court in the admission of evidence and in giving and refusing certain instructions.

It is the contention of the plaintiff in error that the court erroneously admitted evidence to show the mineral character of the lands upon which the timber was cut and of the surrounding country, and that the court, by his instructions, permitted the jury to consider evidence of the mineral character of lands remote from the specified lands on which the timber was cut, and erroneously denied proffered instructions of the plaintiff in error relating to the same subject. The record, as it comes to us, precludes us from considering any of these questions. The complaint alleged that the value of the timber when cut was \$3.50 per thousand feet, and the plaintiff in error proved that that was the price which the defendant in error paid for the logs after they were cut. It was admitted that the total quantity so cut was, as alleged in the complaint, 702,533 feet. No evidence whatever was offered as to the value of the standing timber. The jury, by their verdict, found that the allegation of the answer that the timber was cut on mineral land not subject to entry except as such was not true, and from the amount of the verdict they must have found that the value of the standing timber was substantially as alleged in the answer, or about 40 cents per thousand feet. No error, therefore, if error there were, in the admission of evidence in regard to the mineral character of the land, or in instructing or refusing to instruct the jury on that subject, could have affected the verdict. If the jury found, as they must have found, that the timber was cut in good faith under the belief that it was being cut from mineral land, and in compliance with the law, they had the right to return a verdict that the defendant in error was an innocent trespasser thereon, and liable only for the value of the standing timber. *Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Gentry v. United States*, 101 Fed. 51, 41 C. C. A. 185; *United States v. Van Winkle*, 113 Fed. 903, 15 C. C. A. 533. None of the instructions so given or refused were addressed to the question of the bona fides of the defendant in error, nor is it perceived that they could in any way have affected the finding of the jury on that feature of the case.

**The judgment of the Circuit Court will be affirmed.**

## CORAM et al. v. INGERSOLL.

(Circuit Court of Appeals, First Circuit. November 16, 1904.)

No. 561.

## 1. APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

An order granting a preliminary injunction restraining the removal out of the jurisdiction of the court of property on which complainant claims a lien will not be disturbed by an appellate court where such removal might work irreparable injury to complainant, and the continuance of the injunction cannot seriously harm the defendants, unless it is entirely clear from the record that there is no equity in the bill.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 132 Fed. 168. See 127 Fed. 418.

Thaddeus D. Kenneson and Louis D. Brandeis (Larkin T. Trull and Frederick N. Wier, on the brief), for appellants.

Edgar N. Harwood and Hollis R. Bailey (John H. Hazelton, on the brief), for appellee.

Before COLT, Circuit Judge, and ALDRICH and HALE, District Judges.

PER CURIAM. Upon the threshold of this appeal from the injunction order we are met with two important considerations which cannot but affect the exercise of that discretion upon which the determination of motions for preliminary injunctions so largely turns: First, this case is practically ready for final hearing upon its merits; and, second, the vacating of the present order might result in irreparable injury to the appellee, while its continuance works comparatively little harm to the appellants. The whole effect of the injunction is simply to prevent the transfer beyond the jurisdiction of this court, pending a hearing upon the merits, of a fund on which the appellee claims to have a lien. In other words, the sole effect of the injunction is that matters remain in statu quo. If it were entirely clear upon the face of the papers that there is no equity in the bill, upon any aspect in which it may be viewed, it would be the duty of the court to vacate this restraining order; but, as we are not satisfied that such is the case, upon the appellants' own showing, it seems to be clearly our duty not to disturb the present condition of the parties.

We have no doubt of the reasonableness of the preliminary injunction. The injunction merely holds the fund in the custody of the administrator, where this proceeding finds it, until the rights of the parties may be established upon final hearing. We therefore upon this hearing decline to interfere with the injunction order below. In reaching this conclusion we neither express nor intimate in any way any opinion upon the merits of the case.

The injunction order entered in the Circuit Court on September 6, 1904, is affirmed, and the appellee recovers her costs of appeal.

## CHEW HING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,024.

## 1. CHINESE EXCLUSION—CLAIM OF CITIZENSHIP—SUFFICIENCY OF EVIDENCE.

The judgment of a District Court affirming an order of a commissioner for the deportation of a Chinese person against his claim that he was born in the United States, which was supported by the testimony of himself and two other Chinese witnesses, but was contradicted by a prior admission of defendant, *held* not reversible for error.

Appeal from the District Court of the United States for the Northern District of California.

See 129 Fed. 585.

Henry C. Dibble & Dibble, for appellant.

Duncan E. McKinlay, Asst. U. S. Atty. (Marshall B. Woodworth, U. S. Atty., of counsel).

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant was arrested on a warrant issued upon a complaint sworn to by an inspector of the Chinese bureau, charging him with being a Chinese manual laborer within the limits of the Northern District of California without the certificate of residence required by the act of Congress relating to the coming of Chinese persons into the United States [U. S. Comp. St. 1901, p. 1305]. Upon a hearing had before the United States commissioner that officer ordered the deportation of the appellant. From his order an appeal was taken to the United States District Court for the Northern District of California, and that court affirmed the order. From the judgment of that court the present appeal is taken.

It is assigned as error that the evidence shows that the appellant was born in the United States, and that the finding of the commissioner and the judgment of the District Court affirming the same are not sustained by the evidence. The testimony to sustain the appellant's contention that he was born in the United States consists of his own evidence and that of two other Chinese witnesses. It is contradicted, however, by the admission of the appellant, on a hearing had before the Chinese bureau shortly prior to the hearing before the commissioner, that he was born in China. The appellant attempted to overcome the force of this admission by saying that at the time when he testified he was "dazed with seasickness." But the commissioner was not satisfied with this explanation, or with the evidence tending to show that he was born in the United States. We cannot say that he erred in so regarding the testimony, or that the District Court erred in affirming his order.

The judgment of the District Court will be affirmed.

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

## I. B. KLEINART RUBBER CO. et al. v. STEIN et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,028.

## 1. PATENTS—INVENTION—STOCKING SUPPORTERS.

The Parramore patent, No. 629,391, for a stocking supporter consisting of duplicate suspension tapes and a single hanger adapted to be detachably fastened to a corset stud, is void for lack of patentable invention in view of the prior art, and especially of the Andrews patent, No. 550,551, which in mechanical means potentially adapted to secure the same result anticipated the Parramore device, in which the place of suspension was merely shifted from the side to the front of the corset.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

For opinion below, see 125 Fed. 19.

The suit was brought in the Circuit Court to restrain infringement of letters patent No. 629,391, issued July 25th, 1899, to Robert W. Parramore, for a Hose Supporter.

The patentee describes his invention as follows:

My invention relates to improvements in stocking-supporters of that class which are used in connection with corsets; and the object of the invention is to provide an improved construction especially designed to be connected with a stud or clasp of the corset, thus dispensing with the use of safety-pins and other attaching devices, which have been found injurious to the corset, and enabling a tight-fitting skirt to be clasped around the corset without hindrance from the hose-supporter.

Another object of the invention is to utilize the stocking-supporter as a means for reducing the prominence of the stomach, the supporter being connected with the corset at a point where the sections of the corset meet, the pull on the supporter serving to keep the corset down in front.

A further object of the invention is to provide means which may be used advantageously on corsets of large size and to construct the entire device in a simple and inexpensive manner.

With these ends in view the invention consists in the novel construction, arrangement, and adaptation of parts, which will be hereinafter fully described, and particularly pointed out in the claims.

To enable others skilled in the art to understand the invention, I have illustrated the same in the accompanying drawings, forming a part of this specification, and in which—

Figure 1 is a view illustrating the hose-supporter connected in operative relation to the clasp of a corset. Fig. 2 is an enlarged perspective view of the hanger detached from the corset and from the tapes of the hose-supporter. Fig. 3 is a vertical sectional view of the hanger. Fig. 4 is a detail view of the metallic hanger-piece.

The same numerals of reference are used to designate corresponding parts in each of the several figures of the drawings.

The hanger 5 of the stocking-supporter of my invention is a composite device consisting of a fabric body 6 and a metallic hanger-piece 7. This plate is stamped in a single piece from a metallic sheet, and it is curved or arched in order to provide a convex upper edge, from which may extend the means by which the hanger may be connected with the stud at the lower end of a corset-clasp. This hanger-piece is formed with an elongated loop or eye 8, which extends from the center of the upper convex edge thereof, and at its ends the hanger-piece is enlarged to form the ears 9. The body of the hanger consists of two pieces of fabric 10, cut to proper shape and dimensions, and a binding 11, which is stitched at 12 around the edges of the fabric body-pieces. The metallic hanger-piece is fitted in between the pieces of fabric which form the body and in a position to have the central loop or eye 8 protrude beyond the edges of the body, after which the binding 11 is fitted or applied to the layers

of fabric and the parts are united together by the stitches. To confine the hanger-piece against displacement within the layers of fabric, a row of stitches unites the fabric layers together within the inner concave edge of said hanger-plate, as at 13. The lower straight edges of the layers of fabric forming the body are united by the straight rows of stitches 14, and the eyelets 15 are attached to the ears of the hanger and to the layers of fabric.

My stocking-supporter employs a pair of suspension elastics or tapes 16, the upper ends of which are fitted between the layers of fabric forming the body, and said elastics or tapes are attached to the body by the stitches 14, which unite the lower edge of the fabric layers. The connecting tapes or elastics 17 are connected by the adjustable slides 18 to the suspension-elastics 16, so that the length of the suspension devices may be varied in a manner well understood by those skilled in the art. The connecting tapes or elastics 17 are each provided with the attaching-clasps 19, by which the stocking may be attached to the supporter.

The hanger is adapted to be fitted to the lowermost stud of the series of studs forming a part of the clasp on an ordinary corset, and in Fig. 1 of the drawings this stud is indicated by the numeral 20.

To use my improved hose-supporter, the eye or loop 8 of the hanger is fitted to the stud 20, after which the corset-clasp is closed over the eye or loop and connected to the stud, thereby attaching the hanger 5 to the corset in a manner to prevent the hanger from being disengaged accidentally from the corset. The slides 18 are adjusted properly on the suspension-elastics, and the clasps 19 are attached to the stockings.

The use of a supporter constructed in accordance with my invention entirely overcomes the necessity for attaching the supporting or suspension elastics 16 to the corset by means of safety-pins, clasps, or other devices, which have a tendency to injure the corset by pulling out of place and tearing the fabric of the corset.

The improved supporter has a hanger which takes up but very little room at the point where it is attached to the corset, so that the hanger may be connected to the best advantage to the clasp-stud, and at the same time the hanger is prevented by the corset-clasp from detachment accidentally from the corset. The improved hanger has a pliable fabric body which fits closely against the corset or the person, so that a tight-fitting skirt may be worn around the waist of the person.

The hanger forming the leading feature of my invention is simple in construction, and the metallic hanger-piece serves to strengthen and reinforce the fabric body of the hanger.

The entire device is simple and cheap in construction, easy of use and application, and can be manufactured very cheaply.

The employment of the eyelets 15 in the hanger of my improved stocking-supporter enables the hanger to be connected to studs especially provided on a corset of large size for the connection of the stocking-supporter to the corset, and at the same time these eyelets tend to strengthen the hanger, because they fasten the ends of the hanger-piece to the fabric body.

By reference to Fig. 1 it will be noted that the hanger is connected to the corset in a manner to lie outside of the overlapping section of the corset, and thus the hanger is made to press the meeting edges of the corset-sections together to further insure the snug fitting of the parts.

When the device is in position, the lower front end of the corset will be held close against the body, so that the skirt will fall gracefully from the waist of the wearer.

Although I have described that the metallic element of the hanger is made by stamping it from a piece of sheet metal, I do not strictly confine myself to this sheet-metal construction, because it is evident that the metallic element of the hanger may be made from a piece of wire which is bent to the proper shape.

It will be understood that by reason of the fact that the hanger is connected to the corset at the particular point claimed the pull on the tapes serves to keep the corset down in front, thereby greatly reducing the prominence of the stomach without causing any harmful results, as the pressure on the stomach is only when needed—i. e., when standing or walking.



Changes in the form, proportion, size, and the minor details of construction within the scope of the appended claims may be made by a skilled constructor without departing from the spirit or sacrificing the advantages of the invention.

Having thus fully described the invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A stocking-supporter consisting of the duplicate suspension tapes or elastics, and a single hanger to which the upper ends of the tapes or elastics are connected, said hanger being provided with an eye or loop adapted to be detachably engaged with the stud of a corset-clasp, substantially as described.

2. A stocking-supporter consisting of the duplicate stocking-engaged members, and means for permanently uniting the two members at their upper ends, said means being in the form of a hanger-piece which is adapted to be engaged with the corset at the point where the sections of the corset meet, substantially as described.

3. In a stocking-supporter, a means for connecting the suspension tapes or elastics to a corset consisting of a fabric body and a metallic hanger-piece which is united to said body, said hanger-piece having a central loop or eye which is prolonged or extended beyond the fabric body, and is adapted to be held on the stud of a corset-clasp by the eye thereof for the purposes described, substantially as set forth.

4. A stocking-supporter consisting of a hanger having the metallic hanger-plate provided with a central loop or eye and the ears at the ends of said plate and the fabric body having its layers united to the hanger-plate to inclose the latter, the eyelets secured to the ears of the hanger-plate and to the layers of said body, the suspension-elastics united to fabric body at the edge opposite the hanger-plate, and the connecting tapes or elastics connected adjustably to the suspension-elastics and provided with the clasps, substantially as described.

The device used by appellees, said to infringe appellants' patent, is, except in respect of the metallic hanger piece, practically a copy of the Parramore device. The hanger piece of the appellees' device has, instead of appellants' elongated loop, only an eye, and a slot used in connecting the fabric body therewith.

Appellees cited, in the Circuit Court, among other patents, No. 550,551, issued November 25th, 1895, to J. C. Andrews; patent No. 197,587, issued November 27th, 1877, to J. D. Baufield; patent No. 224,899, issued February 24th, 1880, to R. W. Gray; patent No. 369,678, issued September 13th, 1887, to A. J. Arthur and S. W. Gray; patent No. 606,064, issued June 21st, 1898, to N. W. Lennon, and patent No. 638,540, issued December 5th, 1899, to E. F. Young.

Testimony was also introduced intended to show prior use of the appellants' conception in New York, Brooklyn, and other places.

The Circuit Court held the patent invalid, and dismissed the bill, and from that decree this appeal is prosecuted.

The further facts are stated in the opinion of the court.

Edwin H. Brown, Louis C. Raegner, and Wm. O. Belt, for appellants.

George P. Fisher, Jr., for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court:

Whatever basis for the charge of infringement in this case the Parramore hose suspender may have, must be found in the claim that Parramore, for the first time, constructed a suspender that combined duplicate suspension tapes or elastics with a single hanger; such hanger being adapted to be hung on the stud of the corset clasp, but easily detachable therefrom. No decree for appellant could be based upon the introduction of the arched metallic plate providing a convex upper

edge, from which the hook that engages the corset stud extends; for a plate of that form is not used in appellee's device. No decree could be based upon the specified piecing together and seaming of the fabric to the hanger piece; for this was only a means adapted to the use of the arched plate. Besides, the appellee is not shown to have followed such seaming and piecing.

Whatever practical merit the Parramore suspender has, lies in the fact that, as an entirety, it enables the wearer to suspend her stockings to the lower stud of her corset, whereby, when walking, the suspender has a tendency to press in the stomach, but when sitting, is free from tension, thus becoming a help to what is known as a straight front. Another merit is that the suspender closely fits the figure of the wearer, thus allowing garments to fall over it, easily and gracefully, and without the disfigurement produced by the use of safety pins. Whatever patentable character the alleged invention has, must be found, then, in the fact that Parramore was the first person who has adapted to this new desideratum the precise mechanical means that would carry it out.

The difficulty, however, with appellants' case is, that all these advantages named are potentially present, at least, in the Andrews and other prior patents; and that all the mechanical means to effectuate them are embodied in the prior patents cited. The manifestness of this is so far recognized by counsel for appellant, that their chief argument to obviate its effect upon the fortunes of the case is, that though the Andrews and other patents, potentially anticipate the Parramore patent, the supporters described therein require readaptation to fit them to the uses to which the Parramore patent is put.

The Andrews patent was a side hose supporter. The readaptation referred to, is its transference from the side to the front; as also the shortening of the suspenders made necessary by the fact that the distance from the corset stud, to the hose in the front, is less than the distance from the corset, where side suspenders are fastened, to the hose.

We cannot bring ourselves to the conclusion that a shortening of the suspenders, so as to adapt them to the shorter line to be traversed, is patentable invention. Such shortening would suggest itself, it seems to us, to any wearer who had occasion, for any reason whatever, to transfer the suspenders from side to front.

Nor can we bring ourselves to the conclusion that the mere transfer of the hanging point of the suspender, from the side of the corset to its front, is patentable invention. Straight fronts, in the figure of women, having come into vogue, it appears to us to have been but the ordinary and natural exercise of common sense, to have brought the hose supporter from the side to the front. Patentability cannot be decreed to every little shift that a woman may make in the arrangement of her garments, or the location of the means through which such arrangements are effected.

Parramore v. Taylor—decided in the Circuit Court of Appeals for the Second Circuit—114 Fed. 97, 52 C. C. A. 45, it is true, sustained the Parramore patent. But that case was decided on a record from which the court found, as a fact, that the Parramore patent was the first to describe a complete detachable device that sustained both stockings

from a single existing point of support on the corset. The fact, as thus found, was the pivot on which that case turned. From the record before us we are unable to find that fact. Either the Andrews patent was not brought distinctly to the attention of that court; or for some other reason, the court failed to see, as it appears plain to us, that the Andrews patent, in mechanical means, adaptable to a detachable device that will sustain both stockings from a single point of support on the corset, is identical with the mechanical means employed by Parramore.

The decree of the Circuit Court is affirmed.

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HOLMES et al. v. KIRKPATRICK et al.

(Circuit Court of Appeals, Ninth Circuit. October 17, 1904.)

No. 1,042.

1. PATENTS—ACTION FOR INFRINGEMENT—EVIDENCE.

In an action for infringement of a patent, a written contract between the parties by which it was agreed that defendants might use the patented invention, subject to the payment of a royalty, if plaintiffs' right thereto should be established by the judgment of a court, was admissible in evidence, as tending to show that the use was by plaintiffs' consent, and was therefore not an infringement.

In Error to the Circuit Court of the United States for the Northern District of California.

John H. Miller and Stratton & Kaufman, for plaintiffs in error.

M. A. Wheaton, I. M. Kalloch, and W. H. Davis, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an action at law, instituted to recover damages for the alleged infringement of certain letters patent issued by the United States to the plaintiff in error Holmes, in which his co-plaintiff, Uhlig, subsequently acquired an interest. The action was originally brought against Paris Kilburn, P. J. Harney, and Rudolph Herold, Jr., then constituting the State Board of Harbor Commissioners; but their terms of office having expired after the bringing of the suit, and the present defendants in error having been appointed in their stead, the latter were duly substituted as defendants to the suit. The first trial of the action resulted in a verdict in favor of the plaintiffs in error for \$5,000 damages, upon which verdict judgment was given against the defendants to the action, by whom the case was brought here on writ of error, resulting in the reversal of the judgment and the remanding of the case for a new trial. Kilburn et al. v. Holmes et al., 121 Fed. 750, 58 C. C. A. 116. Upon its second trial in the court below, the jury impaneled in the cause returned a verdict for the defendants, under a peremptory instruction from the court based upon the former decision of this court. The latter was based upon the fol-

lowing written agreement entered into between the parties, which was introduced in evidence on the first trial without objection:

"This agreement, made and entered into this eighth day of October, 1900, between Paris Kilburn, P. J. Harney, and Rudolph Herold, Jr., comprising the Board of State Harbor Commissioners, the first party, and Howard C. Holmes and Carl Uhlig, of the city and county of San Francisco, State of California, the second parties, Witnesseth:

"That, whereas, the said second parties claim as the owners of certain United States letters patent, numbered 646,553, dated April 3, 1900, for certain improvements in the construction of wharves and like structures, the right to collect royalty from the said Board, and from the State of California, for the use of the methods set forth in the claims under said letters patent; and

"Whereas, the said first party is desirous of using certain of the methods set forth in the claims of said letters patent, and of constructing certain wharves and piers along the water or harbor front of the city and county of San Francisco, by the use of wooden cylinders and cylinder piers, and claims and asserts the right on its part to use the methods specified in said letters patent without any liability to the said second parties therefor—

"Now, therefore, it is agreed that the said Board may forthwith proceed to construct docks, piers or wharves along said harbor front and upon property within their jurisdiction, using any of the methods under said patent, or any part thereof, wherein wooden cylinders or cylinder piers are specified as a part thereof;

"That in consideration and in case of the use of the method specified in said letters patent said second parties upon their part will only make and assert as against the said Board of State Harbor Commissioners of the State of California a sum for royalty equal to ten (10) per cent. of the cost of construction of any such wharf or pier as may be so constructed.

"The term wharf or pier as herein employed as the basis for royalties is understood to include all cylinders, piers, caps, stringers, planking, fender-piles, fender-lines, in fact, everything except pavement on the wharf or piers or any structure that may be erected thereon.

"The parties hereto agree that the said second parties shall, upon the adoption of plans and specifications for any wharf or pier containing or including methods covered by the claims of said letters patent, forthwith institute an action against the said Board, in any court of competent jurisdiction, asserting their claims to said royalty of ten (10) per cent., and asking judgment against the said Board for the amount thereof. The parties agree that they will, as far as possible, determine upon the facts to be submitted to the court, but that in the event of the failure to agree upon any fact or facts, then the court shall determine the same by taking testimony as in other cases.

"Should the court in such action by final judgment determine that said Board is liable to said second parties for the royalty specified for its use of any of the methods included in said letters patent in any work so constructed, then it agrees that it will thereupon issue to said second parties a warrant or warrants for the amount so found to be due them by the final judgment or decision of such court, not to exceed ten (10) per cent. of the cost of said wharf, pier, bulkhead, or other work.

"That parties hereto agree that each shall have the right to present any claim or defense to said action, or in the same, or against the parties thereto, which they may have, except that said Board will not make the defense that it cannot be sued in a court of this State or of the United States.

"That said parties further agree that they will hold harmless the members of said Board from any individual liability to them, or for damages personally for the user of any of the methods specified in said letters patent, and also any contractors, materialmen, or others operating under said Board, for the construction of said wharves, piers, bulkhead, or other work, pursuant to said plans and specifications, but that their claim will be altogether against the said Board, and against the members composing the same in their official capacity.

"Said second parties further agree that they will make no claim for royalty or damages in addition to the said ten (10) per cent, in each case, either against the said Board, or against the State of California, for the user of any of the methods specified in said letters patent.

"It is, however, understood that should the first party, after the final determination of the action to be instituted as aforesaid, desire to commence any additional work using said letters patent, then and in that event the second parties shall not be limited in their claim for royalties or damages to any ten (10) or other per cent. upon the cost of such additional work.

"This agreement shall inure to the benefit of, and bind, the assignees, successors, and representatives of the parties hereto.

"In witness whereof, the said parties hereto have caused these presents to be executed, and the seal of said Board of State Harbor Commissioners to be attached thereto, and to be countersigned by its secretary, all at the city and county of San Francisco, the day and year first above written."

In disposing of the case on the first hearing, this court said:

"Under the pleadings it was incumbent upon the plaintiffs to show that there had been an unauthorized use by the defendants of the invention described in the patent sued on, but the evidence shows without any conflict that in the use of this invention the defendants acted with full consent of the plaintiffs, and under an agreement with them for the payment of a stipulated royalty for such use. It is true that under the agreement the payment of the royalty was to be contingent upon the final judgment of a court of competent jurisdiction, determining the liability of the Board of Harbor Commissioners to pay the same. But the fact that the payment was to be made upon a contingency does not affect the question. What was done by the defendants was done under the agreement and with the full consent of the plaintiffs. This conclusion renders the decision of the question of the implied license claimed by the defendants, and all other questions presented by the assignments of error, unnecessary."

On the second trial in the court below, the agreement of October 8, 1900, was offered in evidence by the defendants to the action, and was objected to by the plaintiffs on the ground that it was irrelevant, incompetent, and immaterial. The objections were overruled, and the paper admitted in evidence. It is earnestly insisted on behalf of the plaintiffs in error that that ruling was erroneous. We do not think so. The instrument certainly tended to show consent by the plaintiffs to the use by the defendants to the suit of the patented methods in the structures referred to in the pleadings. The effect of the agreement, which speaks for itself, and is not subject to alteration by parol, was another question, to be passed upon by the court after the introduction of the instrument; and its effect was passed upon and declared by this court in its former decision herein, which decision became the law of the case, and was properly followed by the court below on the last trial.

The judgment is affirmed.

## BROWN v. CRANE CO.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1904.)

No. 1,061.

## 1. PATENTS—ANTICIPATION—CORE-MAKING MACHINE.

The Grant patent, No. 513,998, for a core-making machine, is void for anticipation by prior machines for making tiles which were mechanically and functionally identical, and used in an art which is broadly analogous; both relating to the shaping of tubular bodies from earthy materials reduced by water to plastic and cohesive conditions, differing in degree only.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On final hearing appellant's bill to enjoin appellee's alleged infringement of letters patent No. 513,998, February 6, 1894, to Grant, assignor, was dismissed for want of equity. *Brown v. Crane Co.* (C. C.) 125 Fed. 34.

The patent is for a core-making machine. The claim alleged to have been infringed is the third, as follows: "(3) A core-making machine consisting of a hopper, F, located adjacent to and supplying material to a tube, D, having within it a worm, E, for forcing material out through the tube, D, an aperture, H, within said worm, and a wire, G, held in a fixed position, passing through said aperture, H, and terminating beyond the end of said worm, E, for the purpose of forming a hole in the body of the core for the escape of the gas."

Appellee, to sustain its contention that the machine of claim 3 was anticipated by the prior art, introduced 13 patents, including No. 25,687, October 4, 1859, to Tiffany; No. 37,112, December 9, 1862, to Sault; No. 62,914, March 12, 1867, to Woodecock; and No. 89,878, May 11, 1869, to McKenzie.

Walter H. Chamberlin, for appellant.

Thomas A. Banning, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Cores were made by hand from the beginning to the introduction of appellant's machine. The machines, as we understand, are not used to manufacture cores for sale, but are themselves sold to foundries to supersede therein the hand-making of the required cores. Down to 1903 appellant placed about 350. The advantages of the machine method are not questioned.

As early as 1859 Tiffany produced a tile-making machine, the description of which may be read upon appellant's claim 3 as follows:

"A tile-making machine consisting of a hopper, F, located adjacent to and supplying material to a tube, D, having within it a worm, E, for forcing material out through the tube, D, and a wire, G, held in a fixed position and terminating beyond the end of said worm, E, for the purpose of forming the hole in the body of the tile."

Neither Tiffany nor appellant's assignor specified the relative diameters of tube and wire. Some tiles have thicker walls and smaller internal diameters than others, but neither Tiffany nor another could claim invention in changing the relative diameters of tube and wire from those shown in Tiffany's drawings. Appellant's witnesses prove that appellant's machine makes holes in the cores larger than in hand-made cores, and that there is no fixed, required relation between in-

ternal and external diameters, except that the walls shall be thick enough not to cave in of their own weight. Tiles are formed of clay in a plastic, cohesive condition. Cores are formed of a mixture of sand and flour in a plastic, cohesive condition. The difference in plasticity and coherence is one of degree only.

The machines, as machines, combinations of moving mechanical parts adapted to receive and to apply motion to produce mechanical results, are identical, element for element, function for function.

Are the arts analogous? Broadly, both relate to the shaping of tubular bodies. More closely, both cores and tiles are made from earthy substances, reduced by water to plastic, coherent conditions, then given their tubular shapes, and then baked to hardness for use. If closer analogy were required, it seems to us that nothing short of identity would suffice.

As a patent cannot rightfully be granted merely for a new use of an old machine, it matters not whether the intuitive flash came 35 years or 35 minutes after the disclosure of the original invention.

GROSSCUP, Circuit Judge (concurring). Two facts are undisputed. The first of these relates to the difference of purpose between rubber hose and clay tile, on one hand, and appellant's core on the other; as also the difference between the character of material out of which, respectively, they are made, and upon which the machines are meant to operate. The second fact is the existence of a commercial demand, during a long period, for machine made cores—a demand that the appellant was the first to supply.

The purpose of rubber hose and clay tile is to carry off fluids or gases, gathered from sources external to the tubes themselves. The purpose of the perforation through appellant's core is to carry off gases generated in its own sands by the hot surrounding iron. Rubber hose and clay tile, therefore, are tubes proper, performing the function of tubes; while the perforation through the core is a drainage opening only.

The material out of which rubber hose and clay tile are made, is firm and cohesive. The inventor, contemplating a machine to act on such material, was not concerned with the inquiry whether the material would collapse, or how collapse could be prevented. On the other hand, the material, out of which cores are made, is a sharp sand intermixed with flour, cohesive to a very small degree, fragile, and subject to collapse on slight jar or vibration. It was due to this quality of the material, perhaps more than to anything else, that before appellant's invention, no cores were actually made except according to the clumsy molding process. Thus it appears, that though the product of the core machine, and the product of the rubber hose and clay tile machines, are in form alike, varying chiefly in the diameter of the interior opening; and though the machines themselves operate mechanically much the same; the end to be subserved, and the material to be worked upon, are essentially different. To the mind seeking a way to make a core machine, a problem was presented essentially different from the problem presented to the minds that previously created the rubber hose and clay tile machines.

When, then, the second undisputed fact is also borne in mind—that though a real commercial demand existed for machine made cores, none appeared up to the time of appellant's invention—the real merit of appellant's claim to invention is made clear, viz.: That dealing with a material previously supposed to be insusceptible to manufacture into cores by machines, appellant discovered that a practical, efficient core machine could, in fact, be made; going to the allied arts, not for the generative thought, but for the mechanical means of carrying out the thought. Does not this constitute patentable invention?

The constitutional basis of the patent laws is to promote the progress of the useful arts by giving to him who creates something new and useful a property in the thing created; and, as I look at it, the life germ of any creation is not so much the mechanical form in which it finally becomes embodied, as the flash of inspiration that, out of the darkness in which it lay concealed, first revealed its possibility. The possibility of a thing once seen, it is of no great moment that a ready mechanical means of bringing it into form is at hand; nor that the mechanical means used are similar to those employed before in the allied arts; nor that any mind would have seen the adaptability, mechanically, of what already existed to what was now, for the first time, about to exist. The true inquiry is, Did any one before, in creative imagination, actually see this new thing? Did it not require invention to discern, in the first instance, that the new thing was possible? Is it not invention to bring out of what to others seems chaos the form and feasibility of the new and useful thing?

Invention is not, in my judgment, confined to the concrete mechanical form into which an idea ultimately evolves. Invention is the idea itself, the burst of new thought, the discovery; and patentable invention is the conjunction of these with appropriate and efficient mechanical means. Confessedly, an old idea, carried out mechanically in a new form, is patentable invention. To my mind a new idea, carried out mechanically in an old form, ought equally be regarded as patentable invention. To hold otherwise is to dethrone the head and enthrone the hands—to leave genuine genius unrecompensed, while placing the inventor's crown on mechanical skill.

But there is authority for the conclusion reached by the court, notably the recent case of *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689, and, expressing my dissent on principle, I am compelled to follow that authority, and concur in the judgment reached.

**The decree is affirmed.**



## SAWYER SPINDLE CO. OF MAINE v. CARPENTER.

(Circuit Court, D. Rhode Island. November 1, 1904.)

No. 2,638.

## 1. PATENTS—TERM—EXPIRATION OF PRIOR FOREIGN PATENT.

The amendment of Rev. St. § 4887, by Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1903, p. 405], is not retroactive, and did not revive a patent which had previously expired under the section as it stood before amendment, by reason of the expiration of a prior foreign patent for the same invention.

## 2. SAME—IDENTITY OF INVENTION—DIFFERENCE IN BREADTH OF CLAIMS.

A foreign patent and a subsequent American patent are not for different inventions because the latter contains a more generic claim, which covers the specific form of device described in the former, and other forms as well; and on the expiration of the foreign patent the specific invention claimed therein cannot be held to infringe the broader claim of the American patent, which to that extent, at least, expired with the foreign patent, by virtue of Rev. St. § 4887, where the patents were granted before the amendment of such section by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382].

## 3. SAME—AUTHORITY FROM INVENTOR TO OBTAIN FOREIGN PATENT—EVIDENCE.

To bring a patent within the provision of Rev. St. § 4887, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," the party alleging such expiration has the burden of proving that the foreign patent was obtained by the American patentee or with his consent. *Quære*, whether evidence that it was obtained by another, to whom the American patentee communicated the invention, as shown by the application for his foreign patent, is sufficient to show *prima facie* that such person was authorized to procure a patent.

In Equity. Suit for infringement of letters patent No. 363,425, for a spindle support for spinning machines, granted to Albert R. Sherman May 24, 1887.

Richardson, Herrick & Neave, A. K. Richardson, and J. L. Stackpole, for complainant.

Causten Browne and James M. Morton, Jr., for defendant.

BROWN, District Judge. Letters patent No. 363,425, for a spindle support for spinning machines, issued May 24, 1887, on the application of Albert R. Sherman, filed July 3, 1882. The defendant contends that this patent expired in 1897, through a limitation of its term by a British patent to Alexander Melville Clark, dated May 19, 1883 (No. 2,510), for an invention "communicated to him from abroad by Albert Read Sherman." To meet this ground of defense, the complainant contends that the act of Congress of March 3, 1903, c. 1019, 32 Stat. 1225, 1226 [U. S. Comp. St. Supp. 1903, pp. 405, 406], prevents the expiration of the patent in suit, even if it is for the same invention patented by the British patent to Clark. It is argued that this is a remedial statute, and that, from its date, no matter what evidence may be brought before the court as to the patentee's having procured a foreign patent, the court shall not declare any patent invalid on account of a foreign patent unless the application for the United States patent was more than twelve months later than the application for the foreign pat-

ent; that the Sherman patent in suit was applied for before the British patent, and therefore cannot be limited thereby. To declare a patent invalid, and to declare that a patent was only for a term of less than seventeen years, are, however, two different things.

Section 4887, Rev. St., before the amendments of 1897 and 1903, read as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

Clearly the phrase "nor shall any patent be declared invalid" did not, in this statute, include a declaration or judgment of a limitation of the term of a patent. In the Telephone Cases, 126 U. S. 572, 8 Sup. Ct. 802, 31 L. Ed. 863, it was said:

"In our opinion, it has been settled by the decision of this court in *O'Reilly v. Morse*, 15 How. 62, 112, 14 L. Ed. 601, and impliedly by that in *Siemens v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153, \* \* \* that the effect of section 4887 of the Revised Statutes is not to render invalid an American patent which does not bear the same date as a foreign patent for the same invention, but only to limit its term."

In *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 43, 15 Sup. Ct. 508, 519, 39 L. Ed. 601, it was said:

"If he obtains foreign patents for his invention before obtaining one here, the American patent is limited by law, whether it is so expressed or not in the patent itself, to expire with the foreign patent having the shortest term."

The defendant makes no contention that the patent in suit was invalid, but contends that, by reason of the existence of the British patent, the term of the American patent was limited, under the law. The phrase "nor shall any patent be declared invalid" was not enlarged in meaning by the act of March 3, 1897, c. 391, § 3, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382]. Section 8 of the amendatory act [U. S. Comp. St. 1901, p. 3385] provided, also, that the section as amended should not apply to a patent granted prior to January 1, 1898, etc. Therefore it appears that, under the law as it existed at the date of the application for the patent in suit, and at the date of the expiration of the British patent, the patent in suit was for a term less than seventeen years. Assuming that the British patent was for the same invention, and was procured by authority of Sherman, it had run its term and expired in 1897. Do we find in the amendatory legislation any intention to revive patents that had previously expired by limitation? Certainly not in the amendment of 1897, but, on the contrary, an express intention to the contrary.

It is argued, in effect, that we may find in the act of 1903 an intention of Congress to revive a patent which had been legally dead for about six years. The question of the constitutional power of Congress to enact retroactive statutes concerning patents has been argued, but is immaterial. Statutes are construed to operate prospectively only,

unless the contrary intention is manifest beyond a reasonable doubt. *City of Shreveport v. Cole*, 129 U. S. 36, 43, 9 Sup. Ct. 210, 32 L. Ed. 589. The amendments of March 3, 1903, so far as I can see, contain no indication of an intention to revive expired patents, or to give to the phrase "nor shall any patent be declared invalid" a meaning broader than before. The act of 1903, in my opinion, does not forbid the limitation of the patent in suit by the term of the British patent to Clark.

The defendant contends also that the invention of claim 5 of the patent in suit was not patented by the British patent. It is conceded that the first four claims of the patent in suit and of the British patent are substantially identical, and that the inventions covered thereby are the same. The defendant argues that, though the patent in suit may have expired as to four of its claims, it may still exist as a valid patent for the invention of the fifth claim; citing *Aquarama Co. v. Old Mill Co.* (C. C.) 124 Fed. 229. I do not find, however, in the opinion in that case, any reference to *Siemens v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153, where a similar contention was made (page 280, 123 U. S., page 117, 8 Sup. Ct., 31 L. Ed. 153). The court said (page 283, 123 U. S., page 119, 8 Sup. Ct., 31 L. Ed. 153):

"A patent cannot be exempted from the operation of the law by adding some new improvements to the invention, and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion."

But assuming, for the argument only, that a patent may be limited in term by a foreign patent as to some of its claims, and not as to others—that it may expire in part and survive in part—it would still seem impossible that a single claim should in part expire and in part survive. Where the difference between two claims is merely in breadth, the first being a specific claim for a particular embodiment of an invention, and the second being a generic claim which covers the specific form of the first claim, and other forms as well, it follows, upon the expiration of the species claim, that the specific invention claimed therein can no longer be held to infringe the patent, and that the generic claim has expired in part at least. Two patents and two claims may be regarded as for the same invention, though one claims only a special machine, and the other claims broadly a genus which includes the former. *Otis Elevator Co. v. The Portland Co.*, 127 Fed. 557, 62 C. C. A. 339; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Robinson on Patents*, §§ 464, 465, vol. 2, p. 45. When this is the case, though the American claim may be broader than that of the prior British patent, it is still true that what is claimed under the generic claim has already been patented in a foreign country. I can see no reason why the rules which are applied to determine the question of double patenting when United States Patents are involved are not also applicable when the question is whether the invention has been first patented in a foreign country. What is the distinction between claim 5 of the patent in suit and claim 3 of the British patent? It is not denied that the invention of claim 3 of the British patent would infringe claim 5 of the American patent in suit. Complainant's brief says:

"A structure which would infringe Sherman's fifth claim in suit would not infringe the British patent. In other words, the invention patented in the fifth claim is not patented at all by the English patent."

This statement cannot be accepted. A structure which would infringe Sherman's fifth claim might or might not infringe claim 3 of the British patent, or claim 3 of the patent in suit. The distinction between the claims is merely one of breadth. The complainant's brief says:

"The fifth claim does not require, as do the other four claims, that the bolster should be 'fitted loosely within the bolster-case throughout its length.'"

This is pointed out as the vital distinction. It is said that the peripherally loose bearing was left out of the fifth claim "because his invention of the lock between bolster and bolster-tube could equally be embodied with any detached bolster whose foot could move with the spindle." In other words, it is essential only that the foot of the bolster move with the spindle. This, however, is essential to both claim 3 and claim 5. A bolster fitted loosely throughout its length has a looseness at the foot, and also a looseness at the band-pull. Irrespective of the latter feature, the invention of claim 3 embodies a bolster moving at its foot, and restrained from rotation by a pin connecting it with the bolster-case. The limiting words do not take out of claim 3 any of the essential elements of claim 5.

The case stands thus: Claim 5 covers claim 3, and more. The relation is that of inclusion. The particulars in which the structures of claim 3 and claim 5 are identical are looseness at the foot, with a connection to prevent rotation with the spindle. The difference is that in claim 3 is required also a looseness throughout the length, which is nonessential to the Sherman invention, as claimed in claim 5, if we construe that claim as broadly as the complainant desires. The structure of claim 3 is free, the patent having expired as to this. The defendant's structure has looseness of the bolster throughout the whole length. It would infringe both claim 5 and claim 3. It is distinguishable from the invention of claim 5 exactly as the structure of claim 3 is distinguishable. How can a structure which has the limitation of claim 3—the sole feature upon which claim 5 is distinguishable—be still covered by the generic claim 5? It is clear that a large part of the contents of the verbal expression "claim 5" has been patented in England under claim 3, and is free.

The only contention left for the complainant is that such part of the contents of this generic claim as has not been protected by the specific claim should still be protected by the patent. Disregarding the inconvenience of allowing a patent to expire in sections, part at one date and part at another, and the greater inconvenience of allowing a single claim to expire in part and to survive in part as a limited claim, and adopting this view, we should then arrive at the conclusion that the defendant's device was within only that part of the generic claim that had expired, and not within the part that had survived. Claim 5 and claim 3 are not, in my opinion, claims for separable subject-matter, and the invention of claim 5 has been previously patented by the British patent.

The remaining point in defense is that there is no sufficient proof that the British patent to Clark was taken out by the authority or with the consent of Sherman or his assignee. Construing section 4887 in

*Hobbs v. Beach*, 180 U. S. 383, 397, 21 Sup. Ct. 409, 415, 45 L. Ed. 586, and referring to the following clause, "Every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," it was said, "But this obviously presupposes that the foreign patent shall have been obtained by the American patentee, or with his consent." Proof merely of prior patenting in a foreign country by a stranger is not sufficient to limit a United States patent. Where the foreign patent does not issue to the patentee of the American patent, evidence must be produced to show that the foreign patentee acted with the authority or consent of the American patentee; otherwise he who sets up the foreign patent has not established an essential element of the statute as construed by the Supreme Court. That a stranger has taken out a foreign patent for the same invention affords no evidence of the consent or authority of the American patentee.

The defendant has the burden of proving, as an essential fact, that the foreign patent was obtained by the American patentee, or with his consent. Is this fact sufficiently proved in this case? The answer avers that Sherman obtained letters patent of Great Britain, granted and published in 1883, for the term of 14 years. There is offered in proof a British patent, A. D. 1883, 19th May, No. 2,510, which proves that the invention of the patent in suit was previously patented in a foreign country. It is entitled:

"Letters patent to Alexander Melville Clark, of the firm of A. M. & W. Clark, of 53 Chancery Lane, in the county of Middlesex, Fellow of the Institute of Patent Agents, for an invention of improvements in, and connected with, spinning spindles and their bearings, communicated to him from abroad by Albert Read Sherman," etc.

The provisional specification and specification contain the words, "Communicated to me from abroad by Albert Read Sherman," etc.

It is argued that authority is proved by the fact of communication, and by the possession by Clark of a substantially correct copy of Sherman's specification as it then stood on the files of the United States Patent Office. For what other purpose could it have been communicated by Sherman than for the procurement of a patent? is the inquiry of defendant's counsel. Assuming that there is full proof of a voluntary communication of his invention by Sherman to Clark, does it follow that the communication was for the purpose of procuring a patent, or that Sherman authorized Clark to procure a patent? Might not a mere intermeddler, who had been informed of the invention by the American patentee, in procuring a patent for his own purposes and without authority, use the words "communicated to me from abroad by," etc.? To say that A. has communicated to me an invention does not seem to me substantially equivalent to saying that he authorized me to procure a patent. The burden is on the defendant to show authority. He shows something short of this, to wit, a communication of an invention. This, it is true, would be a natural step preceding an authorization of an agent to procure a patent, but it might well have been made without such purpose. Proof of a communication does not shut out a reasonable probability that there did not accompany the communication any authority to procure a patent. The copy of the British pat-

ent affords no direct evidence of authority. The argument, in substance, is that it proves a communication, which raises a presumption of authority to procure a patent. I seriously doubt, however, whether we may safely say that a presumption of this character arises, or that proof of the communication of an invention amounts to prima facie proof of authority to take out a foreign patent. Upon mere proof that a patentee has described or communicated his invention, is it proper to cast upon him the burden of proving that he did not authorize the taking out of a foreign patent?

As the defendant has filed a motion for leave to take further testimony on this point, it is sufficient to say that it is by no means clear that such evidence is not necessary, that the defendant should forthwith close his testimony, and that at present a supplemental brief from the complainant on this point seems unnecessary.

The motion for leave to take further testimony is granted.

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UNITED STATES v. PUPKE.

(District Court, E. D. Missouri, E. D. November 16, 1904.)

1. OFFENSE AGAINST POSTAL LAWS—SENDING NONMAILABLE MATTER—INDICTMENT.

An indictment under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], charging the mailing of a letter giving information where and from whom an article or thing designed and intended for the prevention of conception might be obtained, must state what the particular "article or thing" consisted of; describing it with at least such particularity that the accused may not only know the particular charge against him, but may be able to plead the judgment of conviction or acquittal in bar of a second prosecution.

On Demurrer to Indictment.

David Patterson Dyer, U. S. Dist. Atty.  
Chester H. Krum, for defendant.

ADAMS, District Judge. This is an indictment for a violation of the provisions of section 3893 of the Revised Statutes of the United States, as amended by the act of September 26, 1888, c. 1039, § 2, 25 Stat. 496 (Supplement, vol. 1, p. 621 [U. S. Comp. St. 1901, p. 2658]). The section as amended, so far as it is necessary for our present purpose, is as follows:

"Every article or thing designed or intended for the prevention of conception \* \* \* and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind, giving information directly or indirectly, where or how, or of whom, or by what means any of the herein-before mentioned \* \* \* articles or things may be obtained or made \* \* \* are hereby declared to be non-mailable. \* \* \* And any person who shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable matter," shall be punished as provided in the act.

The accused is charged under this section, after appropriate averments of time and place, in the following language:

"Did then and there unlawfully and feloniously deposit and cause to be deposited [in the St. Louis post office for mailing and delivery] a certain letter and writing giving information to one Miss Effie Williams where, how, and of whom, and by what means, an article or thing designed and intended for the prevention of conception might be obtained."

The letter is then set out, with appropriate averments as to the time of its mailing and its destination, but the letter in no wise states what the particular article or thing consisted of. It refers to the fact that the accused has inclosed to the addressee a copy of "Our Hydro System." The sufficiency of this indictment is challenged by demurrer, and the point made against it is that the pleader does not disclose what the particular "article or thing" is, about which the defendant gave information to the addressee.

The language of the section in question, already set out, makes any "article or thing designed or intended for the prevention of conception" nonmailable, and it is first made an offense against the United States to mail any "such article or thing." Suppose the indictment had charged the defendant with having mailed "an article or thing designed or intended for the prevention of conception," without any specification as to what that article or thing was. Could it be contended for a moment that the defendant was thereby duly informed of the nature and cause of the accusation against him, within the meaning of the constitutional guaranty to that effect? Could it be successfully contended that he was thereby so furnished with such a description of the charge against him as would enable him to make his defense, or avail himself of his conviction or acquittal as a protection against further prosecution for the same cause, within the meaning of the leading case on that subject, of *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588?

These questions seem to answer themselves. The statutes of the states of the Union make the larceny of personal property an offense. Surely it would not be sufficient to charge a defendant in an indictment with "stealing personal property," without specifying what the property was. Now, if it is not sufficient pleading to aver that a defendant "mailed an article or thing designed or intended to prevent conception," without any specification as to what that article or thing was, the same reasoning would, in my opinion, conduce to the conclusion that it would not be sufficient to allege that the defendant mailed a letter informing the addressee where, how, or of whom she might obtain such an article or thing, without specifying what the article or thing was.

The act of Congress in question first prohibits the mailing of any article or thing designed or intended to prevent conception, and in the same connection, and as a part of the same clause, prohibits the mailing of any letter, etc., giving information how or where any of "the hereinbefore mentioned articles or things may be obtained." The existence of the prescribed article or thing is just as essential to constitute an offense under the second clause, relating to giving information, as under the first clause, relating to mailing the same thing; and it seems to me it is just as important to describe the article or thing in an indictment against a person for violating the second clause as for violating the first. The offense does not consist merely in giving information generally,

nor does it consist of giving information how to prevent conception, but it consists of these two elements and one more, namely, giving information about a certain thing. The offense, therefore, has three elements: (1) The giving of information, (2) about a certain thing, and (3) that thing must be one designed or intended to prevent conception. Obviously, therefore, the article or thing must be as specifically described as the fact of giving information.

The statutes of the United States denounce the counterfeiting of coin or bars in resemblance or similitude of the genuine gold or silver coins of the United States. Under this statute it has always been held that there must be a specification in the indictment of the particular coin counterfeited; otherwise the defendant could not be informed of the nature and cause of the accusation against him, so as to enable him to make his defense, or avail himself of his conviction or acquittal as a shield against further prosecution. Applying the analogy of that kind of a case, it is clear, I think, that the article or thing which is one of the elements of the crime must be so defined and so particularized that the defendant may not only know the particular charge against him, but may be able, after conviction or acquittal, to avail himself of either as a shield against further prosecution with relation to that particular article or thing. It may not always be possible to describe the article or thing with great particularity, but enough can obviously be said to fairly advise the accused of what he is charged.

In this case the copy of the booklet called "Our Hydro System," referred to in the letter addressed to Effie Williams, doubtless sufficiently refers to "the article or thing" to enable the pleader to describe it. If such is not the case, it is probable that the information imparted would not be very valuable to the recipient of the letter, or sufficient to constitute a crime under the statute.

The demurrer is sustained.

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## HYGIENIC FLEECE UNDERWEAR CO. v. WAY.

(Circuit Court, E. D. Pennsylvania. November 26, 1904.)

No. 29.

### 1. UNFAIR COMPETITION—PATENTEE AND IMPLIED LICENSEE—RIGHT TO USE OF NAME.

Defendant Way, while manager of a knitting company, invented an improved muffler, which he patented. He did not transfer the patent, but the company entered on the manufacture of the article under the license implied from his connection with it when the invention was made, and sold it under the name of "Way's Mufflet"; also registering the word "Mufflet" as a trade-mark. Defendant left the employ of the company, which subsequently transferred its business and property to complainant. Defendant commenced the manufacture and sale of the article under the name of the Way Muffler Company, marking each article with the name "Way's Muffler" and the date of his patent. He also adopted a box having a characteristic design on the cover. Complainant continued the manufacture of the article, selling it under the

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¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper*, 30 C. C. A. 376.



name "Way's Mufflet," and marking it with the date of the patent, and also closely imitated the design and reading matter on defendant's box lid, and copied new styles of the article devised by defendant, and his numbers designating the same. *Held*, that defendant, as the patentee, had the right to use his name, as well as the descriptive word "muffler," to designate his manufacture; that complainant acquired no right to either, or to mark its goods as patented; and that its use of such designations and imitation of defendant's packages and designs constituted unfair competition.

In Equity. Suit to restrain unfair competition and use of trade-name.

W. P. Preble, Jr., for complainant.

Henry N. Paul, Jr., and Joseph C. Fraley, for respondent.

J. B. McPHERSON, District Judge. This bill and cross-bill raise questions concerning unfair competition and the use of trade-names. There is very little dispute about the facts, and in the following statement I have therefore used freely the language of the brief prepared by defendant's counsel, with such additions and changes as seemed to me to be desirable:

Since 1881 John Howard Way, the defendant, has been engaged in the manufacture of knitted underwear in the city of Philadelphia. In 1887 the business, which was then conducted under the name of J. H. Way & Bro., fell into difficulties, and was taken over by a limited partnership association called the Way Manufacturing Company, Limited, having a capital divided into 1,000 shares. Way was superintendent under this partnership at a salary, and was also given 10 shares of its stock as a gratuity. In its turn, the partnership failed in 1894, whereupon John and James Dobson, woolen merchants and carpet manufacturers in Philadelphia, who were its largest creditors, gained control of the business in the following manner: James Dobson and Way were appointed assignees of the partnership. In November, 1895, a charter was obtained for a corporation called the Way Manufacturing Company, with a nominal capital of \$50,000. At the assignees' sale the assets of the partnership were bought in for the Dobsons, who found the money to pay for them, and were thereupon transferred to the new corporation. Way agreed that his name might be used in the corporate title, and that he would become the manager of the business at a salary, and in consideration of this agreement the Dobsons promised to give him a 40 per cent. interest in the capital stock. No stock was ever issued, however, perhaps for the reason that the Dobsons did not wish their interest in the enterprise to appear. The underwear, sweaters, and other knit goods manufactured by the corporation were marked with the name of the Way Manufacturing Company, but the possessive word "Way's" was never applied to them, either as a trade-name or otherwise.

On September 3, 1897, the defendant, who was still manager of the Way Manufacturing Company, invented the improved muffler with which this suit is concerned, and immediately patented the article in his own name. No agreement was ever made modifying his complete ownership of the patent, but he at once communicated to the Dobsons the fact that he had made the invention; and the Way Manufacturing

Company, under the implied license that arose from the fact that he had made the invention while in their employ, put the article on the market immediately, and with some success. The company never asked Way to assign the patent, and never paid him any money as part of an agreement to buy it, either express or implied. The solicitor's bill for procuring the patent, amounting to about \$100, with sundry other items, was charged to, and was paid by, the Way Manufacturing Company; but this was probably because the company was making the article, and expected to profit by the protection of the patent. While Way remained the manager of the company, he granted no license to any one else to sell the article, and allowed his name to be used by the company in several suits brought to restrain infringement. The infringing article in these suits, which was called by the maker the "Klondike Collarette," was different in appearance and structure from the article made by the Way Manufacturing Company, and infringed the first and third claims of the patent only. These claims were declared void for lack of patentable invention, but the second claim of the patent has never been passed upon, and for the purposes of this suit must be regarded as valid. Although the litigation on these two claims terminated unfavorably to the defendant, the public has apparently acquiesced in the validity of the remaining claim.

From the beginning of its manufacture, the patented article was called "Way's Mufflet." The defendant testified that it had been immediately recognized that the new article must have a name, and that the name "sweaterette" had been considered for a few days; but "Way's Mufflet" was finally decided upon, which he declares "was meant to signify that it was mine, and no one else's." In marking the goods this possessive name was always put close to the date of the patent, thus: "Way's Mufflet, patented Nov. 16, 1897." The word "mufflet" as an arbitrary word was registered in the Patent office as a trade-mark, or trade-name, in November, 1897, by the Way Manufacturing Company. The sale of the muffler during the season of 1897-98 was considerable, but the following season showed a falling off—due, perhaps, to the fact that the extensive street car advertising of the first year was not repeated.

On the 1st of August, 1899, the defendant was discharged by the Way Manufacturing Company from his position as manager, and his claim to have 40 per cent. of the capital stock issued to him was denied. Thereupon he determined to begin immediately to manufacture the article for which he owned the patent. Believing that he also owned the registered trade-mark, his first intention was to call the article of his manufacture by the name it had always borne—"Way's Mufflet." But within a very short time, and before any business had been done, he was advised that the trade-mark was owned by the Way Manufacturing Company; and accordingly he destroyed all the stationery and advertising matter that had been prepared by him containing this name, and thereafter called the article "Way's Muffler," and carried on his business under the name of the Way Muffler Company. Shortly after he began business for himself, the Way Manufacturing Company filed a bill in equity against him in the court of common pleas of Philadelphia county, in which it averred that it was engaged in selling a

knitted chest and neck protector "ordinarily or commonly called a 'muffler,' and sometimes designated in the trade by the arbitrary word 'mufflet.'" It averred an implied license by operation of law under Way's patent, on the ground that he had made the invention while in the company's employ, and set up also its ownership of the registered trade-mark "mufflet." It declared that Way, a person named Jeffries, and Dobson were "the three principal and majority owners of its stock," and asked that the defendant should be restrained from doing business under the name of the Way Muffler Company, or from using either the words "Way's" or "muffler" in his business. To this bill the defendant filed a cross-bill, asserting his right, as the patentee, to sell the patented article under his own name, and asking, as an owner of the capital stock, for an accounting as to the profits of the company. It is suggested by the defendant that the Way Manufacturing Company made a blunder that was soon regretted in setting forth the truth concerning the ownership of the company's capital stock; but, however that may be, instructions were given not long afterwards that no further steps should be taken, and the suit was not pressed. A demurrer to the cross-bill had been filed, but before it was argued the Way Manufacturing Company went out of business, transferring all its property in November, 1900, to the Hygienic Fleeced Underwear Company, the present plaintiff, and Way apparently gave up the effort to get anything out of his interest in the company's stock. The suit against him having been abandoned, Way proceeded to develop his business with energy and diligence, and as a result it has grown to about ten times the business of the Way Manufacturing Company in the patented article, and amounts to more than a quarter of a million dollars per year. Every muffler put out by him is stamped "Way's Muffler, patented Nov. 16th and 30th, 1897, N. E. cor. 23rd & Arch Sts., Philadelphia." Since the sale to the Hygienic Fleeced Underwear Company, it has continued to manufacture and sell the patented article, marking it with the words: "Way's Mufflet, (Registered Trade-Mark) patented Nov. 16th, 1897; manufactured and owned by Hygienic Fleeced Underwear Co., Inc. Phila."

In September, 1899, immediately after starting in business for himself, the defendant adopted a new and characteristic top, or lid, for the pasteboard boxes used by him. The ground was white, and upon it were printed in dark-blue ink several figures of men and women wearing the muffler, which is indicated by a dotted line pointing to it directly, and by the words, "There it is." The other words on the lid, which are also printed in blue ink, are as follows:

**"A perfect chest and throat protector.  
Don't go on over your head.  
Way's Muffler.  
For men, women and children.  
As easily put on as your hat.  
A sure guarantee against colds."**

Some of these words and figures had been previously used by the Way Manufacturing Company in its placards and other advertising devices, but the combination is wholly new. After the defendant adopted this lid, the Hygienic Fleeced Underwear Company began to

use a lid, also of white ground, printed in a slightly lighter shade of blue, but almost identical in appearance. The figures differ somewhat, but each shows the muffler, and several have the dotted line, and the phrase, "That's it." The other words on the lid are these:

"Way's Mufflet.  
Don't go on over your head.  
Way's Mufflet.  
For men, women and children.  
As easily put on as your hat.  
Way's Mufflet."

There are some differences, as will be observed, but the two lids are so much alike that without careful inspection one might easily be taken for the other.

From time to time the defendant has devised and placed on the market new styles of mufflers. Among these is one put out as 55XX, showing an open-work vertical stripe. Another is 95XX, showing an extra wide horizontal stripe. Another shows a tucked-work dot made by alternating red and black for seven courses for the width of four needles. After the defendant began to make style 55XX, the complainant followed by making a precisely similar muffler with the same vertical open-work stripe, and also called style 55XX. And the same is true of the muffler showing a tucked-work dot of red and black. So, also, after defendant began to make his 95XX, complainant adopted this as a style number for the same kind of muffler.

Upon these facts, I think the legal questions are not hard to solve. The defendant is the owner of a patent whose second claim is presumably valid, under which he is manufacturing a neck and chest protector, commonly known as a muffler. The complainant has no interest in the patent, and no license, express or implied, to manufacture or sell the article. When, therefore, the complainant makes the article and sells it as "Way's," describing it further as patented November 16, 1897, the date of defendant's patent, and declares it to be manufactured and owned by the underwear company, it is asserting, in effect, that it owns the patent, or some interest in the patent, and is manufacturing and selling the article thereunder. Coupled with the palpable imitation of the defendant's box lid, it seems to me that so clear a case of unfair competition is made out that further discussion of the point is needless. So, also, it seems to me to be plain that the defendant has a right to use his own name in describing the article that he invented and patented, and that he has an equally clear right to describe it by using the word that is commonly applied to it. The complainant had acquired no right either in the word "Way," or in the word "muffler" by any independent action of its own. Indeed, no one ever called the article by its descriptive name, "muffler," until the defendant used the word, so that the cases which hold that even a descriptive word may sometimes acquire the properties of a trade-mark have no application to the present controversy. The complainant's predecessor, the Way Manufacturing Company, always sold the article as a "mufflet," and the complainant still sells it by that name; and neither corporation had or has any peculiar right to the word "muffler," used to describe the kind of article that the defendant is offering to the public. When the

word "Way's" began to be used, it was properly employed to indicate that Way was the inventor, and moreover it was thus employed with his consent, and in connection with the manufacture of the muffler under the implied license which he not only recognized, but allowed to remain an exclusive license. But that license did not pass to the complainant. *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369. It ceased when the Way Manufacturing Company sold its property and business, and thereafter Way had the exclusive right to use his own name in describing the article manufactured under his own patent. The imitation of the defendant's box lid is scarcely denied, and, indeed, denial would be ineffectual.

A decree may be drawn dismissing the complainant's bill, and substantially granting the relief asked for in the cross-bill, namely, restraining the complainant from the use of the word "Way" or "Way's," and from marking its goods patented, or patented as of the date of the defendant's patent, or indicating that it has any ownership in the patent, and from the unfair use of a box lid similar to the defendant's.

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BURROWS et al. v. LOWNSDALE.

(Circuit Court of Appeals, Ninth Circuit. October 17, 1904.)

No. 1,068.

1. SHIPPING—INJURY OF PASSENGER—UNSAFE GANG PLANK.

A gang plank consisting of a plank 10 feet long, 16 inches wide, and 1 inch thick, with cleats nailed on one side, but having no railing, rope, or other guard, and which, when extended from the deck of a steamer to a wharf, sloped downward at an angle of about 30 degrees, does not furnish a reasonably safe means for discharging passengers, nor can its use be justified by custom; and the vessel is liable in damages for the injury of a passenger by falling from it into the water.

2. DAMAGES FOR PERSONAL INJURY—INTEREST.

Interest should not be allowed on the amount of damages awarded by a court of admiralty for a personal injury.

Appeal from the District Court of the United States for the Western Division of the District of Washington.

J. B. Bridges, for appellants.

J. W. Robinson and J. C. Cross, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellee, who was the libelant in the court below, was a passenger on board the steamer T. C. Reed, which was a small boat plying the waters of Gray's Harbor and the Chehalis river, in the state of Washington. The libelant took passage in the city of Aberdeen for the city of Hoquiam, some five miles distant. When the steamer arrived at the dock at the latter place, a gang plank was thrown out from the passenger deck of the steamer to the stationary wharf for the purpose of landing the passengers. That plank was introduced in evidence in the court below, and is brought here as an

exhibit. It is about 10 feet long, 16 inches wide, 1 inch thick, and has small cleats nailed to one side of it, about 19 inches apart. It has no railing, ropes, or guards of any kind, and had none at the time of the accident in question. When placed for the passage of the passengers, with one end resting on the boat and the other on the wharf, the angle of declination towards the latter was very considerable; the court below finding, from conflicting evidence upon the point, that the angle was about 30 degrees. The purser of the vessel stood at the end of the plank that rested on the boat, and assisted the libelant, who was a man past 70 years of age, as far and as well as he could; but libelant, either from dizziness, or from the slipping of his foot as he stepped from one cleat to another, fell from the plank into the water below, striking the steamer one or more times in his descent, and was rescued in an unconscious condition. His injuries, according to the evidence, were serious, and fully justified, in our opinion, the amount of \$2,500 awarded him as damages by the court below, if he was entitled to recover at all.

We also agree with the court below that the plank used by the officers of the steamer in question was not a safe method for the discharge of its passengers. It is not a sufficient answer to say, as do the appellants, that it is the same kind of a plank that is usually used for the purpose by similar boats plying those waters, and that it has generally, if not always, been found sufficient. Such a plank as that described, extending over the water at such an angle, without any railing, ropes, or guards, is not a reasonably safe means of passage for man, woman, or child, of whatever age. The law made it the duty of the carrier to provide a reasonably safe means for discharging its passengers, and the failure of appellants in that regard in the instance in question rendered them clearly liable in damages.

We are of the opinion, however, that the court below erred in giving the libelant interest upon the amount of damages awarded him from the time of filing the libel to the time of giving the judgment. It is the settled law in this country that whether interest shall be allowed by the court of first instance, or by the appellate court, in admiralty, on the amount of damage in a collision case, is within the discretion of the court. *Hemmenway v. Fisher*, 20 How. 258, 15 L. Ed. 799; *The Ann Caroline v. Wells*, 2 Wall. 538, 17 L. Ed. 833; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; *The North Star*, 62 Fed. 71, 10 C. C. A. 262. But this rule does not apply to actions for damages for personal injuries. The distinction between the two classes of cases is clearly pointed out by the Supreme Court of Tennessee in the case of *Louisville & Nashville R. Co. v. Wallace* (Tenn.) 15 S. W. 921, 14 L. R. A. 548. As there said, a personal injury never creates a debt, nor becomes one, until it is judicially ascertained and determined; nor until that time can it draw interest.

The cause is remanded to the court below, with directions to modify the judgment by striking out the interest allowed from the filing of the libel to the date of the judgment; and, as so modified, the judgment will stand affirmed.

## UNITED STATES v. VANDIVER.

(District Court, E. D. Pennsylvania. November 14, 1904.)

## No. 1.

**1. CUSTOMS DUTIES—PERSONS LIABLE FOR—BROKER MAKING DECLARATION AS CONSIGNEE.**

A customhouse broker, who makes the sworn declaration for entry of goods, in which he declares himself the consignee, cannot thereafter deny that he is such as against the government, and becomes liable for the duties under the provision of section 1 of the customs administrative act of June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], that "all merchandise imported into the United States shall for the purposes of this act be deemed and held to be the property of the person to whom the merchandise may be consigned," including additional duties imposed for undervaluation under section seven of such act as amended by section 32 of the tariff act of July 24, 1897, c. 11, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1892].

**Action to Recover Duties.** On motion by defendant for judgment on point reserved notwithstanding the verdict.

J. Whitaker Thompson and John C. Swartley, for the United States.  
S. Morris Waln, for defendant.

J. B. McPHERSON, District Judge. The question in this case arises upon the following facts: In June, 1903, Mrs. William G. Steel, of Mt. Airy, Philadelphia, bought of Salvati & Co., in Venice, five pieces of decorated glassware, for which she was to pay 800 lire when the goods should be delivered at her residence in this city. This price was to include packing and transportation charges and the duty imposed by the United States on such articles. The invoice made out by Salvati & Co., however, aggregated only 190 lire, or \$37. The goods were shipped from Genoa to New York by the steamship Manilla, and from a certified extract from the steamship's bill of lading it appears that they were entered at the last-named port by the American Express Company. It does not appear whether or not the express company was formally named as the consignee—the evidence does not satisfactorily show who was thus named—but on July 17, J. J. Hughes, described as "attorney for American Express Co.," made application to enter the goods without a certified invoice, and declared under oath that they were "imported by the American Express Co.," and that the price of 190 lire was "the actual cost or the foreign market value of the merchandise." The entry was made on the same day, but was merely to obtain immediate transportation in bond over the Pennsylvania Railroad to the port of Philadelphia. The entry for that purpose is signed, "For J. L. Vandiver, The American Express Co., by [an illegible name], Attorney." Upon this paper is stamped, "Consigned to the Collector of Customs at Philadelphia, pursuant to Art. 24, Treasury Regulations, August 7, 1890." When the two cases reached Philadelphia, the defendant, who is a customhouse broker, and had been employed to look after the goods on their arrival, made the following sworn declaration:

"Declaration of Consignee, Importer or Agent.

"I, John L. Vandiver, do solemnly and truly declare that I am the consignee of the merchandise described in the annexed entry and invoice; that the invoice and bill of lading now presented by me to the Collector of Customs are the true and only invoice and bill of lading by me received of all the goods, wares and merchandise imported in the Manilla, whereof ——— is master, from Genoa, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know or believe in the existence of any other invoice or bill of lading of the said goods, wares and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares and merchandise, according to the said invoice and bill of lading; that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purports to have been made; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly declare that to the best of my knowledge and belief Wm. G. Steel is the owner of the goods, wares and merchandise mentioned in the annexed entry: that the invoice now produced by me exhibits the actual cost at the time of exportation to the United States, in the principal markets of the country from whence imported, of the said goods, wares and merchandise, and includes and specifies the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing said goods, wares and merchandise in condition packed ready for shipment to the United States, and no other or different discount, bounty or drawback but such as has been actually allowed on the same."

On the entry accompanying this declaration, which was also signed by the defendant, the merchandise is said to be "imported by John L. Vandiver," and the duty is set down at \$22.20. This sum was paid on July 21 by the defendant, but before the cases were delivered they were seized for undervaluation, and were duly appraised at \$79.12. From this appraisement the defendant appealed on July 30, signing the following paper:

"Importer's Notice to Collector, Claiming Reappraisalment.

"As I consider the appraisement made by the United States Appraisers too high on two cases of glassware imported by me, in the Manilla and R. R. from Genoa, I have to request that the same may be reappraised, pursuant to law, with as little delay as your convenience will permit, at Philadelphia."

On October 23 the general appraisers affirmed the appraised value, and duties were thereupon imposed as follows: Duty of 60 per cent. on \$79, amounting to \$47.40, and additional duties amounting to \$38.60, under section 7 of the customs administrative act of June 10, 1890, c. 407, 26 Stat. 134, 1 Supp. Rev. St. p. 748, as amended by section 32 of the tariff act of July 24, 1897, c. 11, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1892], making a total of \$86, and leaving a balance of \$63.80, for which the present suit is brought.

The defense is that a customhouse broker is not liable for duties upon merchandise toward which he renders such service only as a broker is ordinarily called upon to render, and that the suit should therefore have been brought against the ultimate owner. To this position I think



it is sufficient to reply that the defendant cannot be permitted to deny his sworn declaration, wherein he has distinctly and deliberately described himself as the consignee. Indeed, in the absence of evidence to the contrary, I think I should be justified in holding that this declaration was true, and that the goods had been formally consigned to the defendant. In either case, he is to be treated as the consignee, and the consequence follows that under section 1 of the customs administrative act (26 Stat. 131, 1 Supp. Rev. St. p. 744 [U. S. Comp. St. 1901, p. 1886]) he becomes liable as if he were the real owner. That section provides, *inter alia*, that "all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned." As was pertinently said by the Circuit Court of Appeals for the Second Circuit in *Baldwin v. United States*, 113 Fed. 217, 51 C. C. A. 174:

"The government is not called upon to hunt up any ultimate consignee when there is a primary consignee to whom the goods are sent, who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods, thus being himself their 'importer.'"

In my opinion, that case is in no essential particular different from the case at bar, and is therefore decisive of the present question. So, also, if I am right in supposing that the defendant's sworn declaration that he was the consignee prevents him from denying it now, the recent decision of *United States v. Bishop*, 125 Fed. 181, 60 C. C. A. 123, is also in point. If the liability of a customhouse broker, as such, to pay duties, is to be determined, it ought to be raised in a case where he confines himself to his agency, and does not assume another character. No doubt it is convenient for these brokers to make the necessary declarations themselves, instead of requiring their clients to make them, but, if they choose to take upon themselves a character to which they are not entitled, they may be called upon to bear some of its burdens—at least, so far as the government is concerned. Who should ultimately pay such a duty as is here involved—the broker or his principal—is not now in controversy.

Judgment may be entered for the government on the point reserved.

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#### In re FARRAR.

(District Court, D. Vermont. November 22, 1904.)

#### 1. PRISONS—ALLOWANCE FOR GOOD TIME—FEDERAL STATUTE.

Section 1 of Act June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1903, p. 448], providing for an allowance for good time to "each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States and is confined in execution of the judgment," is to be given effect in accordance with its express terms in favor of a prisoner who was convicted prior to its passage, notwithstanding the provision of section 3 that "this act \* \* \* shall apply only to sentences imposed by courts subsequent to the time that this act takes effect, as hereinbefore provided," which, in view of the direct conflict which would result if applied to section 1, must be construed as applying only to section 2, providing for the restoration by the Attorney General of allowances for good time which have been forfeited.

Habeas Corpus.

L. C. Moody, for relator.

James L. Martin, U. S. Atty.

WHEELER, District Judge. The first section of chapter 1140, 32 Stat. 397, approved June 21, 1902 [U. S. Comp. St. Supp. 1903, p. 448], provides clearly "that each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined in execution of the judgment," whose record of conduct shows that he has faithfully observed all the rules, and not been subjected to punishment, shall be entitled to a deduction from the term of his sentence of several days for each month, according to its length. The relator comes exactly within the words of that section, and according to them his term of imprisonment expired October 24th, and he is entitled to be discharged. There is no proviso or qualification to that section. A separate section (2) authorizes the Attorney General to restore time forfeited in federal penitentiaries without limitation. A third section provides that the act shall take effect after 30 days from its approval, and apply only to sentences imposed subsequent to that time, "as hereinbefore provided." If the first section did not expressly apply to each prisoner who has been convicted as well as to those who should be, the third section would plainly cut off the relator; and, if the third section did not expressly provide that the act should only apply to subsequent sentences, he would be left within the first section. The intent of Congress is to be found, not guessed at, from the words, and all of the words, of the act, and every word is to have effect, if it can have. If there are any words that the limitations of the last section can be applied to besides the express words of the first section, they should be applied to those general words, so as to leave effect for all. The provisions of the second section being wholly free, those of the third can be applied to them without touching the very express provisions of the first. This will leave all words to have some operation, and somewhat reconcile what would otherwise be a plain contradiction, which makes it all in any view doubtful. The doubts should, upon common principles, so far as they fairly can, be resolved in favor of liberty.

Relator discharged.

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In re COLALUCA.

(District Court, D. Massachusetts. November 21, 1904.)

No. 9,187.

**1. BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—JUDGMENT ON RECOGNIZANCE.**

Where a defendant against whom a judgment has been obtained for an assault, on being arrested on execution makes application to take the poor debtor's oath, and gives a recognizance under Rev. Laws Mass. c. 168, § 29 et seq., such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered thereon

constitutes a liability for a willful and malicious injury to the person, within Bankr. Act July 1, 1898, § 17a(2), 30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3428], which is not released by a discharge in bankruptcy.

**2. SAME—DISMISSAL OF PETITION—GROUNDS.**

A petition in voluntary bankruptcy, which schedules no debt which would be barred by a discharge, may be dismissed in the discretion of the court.

In Bankruptcy. On review of order of referee dismissing petition.

John E. Crowley, for bankrupt.

John T. Wilson, for creditor.

LOWELL, District Judge. Colaluca filed a voluntary petition alleging but one debt, viz., on a judgment for \$250. Adjudication followed. The creditor moved to dismiss the petition, and the referee allowed the motion upon the ground that the only debt scheduled was one which would not be discharged in bankruptcy. The debt arose as follows: The creditor recovered judgment against the bankrupt in an action wherein the former declared that the latter had assaulted and wounded him. The bankrupt was arrested upon an execution issued on this judgment, made application to take the oath for the relief of poor debtors, and executed a recognizance with sureties in the usual form. Rev. Laws Mass. c. 168, § 29 et seq. The bankrupt thereafter made default on the recognizance, and the creditor obtained judgment in a suit brought thereon. Thereafter the petition in bankruptcy was filed.

The court has to determine: First. If the judgment on the recognizance is a liability not discharged in bankruptcy, being "for willful and malicious injuries to the person or property of another." The bankrupt did not dispute that the original action was brought on a liability of this sort. Did the nature of the original action inhere in the judgment on the recognizance? That it did so inhere the Supreme Court of Massachusetts decided in *Smith v. Randall*, 1 Allen, 456, 460, and I do not understand that this decision was overruled in *Everett v. Henderson*, 150 Mass. 411, 23 N. E. 318. In *Moore v. Loring*, 106 Mass. 455, the court said that a bond to dissolve an attachment and a "recognizance are cumulative securities for the same debt." See *Watts v. Stevenson*, 169 Mass. 61, 63, 47 N. E. 447.

Second. Should a petition in bankruptcy be dismissed because it schedules no debt which would be barred by discharge? The affirmative was held in *re Maples* (D. C.) 105 Fed. 919. See *re Yates* (D. C.) 114 Fed. 365. I agree with the first decision so far as to hold that the court has discretion to dismiss under the conditions stated. The court may not be compelled in every case, upon a motion to dismiss, to determine the nature of the liabilities scheduled, but it has discretion to do so. The bankrupt's conduct in this case, as found by the referee, requires dismissal, if that be otherwise allowable.

Judgment of the referee affirmed.

## SCHMIDT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 24, 1904.)

No. 1,053.

**1. UNITED STATES REVISED STATUTES—RULES OF CONSTRUCTION.**

It is a settled rule that, in the construction of the Revised Statutes of the United States, a mere change in the phraseology of a prior statute will not be regarded as altering the law, unless it is clear that such was the intent; and it is another canon of construction that, in determining the meaning of an ambiguous provision in the revision, the courts may refer to the original statute from which the section was taken, to ascertain from its language and context to what class of cases the provision was intended to apply.

**2. NATURALIZATION—PERJURY IN PROCEEDINGS IN STATE COURT—JURISDICTION OF FEDERAL COURT TO PUNISH.**

The provision of Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222 [U. S. Comp. St. Supp. 1903, p. 191], which imposes a punishment upon any person "who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact," may be deemed an amendment to Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], which provides a lesser penalty for the same offense; and a person who knowingly swears falsely to a material fact in naturalization proceedings in a state court may be indicted and punished for the perjury thereunder in a federal court. By section 4 of Act July 14, 1870, c. 254, 16 Stat. 255, of which act said section 5395 was a part, such jurisdiction was expressly given to the federal court; and although in the Revised Statutes the two sections were classified separately, and section 4, which became section 5429 [U. S. Comp. St. 1901, p. 3670], was, in terms, made to apply to the five immediately preceding sections, it was not intended thereby to lessen the jurisdiction under section 5395, which, in terms, extends to "all cases where oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens or in any proceeding under such laws." Ross, Circuit Judge, dissenting.

**3. SAME—PROSECUTION FOR PERJURY—EVIDENCE.**

The provision of Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222 [U. S. Comp. St. Supp. 1903, p. 191], that all courts shall, before issuing a final order or certificate of naturalization, "cause to be entered of record the affidavit of the applicant and of his witnesses, so far as applicable, reciting and affirming the truth of every material fact requisite to naturalization," does not limit the evidence which may be taken in the proceeding to the affidavits so entered of record; and, on the trial of a person for perjury committed in such a proceeding, oral evidence is admissible to show the commission of the offense.

**4. SAME.**

On the trial of a defendant for perjury committed in a naturalization proceeding, his signature to affidavits filed in the proceeding is admissible to prove the fact that he was a witness therein, although such affidavits, when signed, were in blank.

**5. SAME—RECORD OF PROCEEDING AS EVIDENCE—DEFECTIVE FINAL ORDER.**

In a prosecution for perjury committed in a naturalization proceeding, where the record of the court therein, including the final order, was admitted in evidence without objection, it was proper for the court to instruct the jury that such record should be taken as establishing the facts therein stated, although the final order may have been defective in form, in failing to recite the making and recording of the affidavits required by section 39 of Act March 3, 1903, c. 1012, 32 Stat. 1222 [U. S. Comp. St. Supp. 1903, p. 191], for which defect it is declared void by said section; it being doubtful, moreover, whether it is intended that such order shall be void, except for the purpose of proving citizenship.

**6. CRIMINAL LAW—INSTRUCTIONS—EFFECT OF FAILURE TO PROVE MOTIVE.**

The absence of a motive shown for the commission of a crime may properly be considered by the jury only as bearing on the question whether the offense was committed by the defendant, and, where its commission by him is clearly proved by direct and undisputed evidence, the fact that his motive is not shown is immaterial, and the refusal of an instruction that the jury shall take such fact into consideration is not error.

In Error to the Circuit Court of the United States for the Southern Division of the District of Washington.

John L. Sharpstein, for plaintiff in error.

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was indicted and prosecuted in the United States Circuit Court for the District of Washington upon an indictment containing ten counts, in each of which he was charged with swearing falsely in certain naturalization proceedings pending in the superior court of the state of Washington for Walla Walla county. The ten counts in the indictment were all in the same form, except as to the name of the person applying to be naturalized; and it was charged in each thereof that the plaintiff in error did willfully, falsely, corruptly, feloniously, and contrary to his oath, swear, testify, depose, and make affidavit before the said court; and then followed the specification of the false testimony so given. The plaintiff in error was tried before a jury upon this indictment, and was convicted.

The principal question presented on the writ of error is whether one who swears falsely in a naturalization proceeding in a court of a state may be indicted and punished in a court of the United States, under the provisions of section 39 of the act of March 3, 1903, c. 1012, 32 Stat. 1222 [U. S. Comp. St. Supp. 1903, p. 191], which, among other provisions, denounces a penalty against any person "who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact." This act may be deemed an amendment to section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654], in that it increases the penalty provided for in that section. Section 5395 reads as follows:

"In all cases where oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceeding under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished by imprisonment not more than five years nor less than one year, and by fine of not less than one thousand dollars."

This statute would seem to be sufficiently comprehensive to include all cases of false swearing in naturalization proceedings, committed in whatever court. That such is its intention is shown by the prior legislation on the same subject. The section is taken from the act of Congress of July 14, 1870, c. 254, 16 Stat. 254, entitled, "An act to amend the naturalization laws, and to punish crimes against the same,

† 6. See Criminal Law, vol. 14, Cent. Dig. §§ 23, 1271.

and for other purposes." The first four sections of the act relate specifically to offenses against the naturalization laws. Section 1 provides for the punishment of perjury in all cases—

"Where any oath, affirmation, or affidavit shall be made or taken under or by virtue of any act or law relating to the naturalization of aliens, or in any proceedings under such acts or laws."

Section 4 (Act July 14, 1870, c. 254, 16 Stat. 255) enacts that:

"The provisions of this act shall apply to all proceedings had or taken or attempted to be had or taken before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced, and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed."

These words are clear, and leave no room to doubt that jurisdiction was thereby given to the United States courts of offenses committed against the naturalization laws in any court, whether state or federal.

The act of 1870 was an amendment to the naturalization laws. Those laws contained a provision conferring on state courts jurisdiction in naturalization proceedings. The amendment applied to all the naturalization laws, and its intent was to make punishable in the courts of the United States all crimes committed against those laws. Being an amendment to all of those laws, it is its fair construction that section 1 was intended to include offenses against the naturalization laws committed by false swearing in the state courts, and to confer jurisdiction on the federal courts to deal therewith. If so, section 4 of the amendment was not necessary to make effective that intent, and may be deemed surplusage. When the act of 1870 was carried into the Revised Statutes, section 1 thereof was severed from its connection with the other three sections referred to, and was placed in chapter 4, tit. 70, which deals with "crimes against justice." Sections 2, 3, and 4 were placed in chapter 5, under the title, "Crimes Against the Operation of the Government," and are therein numbered 5424-5429, inclusive [U. S. Comp. St. 1901, pp. 3668-3670]. Section 5429 reads as follows:

"The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization shall be commenced or attempted to be commenced."

Section 4 is thus specifically repeated in the Revised Statutes, and therein made to refer to the five preceding sections only, and it does not in terms refer to section 5395. It is argued from this that it was the intention of Congress, by the revision, to exclude section 5395 from the operation of section 5429, and thereby to remove from the jurisdiction conferred by the former section the offenses therein described against the naturalization laws committed in state court proceedings. Was such the intention of Congress in adopting the Revised Statutes? Did Congress by the revision make or intend to make any change in the existing law?

It is not to be inferred that Congress by the revision intended to change the existing statute so as to distinguish between two classes of offenses against the naturalization laws, and to make offenses of one

class committed in state court proceedings punishable in the federal courts, and exclude another class of such offenses, unless the intention so to do has been clearly expressed. The act under which the statutes were revised (Act June 27, 1866, c. 140, 14 Stat. 75 [U. S. Comp. St. 1901, p. 3755]), in section 2, provides that:

"The commissioners shall bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text."

Section 5600 of the Revised Statutes [U. S. Comp. St. 1901, p. 3751] provides that:

"The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title, under which any particular section is placed."

The Supreme Court, in construing the Revised Statutes, has repeatedly affirmed the settled rule that a change of phraseology in a revision will not be regarded as altering the law, where it had been well settled by plain language in the statutes, unless it was clear that such was the intent. Said the court in *McDonald v. Hovey*, 110 U. S. 619, 629, 4 Sup. Ct. 142, 146, 28 L. Ed. 269:

"So upon a revision of statutes a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law."

And the court cited with approval *In re Murphy*, 23 N. J. Law, 180, where, in construing several statutes which had been consolidated, a proviso in one of them broad enough in its terms to affect the whole consolidated law was held to affect only those sections with which it had been originally connected. In *United States v. Ryder*, 110 U. S. 729, 740, 4 Sup. Ct. 196, 201, 28 L. Ed. 308, the court said:

"It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."

To the same effect is *Logan v. United States*, 144 U. S. 263, 302, 12 Sup. Ct. 617, 36 L. Ed. 429. A case in point is *Doyle v. Wisconsin*, 94 U. S. 50, 24 L. Ed. 64, in which it was held that section 1007 of the Revised Statutes [U. S. Comp. St. 1901, p. 714], which provides that, where a writ of error may operate as a writ of supersedeas, execution shall not issue until ten days after the rendition of the judgment, has reference only to the courts of the United States. This conclusion was reached upon a consideration of the statutes as they stood before the revision. The court, by Chief Justice Waite, said, "The Revised Statutes are a revision and consolidation of the old statutes, rather than an enactment of new;" and, after quoting section 5600 [page 3751], he added, "This makes it proper that we should look to the original act to ascertain the legislative intent in cases of doubt." In the recent case of *United States v. Severino* (C. C.) 125 Fed. 949, Thomas, District Judge, in a carefully considered opinion, held that, notwithstanding

the changes in revision, section 5395 still conferred on the federal courts jurisdiction of a perjury committed in naturalization proceedings in a state court in the procedure prescribed by Congress.

Again, it is an established canon of construction that, in finding the meaning of an ambiguous statute in the revision, the courts are permitted to refer to the original statute from which the section was taken, to ascertain from its language and context to what class of cases the provision was intended to apply. *The Conqueror*, 166 U. S. 122, 17 Sup. Ct. 510, 41 L. Ed. 537; *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Myer v. Car Company*, 102 U. S. 11, 26 L. Ed. 59; *United States v. Lacher*, 134 U. S. 626, 10 Sup. Ct. 625, 33 L. Ed. 1080. In the case last cited the court said:

"If there be any ambiguity in section 5467 [U. S. Comp. St. 1901, p. 3691], inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged, and consolidated, resort may be had to the original statute from which the section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law."

Section 5395 refers to "all cases" of false oaths made "under or by virtue of any law relating to the naturalization of aliens or in any proceeding under such laws." If there be any ambiguity as to the meaning of the words "any law" and "any proceeding," it is dispelled by the language of the act of July 14, 1870, from which it is taken. In view of these considerations, we entertain no doubt that it was the intention of Congress, in enacting the statute of March 3, 1903, c. 1012, 32 Stat. 1222 [U. S. Comp. St. Supp. 1903, p. 191], to recognize the jurisdiction conferred upon the federal courts by the act of July 14, 1870, and the Revised Statutes. Further evidence of that intention is found in the terms of the act of 1903, where it is provided that:

"The court in which such conviction is had shall thereupon declare the order or decree and all certificates admitting such person to citizenship null and void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

Error is assigned to the admission of oral evidence offered on the part of the prosecution to prove the commission of the offense. It is said that under the act of Congress of March 3, 1903, which provides that all courts shall, before issuing the final order or certificate of naturalization, "cause to be entered of record the affidavit of the applicant and of his witnesses, so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization," the law requires the testimony to be in the form of an affidavit, that the written affidavit is the best evidence of its own contents, and that parol evidence is inadmissible without accounting for the nonproduction of such written evidence. But the statute does not so limit the scope of the investigation in naturalization proceedings. The act requires the court "to make careful inquiry into such matters," and adds thereto the requirement that before issuing the final order the affidavit of the applicant and his witnesses, so far as applicable, shall be entered of record. This leaves it open to the court to take oral testimony and to sift the truth of the evidence upon any question material to the investigation, so long as the evidence of the material facts is embodied in the form of an affi-



davit to go upon the record. There was no error, therefore, in overruling the objection to the oral testimony.

Error is assigned to the admission in evidence of the affidavits of the affiants in the naturalization proceedings. Objection to their admission was made on the trial on the ground that they were not affidavits at the time when they were signed, but were blanks, and were subsequently filled in by the clerk of the state court. The trial court sustained the objection so far as the substance of the affidavits was concerned, but admitted the signatures in evidence as tending to prove that the affiants were in the state court as witnesses. There was no error in this, and it is not conceivable that the rights of the plaintiff in error could have been prejudiced thereby.

It is contended, further, that the court erred in admitting in evidence the final orders of naturalization, for the reason that the same are void. The ground upon which the orders are claimed to be void is that they were not framed in compliance with the act of 1903, which declares that all final orders which do not show upon their face that the affidavits have been made and recorded shall be null and void. These orders did not so show or recite, but they were entered at the bottom of the page on which in each case the appropriate affidavits were recorded. It is a sufficient answer to this objection to point to the fact that the orders were read in evidence without objection on the part of the plaintiff in error.

It is contended, further, that the court erred in instructing the jury as follows:

"The record of the superior court which was read to you contains recitals of what the proceedings were. That record is verified by the signature of the presiding judge, and it is to be taken as showing that what it contains is a true recital of what did occur, so far as showing what occurred. The record, like all other material matters, is submitted to you with all the testimony as to what the facts were—what actually did take place."

To this charge the plaintiff in error excepted. It is urged that, the judgment being null and void, it could not be considered by the jury for any purpose. No such objection to the orders was specified at any time in the trial court. On the other hand, the orders were, as we have seen, admitted in evidence without objection. Being so admitted in evidence, it was proper for the court to instruct the jury concerning their force and effect. The proceedings in the state court, whatever may be said of the defects of the final orders, were not void. That court had jurisdiction of the subject-matter of the proceedings and of the parties. The defects in the final orders were irregularities for which the statute declared them null and void. It may be doubtful whether it was the intention of the statute to avoid such final orders or to declare them voidable, for immediately following its provision in that regard is the further provision conferring jurisdiction on the federal courts to declare such defective orders null and void. The most that can be said of the effect of the statute is that the orders were deprived of all efficacy for the purpose of adjudicating or proving citizenship. The irregularities were defects in form, and such as might have been remedied by entering new orders in compliance with the law. The effect of the statute, it would seem, is not to deny to such defective

order admissibility in evidence when it is offered as matter of inducement to perjury, to show the pendency of the proceeding, the jurisdiction of the court, or the giving of the testimony and its materiality. 22 Enc. of Law (2d Ed.) 692, and cases there cited. It was for this purpose that the trial court directed the jury to consider the final orders; that is, as tending to show what occurred. The plaintiff in error had admitted that these orders were properly to be considered by the jury, and he had waived any right he may have had to object thereto, by submitting to the court, before the charge was given, a written request for an instruction as follows: "The orders read in evidence from the journal of naturalization are to be considered by you only as tending to prove the fact that such naturalization proceedings were had." This instruction was properly denied. If the orders were lawfully admitted in evidence and read to the jury, their effect was not to be narrowed as indicated in the proffered charge. If they had any effect whatever, it was to tend to establish the facts for which they were admitted in evidence.

Error is assigned to the refusal of the court to instruct the jury—

"That, when the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence; and in this case, if the jury find upon careful examination of all the evidence that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider, in connection with all the other evidence in the case, in making up their verdict."

This instruction so requested, while proper in some cases, had no rightful application to the evidence in the case before the court. It was clearly proven by the direct testimony of witnesses, and it was not disputed, that the plaintiff in error went to these aliens, who had not been in the United States the requisite time to entitle them to citizenship, and actively induced them to appear before the court and take out their final papers, and in that connection falsely testified before the court, as charged in the indictment. The jury may inquire into the motive of a defendant when it is necessary to resort to it in arriving at the ultimate fact that it was he who committed the crime charged. The motive then becomes an aid in completing the proof of the commission of the act; and in such a case it is proper to charge the jury that the absence of motive, if they fail to find one, may be taken into consideration in determining the question whether the crime was committed by the accused or by some other. The instruction is particularly applicable to cases where the proof consists in circumstantial evidence. In such a case it may be controlling. *People v. Fitzgerald*, 156 N. Y. 258, 50 N. E. 846. That the plaintiff in error did falsely testify was not denied. His motive in so doing was not disclosed, and it was not necessary that it should be. While the prosecution is never required to prove a motive for the crime, it is always permitted to do so. In the present case the proof was not circumstantial, but was direct, and was undisputed. To have given the charge requested would have been to tell the jury that they were at liberty, in determining whether they would give credence to the positive and uncontroverted testimony of wit-

nesses to the overt act of the plaintiff in error, to be influenced by the fact that they failed to find a motive for his act. Such is not the law.

The judgment of the District Court is affirmed.

ROSS, Circuit Judge (dissenting). The plaintiff in error was indicted and prosecuted for, and convicted of, the crime of perjury, committed in the superior court of the state of Washington for Walla Walla county, in 10 certain naturalization proceedings then and there pending. One of the questions presented by the present appeal, and the first to be considered and disposed of, is in respect to the jurisdiction of the court below over the offense.

The same question was before Judge Thomas, in the Southern District of New York, in the recent case of *United States v. Severino* (C. C.) 125 Fed. 949, and was by him quite fully considered, in an opinion in which the jurisdiction of the federal courts was sustained. He reached the conclusion, in which I quite agree—

"That state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends [that is, the state court], and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it."

Judge Thomas, in the case cited, further held that section 5395 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3654] is applicable to perjuries committed in naturalization proceedings in the state courts, and therefore sustained the federal jurisdiction of such offenses. In considering that question, it was said by the learned judge:

"At the first view there would be hesitation in concluding that Congress intended to punish perjuries in naturalization proceedings, committed in a court foreign to its governmental jurisdiction, against another and independent sovereignty, thereby making its penal statutes applicable to offenses committed against the justice of a separate state. But it is precisely what at a time, and for a time at least, it did do, in plainest terms, by Act July 14, 1870, c. 254, 16 Stat. 254 [U. S. Comp. St. 1901, p. 3654]."

The first subdivision of section 2165, tit. 30, of the Revised Statutes [U. S. Comp. St. 1901, p. 1329], embodying the naturalization laws, is as follows:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal and clerk, two years at least prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject."

By its act of July 14, 1870, c. 254, 16 Stat. 254 [U. S. Comp. St. 1901, p. 3654], Congress amended those laws in certain particulars, and for the first time made specific provision for the punishment of crimes committed against them; declaring, among other things, in its first section—

"That in all cases where any oath, affirmation, or affidavit shall be made or taken under or by virtue of any act or law relating to the naturalization of

aliens, or in any proceedings under such acts or laws, and any person or persons taking or making such oath, affirmation, or affidavit, shall knowingly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall upon conviction thereof be sentenced to imprisonment for a term not exceeding five years and not less than one year, and to a fine not exceeding one thousand dollars"; and, in its fourth section, "that the provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed."

The provisions of the act of July 14, 1870, were subsequently revised, amended, and carried into the Revised Statutes as sections 5395, 5424, 5425, 5426, 5427, 5428, and 5429 [U. S. Comp. St. 1901, pp. 3654, 3668-3670], which read as follows:

"Sec. 5395. In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished by imprisonment not more than five years, nor less than one year, and by a fine of not more than one thousand dollars."

"Sec. 5424. Every person applying to be admitted a citizen, or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen, shall be punished by imprisonment at hard labor not less than one year, nor more than five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment.

"Sec. 5425. Every person who uses, or attempts to use, or aids, or assists, or participates in the use of any certificate of citizenship, knowing the same to be forged, or counterfeit, or ante-dated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or who, without lawful excuse, knowingly is possessed of any false, forged, ante-dated, or counterfeit certificate of citizenship, purporting to have been issued under the provisions of any law of the United States relating to naturalization, knowing such certificate to be false, forged, ante-dated, or counterfeit, with intent unlawfully to use the same; or obtains, accepts, or receives any certificate of citizenship known to such person to have been procured by fraud or by the use of any false name, or by means of any false statement made with intent to procure, or to aid in procuring, the issue of such certificate, or known to such person to be fraudulently altered or ante-dated; and every person who has been or may be admitted to be a citizen who, on oath or by affidavit, knowingly denies that he has been so admitted, with intent to evade or avoid any duty or liability imposed or required by law, shall be imprisoned at hard labor not less than one year nor more than five years, or be fined not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed.

"Sec. 5426. Every person who in any manner uses for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment,

or exemplification has been unlawfully issued or made; and every person who unlawfully uses, or attempts to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be punished by imprisonment at hard labor not less than one year nor more than five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment.

"Sec. 5427. Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.

"Sec. 5428. Every person who knowingly uses any certificate of naturalization heretofore granted by any court or hereafter granted, which has been or may be procured through fraud or by false evidence, or has been or may be issued by the clerk, or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; and every person who falsely represents himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be punishable by a fine of not more than one thousand dollars, or be imprisoned not more than two years, or both.

"Sec. 5429. The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced."

It will be observed that, in these revised and amended sections, Congress was dealing specifically with crimes against the naturalization laws. By section 5429 it expressly made the provisions of sections 5424, 5425, 5426, 5427, and 5428 applicable to "all proceedings had or taken, or attempted to be had or taken, before any court [federal or state] in which any proceeding for naturalization may be commenced or attempted to be commenced." Thus having its attention specifically directed to the subject, Congress, in revising and amending the provisions of the act of July 14, 1870, omitted the provision of section 4 of that act conferring upon the courts of the United States "jurisdiction of all offenses under the provisions of this act in or before whatsoever court or tribunal the same shall have been committed," and made applicable to naturalization proceedings had in the state courts only the provisions of sections 5424, 5425, 5426, 5427, and 5428, which do not include the crime of perjury committed in such proceedings in a court of a state. That action of Congress was in accord with the rule declared by the Supreme Court in *Loney's Case*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949, where it is said that "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had."

I am of opinion that the court below was without jurisdiction of the alleged offense, for which reason I think the judgment should be reversed, with directions to that court to dismiss the indictment.

**HATCHER v. HENDRIE & BOLTHOFF MFG. & SUPPLY CO. et al.**

(Circuit Court of Appeals, Eighth Circuit. October 28, 1904.)

No. 1,826.

**1. REMOVAL OF CAUSES—EFFECT ON PRIOR ATTACHMENT.**

When an action is removed from a state court into a federal court, the latter takes the case in the condition in which it stood at the time of removal, and a lien obtained by an attachment in the state court is not lost or terminated by the removal; but power to protect and enforce that lien after the removal exists in the federal court in like manner as if it had been obtained by a proceeding in that court.

**2. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS—ENFORCEMENT OF ATTACHMENT LIEN.**

A suit in equity in a federal court to enforce an attachment lien obtained in a former action in the same court, and to subject the attached property or its proceeds to the satisfaction of the judgment recovered therein, is not an original suit, but is ancillary and supplementary to the former action, and may be maintained as an incident to the jurisdiction already vested, without regard to the citizenship of the parties; and it is immaterial, so far as the ancillary character of the suit is concerned, that the proceeds of the attached property are not in the actual custody of the federal court; the effect of the removal having been to bring the property potentially within the jurisdiction and custody of that court.

**3. ATTACHMENT—LIEN—VOLUNTARY SURRENDER OF PROPERTY BY GARNISHEE.**

Where a garnishee served under an attachment voluntarily delivers the property of the defendant in his possession to the sheriff, no judgment against him is necessary to perfect the attachment lien on such property; nor is the lien defeated because the sheriff fails to make return of such delivery, where he retains custody of the property under the writ.

**4. SAME—GARNISHMENT—PLEADING.**

A statement in the answer of a garnishee under an attachment that it was "informed" that the property, which it admitted having received from the defendant, belonged to a third person, does not need to be traversed by the plaintiff, where the property has been surrendered by the garnishee to the officer holding the attachment.

**5. SAME—SUIT TO ENFORCE MECHANIC'S LIEN—RIGHT TO PURSUE CONCURRENT REMEDIES.**

Under the statutes of Colorado, the remedy upon a mechanic's lien and the remedy upon the debt which it secures are distinct and concurrent; and both remedies, including the provisional and auxiliary remedies obtainable in an action upon the debt, may be pursued in a single action.

**6. REMOVAL OF CAUSES—PROCEDURE AFTER REMOVAL—VALIDITY AND EFFECT OF JUDGMENT.**

Although the distinction between actions at law and suits in equity is carefully maintained in the federal courts, and when a case which unites both legal and equitable grounds for relief, as permitted by the practice of the state in which it is brought, is removed into a federal court, the pleadings should be recast so as to separate the two causes of action, yet where an action to enforce a mechanic's lien and to recover the debt which it secures, in which plaintiff had also obtained an attachment, which had been served, was thereafter removed and proceeded with in the federal court on the original pleadings as a suit in equity, without objection, and a money judgment was rendered against the defendant, such judgment is not void, even if erroneous, and cannot be collaterally attacked.

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¶ 2. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

**7. EQUITY—DECREE—COLLATERAL ATTACK.**

An adjudication in a Circuit Court of the United States that the facts of a particular case are such as to make it cognizable in equity, although erroneous, is not a nullity, and cannot be questioned collaterally.

**8. ATTACHMENT—ABANDONMENT.**

An agreement by an attachment plaintiff with other creditors, subsequently attaching the same property, to prorate the proceeds thereof, which they could enforce under the statute if their liens were valid, did not constitute an abandonment of his lien upon certain of the property, upon which the later attachments were held invalid in an action to which he was not a party.

**9. SAME—SUIT TO ENFORCE LIEN—LACHES.**

Delay in the institution of proceedings to enforce an attachment lien, which could not have given rise to an inference of an abandonment of the lien, and which resulted in no advantage to the attaching creditor or injury to the opposing party, does not constitute such laches as will bar the right to enforce the lien.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit, by Hatcher against the Hendrie & Bolthoff Manufacturing & Supply Company and the International Trust Company, to subject the proceeds of a sale of attached property to the satisfaction of a judgment rendered in the action in which the writ of attachment was issued. From a decree sustaining a demurrer to and dismissing the bill, the complainant appealed.

Briefly stated, the allegations of the bill are as follows: Complainant is a citizen of Colorado; and defendants are corporations existing under the laws of that state. January 23, 1896, complainant commenced an action in the district court of Mineral county, Colo., against the United Leasing Company and the United Mines Company, to recover from the leasing company the purchase price of materials furnished to it for the working of certain mining claims held by it under a lease from the mines company, and to enforce a mechanics' lien upon these claims. February 21, 1896, the action was removed by the defendants into the court below on the ground of diversity of citizenship. The case was there proceeded with as a suit in equity, and complainant obtained a decree against the leasing company for the purchase price of the materials July 18, 1896, but the mechanics' lien branch of the action ultimately failed. *United Mines Co. v. Hatcher*, 25 C. C. A. 46, 79 Fed. 517. When the action was commenced a writ of attachment against the property of the leasing company was regularly sued out and served upon the Amethyst Mining Company, as garnishee, then in possession of a Knowles compound pump, the property of the leasing company, and being used by the garnishee in the tenth level of its mine. The garnishee answered that it had the pump in its possession, and had received it from the leasing company, but was informed that it was the property of the Hendrie & Bolthoff Manufacturing & Supply Company. February 27, 1896, after the removal of the action into the court below, the garnishee removed the pump from its mine, and delivered it into the custody of the sheriff of Mineral county, the officer who had served the writ. Other like writs of attachment had been issued in separate actions commenced in the state court February 1 and 6, 1896, by other creditors of the leasing company, and these writs had also been served upon the Amethyst Company as garnishee. The sheriff, in accepting possession of the pump from the garnishee, received it under the several writs of attachment for the benefit of the several attaching creditors, including complainant. The pump was subsequently sold under an amicable arrangement with the Hendrie & Bolthoff Company, whereby the proceeds were placed in the custody of the International Trust Company, to stand in all respects in place of the pump. Proceedings upon an intervening petition of the Hendrie & Bolthoff Company, filed July 27, 1896, in one of the actions in the state court, to which complainant was not made a party, resulted in a decision by the Supreme Court of the state, December 24, 1901, to the effect that, as against creditors whose writs of attachment were served upon the

garnishee subsequently to January 25, 1896, the intervener became the owner of the pump under a purchase from the leasing company made on that date. *Hendrie & Bolthoff Co. v. Collins*, 29 Colo. 102, 67 Pac. 164. This purchase was made two days after complainant's writ was served, but prior to the service of the writs of other creditors. Notwithstanding the removal of complainant's action into the court below, the district court of Mineral county at all times expressly recognized the right of complainant under his writ of attachment served upon the garnishee before the removal, and, with complainant's acquiescence, proceeded upon the theory that complainant and the other attaching creditors were entitled, under the statutes of the state, to prorate the proceeds of the sale of the pump. The proceeds arising from the sale of other property attached in like manner were so distributed, the court recognizing complainant's right to participate in the distribution as being established by the judgment or decree recovered by it in the court below after the removal. No proceedings of any kind were taken by the *Hendrie & Bolthoff Company* to question or avoid the lien acquired by complainant under his writ of attachment, and no judgment in favor of an attaching creditor now remains in the state court, under which a claim is or can be made upon the proceeds of the sale of the pump. The leasing company is insolvent, and these proceeds constitute the only property out of which the balance due upon complainant's judgment can be satisfied. The bill prayed that defendants be required to bring into court and account for the proceeds of the sale of the pump, with any interest accrued thereon, to the end that complainant's judgment might be satisfied therefrom, should his right thereto under the attachment be sustained. The suit was commenced February 28, 1902, a little more than three months after the decision of the Supreme Court establishing the superiority of the claim of the *Hendrie & Bolthoff Company* over those of the attaching creditors other than complainant.

John R. Smith and Albert L. Moses, for appellant.

Robert D. Thompson (John M. Waldron, on the brief), for appellees.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When an action or suit in a state court is removed into a Circuit Court of the United States, the latter takes the case in the condition in which it existed in the state court at the time of the removal; and, if a lien or other right has been obtained by either party by any proceeding had in the case prior to the removal, power to protect and enforce that lien or right after the removal exists in the Circuit Court, in like manner as if it had been obtained by a proceeding in that court. *Kern v. Huidekoper*, 103 U. S. 485, 491, 26 L. Ed. 497; *Duncan v. Gegan*, 101 U. S. 810, 812, 25 L. Ed. 875; *Chicago, etc., Bridge Co. v. Anglo-American, etc., Co.* (C. C.) 46 Fed. 584, 590. The lien obtained by the attachment proceeding in the state court was not lost or terminated by the removal of the action to the Circuit Court, and when, shortly thereafter, the garnishee delivered the pump into the custody of the sheriff who had served the writ, that officer received the pump charged with an enforceable lien for the satisfaction of any judgment which the complainant should obtain in the Circuit Court, in like manner as it would have been charged with a lien for the satisfaction of a judgment obtained in the state court if there had been no removal. Section 4, Act March 31, 1875, 18 Stat. pt. 3, c. 137, p. 470.

A suit in equity in a circuit court to give effect to the proceedings,



judgment, or decree in a former action or suit in that court, or to secure the fruits and benefits thereof, or to obtain any relief growing out thereof and having direct reference thereto, is not an original, but a dependent and ancillary, suit, and may be maintained as an incident to the jurisdiction already vested, without regard to the citizenship or residence of the parties. So a suit is dependent and ancillary, the object of which is to enforce an attachment lien obtained in a former action in the same court, and to subject the attached property, or the proceeds of its sale, to the satisfaction of a judgment recovered in that action. Such a suit is supplementary merely to the former action, and is a continuation thereof, so far as the question of jurisdiction is concerned. *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749; *Riggs v. Johnson Co.*, 6 Wall. 166, 187, 18 L. Ed. 768; *Jones v. Andrews*, 10 Wall. 327, 333, 19 L. Ed. 935; *Dietzsch v. Huidekoper*, 103 U. S. 494, 498, 26 L. Ed. 354; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Pacific R. R. v. Missouri, etc., Co.*, 111 U. S. 505, 522, 4 Sup. Ct. 583, 28 L. Ed. 498; *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Central National Bank v. Stevens*, 169 U. S. 432, 464, 18 Sup. Ct. 403, 42 L. Ed. 807; *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; *Lamb v. Ewing*, 4 C. C. A. 320, 324, 54 Fed. 269; *Maithland v. Gibson* (C. C.) 79 Fed. 136.

The fact that the proceeds of the sale of the attached property are not in the actual custody of the Circuit Court does not make the present suit an original one. The effect of the removal of the former action into that court was to bring the property potentially within its jurisdiction and custody, and the purpose of the present suit is to have this jurisdiction exerted over the proceeds of the sale of the property. Whether the complainant's right to invoke the exercise of this jurisdiction has been waived or lost by laches is another question. While suits to enforce a claim to or lien upon property already in the court's custody are dependent and ancillary, such custody is merely one of several distinct grounds of ancillary jurisdiction, and not an essential requisite to its existence and exercise in all cases.

The appellees, referring to *Mills' Ann. Code Colo.* §§ 124, 125, insist that no lien upon the pump was obtained by the attachment proceeding, because no judgment was entered against the garnishee, requiring him to deliver the pump into the custody of the sheriff, and because no return was made of the delivery which was in fact made. The only purpose of such a judgment would have been to compel the garnishee to deliver the pump to the sheriff, and, as this was voluntarily done, as expressly permitted by the statute, a judgment against the garnishee was not necessary. A failure, if there were such, to make due return to the court of that delivery, did not defeat the lien under the attachment; the sheriff having retained the custody of the pump under the writ. *Drake on Attachment* (7th Ed.) § 204.

Even more untenable is the claim that the complainant acquired no right by the attachment, because he did not in the attachment proceeding traverse the statement in the answer of the garnishee that it was "informed" that the pump was the property of the Hendrie & Bolthoff Company. That statement was a mere suggestion of a possible claim

to the pump by the company named. It was not an assertion of ownership in that company, or an assertion of an absence of ownership in the leasing company, the defendant in the attachment, and was not intended as an act of resistance to the attachment, because the garnishee immediately delivered the pump into the custody of the sheriff under the writ. There was therefore nothing in the garnishee's answer upon which an issue could be properly taken, or which would prejudice or defeat the attachment if not traversed.

As commenced in the state court, the original action was not merely to enforce the mechanics' lien, but also to recover the debt which it secured. Being for the purchase price of materials, the debt was contractual. The state law expressly authorized both attachment and garnishment, as "provisional and auxiliary remedies" in an action on contract. Mills' Ann. Code, p. 257, §§ 91, 118. It was also declared in the statute providing for the enforcement of a mechanics' lien:

"No remedy given in this act shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise herein provided." Mills' Ann. St. Colo. § 2897.

No provision in that act purported to restrict the right to recover the debt by an ordinary action, or to deny the right to resort to the provisional and auxiliary remedies of attachment and garnishment in such an action. The rule is general, in the absence of some provision to the contrary, that the remedy upon a mechanic's lien and the remedy upon the debt are distinct and concurrent, and may be pursued at the same time or in succession (Phillips, *Mechanics' Liens* [3d Ed.] § 311; 2 Jones on Liens, § 1552; West v. Flemming, 18 Ill. 248, 68 Am. Dec. 539; Brennan v. Swasey, 16 Cal. 141, 76 Am. Dec. 507; Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395; Gilman v. Illinois & Mississippi Telegraph Co., 91 U. S. 603, 616, 23 L. Ed. 405; 2 Jones on Mortgages [2d Ed.] §§ 1215-1222); and in the courts of those states where the prescribed procedure, like that in Colorado (Mills' Ann. Code, §§ 1, 70), permits a blending together of proceedings at law and in equity, both remedies, including the provisional and auxiliary remedies obtainable in an action upon the debt, may be pursued in the same action. The contention that attachment and garnishment in a mechanic's lien suit were not authorized by the laws of the state cannot be sustained.

In the courts of the United States the distinction between actions at law and suits in equity is carefully maintained, and a blending together in one action or suit of legal and equitable causes of action, or of common-law and equity proceedings, is not permissible; and this is equally true whether the action or suit is originally commenced in one of these courts, or is removed thereto from a state court. Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Schoolfield v. Rhodes, 27 C. C. A. 95, 82 Fed. 153; Highland Boy Gold Mining Co. v. Strickley, 54 C. C. A. 186, 116 Fed. 852; Files v. Brown, 59 C. C. A. 403, 406, 124 Fed. 133; Anglo-American, etc., Co. v. Lombard (C. C. A.) 132 Fed. 721, 731. When a case which unites both legal and equitable grounds for relief, as permitted by the prescribed practice in the state in which it is brought, is removed into a federal court, the pleadings should be recast so as to separate the action at law from the suit in equity, and the two cases should proceed separately, each according to its nature. In the

federal courts a proceeding to foreclose a mechanic's lien is a suit in equity, even though the state statute creating the lien designates the proceeding for its foreclosure as an action at law. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. Ed. 853. A proceeding in attachment is essentially according to the course of the common law, and, although provisional and auxiliary, is an action at law as distinguished from a suit in equity. *United States v. Swan*, 13 C. C. A. 77, 82, 65 Fed. 647; *Drake on Attachment* (3d Ed.) § 4a; *Waples on Attachment*, § 103; *Shinn on Attachment*, § 7. No writ of attachment, and therefore no attachment lien, can be obtained in a mechanic's lien suit commenced in a federal court, because proceedings in equity and at law cannot be so combined.

Relying upon the principles just stated the appellees insist that the attachment lien was lost because after the removal of the original action the pleadings were not recast and the proceeding in attachment separated from the proceeding to foreclose the mechanics' lien, and transferred to the law side of the court. But there is no room for such a contention in the present case. The lien was created or obtained by the proceeding in attachment in the state court prior to the removal, and no controversy or issue of law or fact in that proceeding was ever presented in the Circuit Court. As no occasion arose in that court for any action in the attachment proceeding, there was no necessity for its separation from the foreclosure suit. The rendition of a judgment or decree for the payment of the debt, which was part of the main case, and not of the proceeding in attachment, was all that was required to establish complainant's right to subject the attached property to the satisfaction of his demand.

Whether, if objection had been seasonably made, a personal decree for the payment of the debt could have been properly rendered in the Circuit Court in the suit to foreclose the mechanics' lien, as incidental to a foreclosure (*Noonan v. Lee*, 2 Black, 499, 509, 17 L. Ed. 278; *Orchard v. Hughes*, 1 Wall. 73, 77, 17 L. Ed. 560; 2 *Jones on Mortgages*, [2d Ed.] § 1711; *Equity Rule 92*; *Northwestern Mutual Life Ins. Co. v. Keith*, 23 C. C. A. 196, 77 Fed. 374; *White v. Ewing*, 16 C. C. A. 296, 69 Fed. 451), and, if so, whether, over the like objection, such personal decree could have been properly rendered when the claim to a mechanics' lien failed (*Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Kramer v. Cohn*, 119 U. S. 355, 7 Sup. Ct. 277, 30 L. Ed. 439; *Alger v. Anderson* [C. C.] 92 Fed. 696, 710; 2 *Jones on Liens*, § 1614), need not be considered, because the case was one in which the court had jurisdiction of the parties and of the subject-matter, and the decree was not void, even if erroneous. In other words, there was not an entire absence of jurisdiction, but at most an erroneous exercise of jurisdiction. Not only was a suit to foreclose a mechanic's lien cognizable in the Circuit Court sitting in equity, but a suit to enforce a debt, essentially equitable in nature, was equally cognizable therein. Whether the debt was of that nature in this instance is not now open to question, because the rendition of the decree was an adjudication of the existence of whatever facts were necessary to support it; and an adjudication that the facts of a particular case are such as to make it cognizable in equity, although erroneous, is not a nullity, and cannot be questioned

collaterally. *Mellen v. Moline Ironworks*, 131 U. S. 352, 367, 9 Sup. Ct. 781, 33 L. Ed. 178; *Clark v. Brown*, 57 C. C. A. 76, 78, 119 Fed. 130; *Van Fleet's Collateral Attack*, § 100; *Foltz v. St. Louis & San Francisco Ry. Co.*, 8 C. C. A. 635, 60 Fed. 316.

It is insisted that the complainant abandoned his attachment lien by making an arrangement with the subsequent attaching creditors to prorate the proceeds of the attached property, the right to which, as between the Hendrie & Bolthoff Company and the other creditors, or some of them, was being litigated in the state court. As this arrangement was rested by the participants, including the complainant, upon the liens which were believed to have been severally obtained by them under their separate writs of attachment, and upon the provision (Mills' Ann. Code, §§ 92a-92c) for securing a proportional distribution among attaching creditors of the proceeds of the attached property, the inference to be drawn therefrom is that the complainant was asserting, rather than abandoning, his attachment lien. By conceding to other attaching creditors what they could have obtained by adversary proceedings, he did not waive his lien as against the debtor or others purchasing from the debtor subsequently to the attachment. He was not a party to the litigation in the state court wherein the Hendrie & Bolthoff Company asserted its right to the pump as against the creditors whose writs of attachment were served after that company's purchase, and his right under his prior attachment was not affected by that litigation.

Nor does the bill show that the complainant's right to relief is barred by laches. From the allegations of the bill, the facts controlling a decision of this question appear to be these: The sheriff received the pump from the garnishee under the complainant's writ of attachment, among others, and the district court of Mineral county and the other attaching creditors at all times recognized the complainant's lien. Under the direction of that court, the complainant actually received his portion of the proceeds of the other attached property according to the arrangement between himself and the other creditors. The claim of the Hendrie & Bolthoff Company was that it purchased after, and not before, the complainant's attachment; and that company never instituted any proceeding to question or avoid the complainant's lien, although having actual knowledge of its continued recognition by the district court of Mineral county. Within three months after the controversy between the Hendrie & Bolthoff Company and the subsequent attaching creditors was determined adversely to the latter, the complainant commenced the present suit. He could probably have compelled a transfer of the actual custody of the pump or of the proceeds of its sale to the Circuit Court, but, in view of the other attachments in the state court, and of the continued recognition of his lien by that court and by the other creditors, it was not essential to the preservation of his lien that he should do so. No inference of an abandonment of the lien could have been reasonably drawn under the circumstances. The delay in subjecting the pump or the proceeds of its sale to the satisfaction of the complainant's decree is satisfactorily explained, and no injury to the Hendrie & Bolthoff Company, or advantage to the complainant, seems to have resulted therefrom.

The decree is reversed, and the case is remanded to the Circuit Court, with a direction to overrule the demurrer to the bill, and to take such further proceedings as may not be inconsistent with the views expressed in this opinion.

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UNITED STATES v. BITTER ROOT DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Ninth Circuit. November 7, 1904.)

No. 1,047.

1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

To give a court of equity jurisdiction of a suit involving matters cognizable at law, it must appear that the equitable remedy will afford more complete or effectual relief in kind or degree than the legal remedy, and the fact alone that the evidence may be obtained and presented with greater convenience in an equity suit is not sufficient.

2. SAME—ACTION FOR TORT—ACCOUNTING.

A bill by the United States against a number of corporations and individuals to recover for a joint trespass upon public lands, and the unlawful and willful cutting and removal of timber therefrom by defendants, who are alleged to have conspired for the purpose, does not state a cause of action in equity for an accounting because it is alleged that, by reason of the complicated relations between the defendants, complainant is unable to state the quantity of timber taken by each.

3. SAME—SUIT TO RECOVER FOR TIMBER CUT FROM PUBLIC LANDS.

The United States cannot maintain a suit in equity for an accounting of the gains and profits made by defendants from the alleged unlawful and willful cutting and removal of timber from public lands; its right of recovery being confined to damages for trespass, or damages, recoverable in an action in the nature of trover, in an amount to be based on the value of the manufactured product.

4. SAME.

A suit by the United States to recover for trespass upon public lands, and the cutting and removal of timber therefrom, does not present a case of mutual accounts, cognizable in equity, because of an allegation that complainant granted licenses to defendants to cut timber from certain other lands, and that under cover of such licenses they unlawfully and willfully cut timber from the lands in suit; nor is such a suit maintainable on the theory of establishing a trust in property purchased with the proceeds of the timber taken, where it is not alleged that defendants are insolvent.

5. SAME—DISCOVERY—PRODUCTION OF DOCUMENTS IN SUPPORT OF LEGAL DEMAND.

A federal court of equity is without jurisdiction of a suit for a discovery and for final relief which consists of the enforcement of a purely legal demand; the only ground of equity jurisdiction being the discovery by requiring the production of papers and records, which, under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], can be obtained in an action at law.

6. SAME—SUIT AGAINST EXECUTOR.

A federal court of equity is without jurisdiction of a suit against an executrix to recover for a tort alleged to have been committed by her testator, where she is not charged as trustee, but solely as the personal representative of the tortfeasor.

Appeal from the Circuit Court of the United States for the District of Montana.

The appellant was the complainant in a bill in equity filed in the Circuit Court of the United States for the District of Montana against the appellees

herein as defendants. The substance of the bill was as follows: That on April 1, 1888, the appellant owned certain public lands in the state of Montana, which are described in the bill, comprising many thousands of acres, some of which were surveyed, and others of which were unsurveyed; that on said date there were growing and standing on said lands forests of pine and fir and other trees fit to manufacture into lumber, which standing timber was of the value of more than \$2,000,000; that at the date of filing the bill said lands had, for the most part, been stripped of such timber, and, except very small portions thereof, were denuded of timber, without license or authority or permission of the United States or any one authorized to represent the appellant, and that in consequence of such spoliation the appellant has lost millions of dollars' worth of its property; that one Marcus Daly, now deceased, a citizen and resident of the state of Montana, did on or about January 1, 1889, determine to convert and appropriate to his own use all the merchantable and marketable timber growing and standing on the said lands, without buying the same or obtaining any right or authority except as in the bill hereinafter stated; that, in order to carry out his designs, and to conceal his identity and escape personal liability, and to deceive the public and the officers of the appellant, he, with the aid of certain named persons, on or about August 12, 1890, organized, under the laws of the state of Montana, the Bitter Root Development Company, of which John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and they and Daniel J. Hennessy and William W. Dixon were named as trustees to manage the affairs of the company for the first three months of its existence; that the capital stock of the corporation was fixed at the sum of \$300,000; that said incorporators and trustees had but a nominal interest in the corporation, but certain of them were agents, and others attorneys, of said Marcus Daly, and with him they conspired to denude said lands of their timber; that all of the stock of said corporation was subscribed for the use of and controlled by the said Marcus Daly, and that said named persons, together with Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donahue, William L. Hoag, and Joseph B. Long, aided and assisted said Marcus Daly up to the time of his death in the work of spoliation which, in pursuance of said conspiracy, had been planned; that said parties other than Daly participated in the profits, but to what extent it is unknown to the appellant; that such of the said parties as are not made defendants to the bill are either dead, or out of the jurisdiction of the court, or insolvent; that immediately upon the organization of the corporation, and under the corporate name thereof, said parties so named commenced the work of cutting and carrying away from said lands the growing and standing timber thereon, using at first several portable sawmills, and later a large lumber sawmill at the town of Hamilton, and carried on said work with unremitting industry for several years; that at all such times the officers, directors, trustees, and stockholders of said corporation acted for and in behalf of said Marcus Daly, as his agents, and had knowledge that said timber was being cut without right or authority from the public domain, except as to a small fraction thereof, as hereinafter stated; that in pursuance of such fraudulent conspiracy, and concealment of the same, the said conspirators, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations obtain from the appellant licenses to cut certain timber on small portions of the tracts in the bill described, and under cover of such permits they cut and carried away and manufactured not only the timber growing on the lands included in such licenses, but they willfully and fraudulently entered upon large tracts of land adjacent thereto, and cut and carried away the timber growing thereon, and afterwards cut and sold the lumber to persons unknown to the appellant, but known only to said Daly and the officers and agents of said corporation; that they appropriated the proceeds of the same to their own use; that just when such sales were made, how much the proceeds were, to whom paid, in what proportion, and at what particular times, the appellant is unable to say; that in further execution of said conspiracy the said Daly and his associates organized other corporations for the purpose of concealing their illegal acts, and to make detection and proof of the same difficult, if not impossible; that on January 14, 1891, they

organized the corporation known as the Anaconda Mining Company, with a capital stock of \$12,500,000, divided into 500,000 shares; that on December 5, 1891, the capital stock of said corporation was increased to \$25,000,000; that at the stockholders' meeting at which this was done it appeared that no one of the incorporators or trustees that were named at the time of the incorporation had any substantial interest therein, and that on December 31st of that year another meeting of the stockholders was held, at which it was voted to extend the term of existence of said corporation for 40 years. At that meeting it appeared that Marcus Daly, either in his own person or as trustee or by proxy, controlled over 700,000 of the 1,000,000 shares of said capital stock, and in less than six months thereafter said capital stock was reduced from \$25,000,000 to \$1,000,000, and the number of shares from 1,000,000 to 40,000; that in furtherance of said conspiracy the said Daly on April 27, 1894, through his agents, procured to be conveyed unto himself all the property of said Bitter Root Development Company; that in the deed of transfer it appeared that said company, for and in consideration of \$1, transferred all its property of every kind and description, real and personal, timber lands, timber-cutting privileges, and rights, etc.—in fact, everything belonging to the Bitter Root Development Company—to Marcus Daly; that four days later Daly deeded the same property to the Anaconda Mining Company for the express consideration of \$1,442,379.46; that said Daly did in fact receive said named consideration, the whole thereof being the result of the spoliation of the lands of the appellant as aforesaid; that the money so received by him belonged in fact to the appellant, but that in fact said consideration was not all paid in cash, but a portion of the same was stock in said Anaconda Mining Company, but how much was cash, and how much was stock, the appellant is unable to state; that in furtherance of said conspiracy, on June 6, 1895, the defendants Kirkpatrick, Scallon, and Bromley, acting for and in behalf of said Daly, organized under the laws of the state of Montana the Anaconda Copper Company, with an organized capital stock of \$30,000,000, consisting of 300,000 shares, and for the first three months of its existence the said Kirkpatrick, Scallon, Bromley, Donahue, Hoag, Hennessy, and Long were named as trustees; that nine days thereafter the same persons organized under the laws of said state the Anaconda Copper Mining Company, with an organized capital stock of \$30,000,000, consisting of 1,200,000 shares, with the same set of trustees to manage its affairs for the first three months of its existence; that in the execution of said conspiracy and for the purpose of complicating the situation, said Daly, through his agents, within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, conveyed the identical property named in the deed to that corporation to the said Anaconda Copper Mining Company, for and in consideration of the sum of \$1; that these several conveyances were made, in the main, in furtherance of said conspiracy, and for the purpose of so complicating the situation as to make detection difficult, if not impossible; that the conveyance by the Bitter Root Development Company to Daly of all its property for the consideration of \$1 was fraudulent, and that the said Daly did, in the name of the Anaconda Copper Mining Company, carry on the same work of spoliation of the timber on said lands from the time of the conveyance of said property to said last-named corporation until the date of his death; that he continued to use the same means and the same mill, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and, so knowing, continued the same; that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations, or was appropriated by Daly and his assistants to their own use and benefit, but how much was carried over into the said corporations, and how much was divided previous to the last deed so referred to, and how much of the property of the appellant was converted by said last-named corporation, and how much thereof was appropriated by said company, and how much by Daly and his associates, it is impossible for the appellant to state; that, by reason of such spoliation carried on during a period of about ten years, the appellant has lost property of the value of \$2,000,000 and upwards, and that said Marcus Daly and the other defendants named in the bill occasioned this loss by willfully trespassing on

the lands of the appellant without its consent, and in violation of law, and that they appropriated and converted to their own use the trees and timber growing thereon; that said defendants, or some of them, have at all times had, and now have, possession of the said sawmill, and they have received all proceeds from the sales of lumber, and divided the same among themselves; but by reason of the frauds so practiced, and their concealment, and by reason of said defendants having possession of all books of account, it is impossible for the appellant to set forth to a greater extent the details of the conspiracy, or to show when and by whom the particular acts of spoliation were performed, or just when and to whom the lumber was sold, or when and by whom the proceeds thereof were received; that, owing to the sparsely settled condition of such lands, and the imperfect means of the appellant to patrol and protect the same, said frauds and trespasses were not discovered until a comparatively short time before the filing of the bill.

The bill contains this averment: "Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that by reason of the frauds and conspiracies above set forth, and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given your orator by said actions at law, and your orator is only relleivable in a court of equity, where matters of this kind are properly cognizable and relleivable."

The bill further alleges that Marcus Daly died on the 12th day of November, 1900, and left estate of the value of about \$12,000,000 in Montana and elsewhere; that a large portion of said estate was the result and proceeds of said illegal acts; that he died testate, having named the defendant Margaret P. Daly his executrix; that his will was duly admitted to probate in the district court of the county of Deer Lodge, in Montana, and letters of administration were duly issued thereon to the said Margaret P. Daly, and that she is now the acting executrix; that said Margaret P. Daly, under and by virtue of the terms of said last will, is now the owner of a large portion of said estate.

The bill then prays for equitable relief: First, that Margaret P. Daly, both in her own person and as executrix, and each of the appellees, be decreed to hold in trust for the use and benefit of the appellant so much of their estate, both real and personal, as shall have come to them directly from the proceeds of the sale of said timber; second, that the appellant recover from said appellees the profits and gains and advantages which they have received or made by reason of said willful trespasses and fraudulent conversion of said timber; third, that each of said appellees make a full and true discovery and disclosure of and concerning the transactions aforesaid, and that an accounting be taken of all said dealings between the appellant and the appellees; that on said accounting the appellees be required to produce all licenses, permits, and all other documents of every kind and character which they may have received from the appellant, or by which they claim the right to enter upon any of said lands or to cut the timber therefrom; fourth, that they account for the number of logs received by them and manufactured into lumber at their said mill, or at any other mill owned or used by them; also the gains, profits, and advantages which have accrued to them from trespassing on said lands and converting said timber to their own use; fifth, that they account for all sums received on sales of such timber; sixth, that they set forth a list and description of all books of account, deeds, stockbooks, letters, papers, or writings relating to the matters aforesaid, or any of them, and that they deposit the same with the clerk of the court for the purpose of inspection by the appellant, and for all other legitimate and usual purposes; that upon such accounting the appellees be required to pay to the appellant all money derived by them from their participation in the conspiracy aforesaid, with interest thereon, and for such further relief as pertains to equity.

A demurrer was interposed to the bill for want of equity, and upon the further ground that the complainant therein had a full, complete, and adequate remedy at law for the recovery of damages for the alleged wrongs, and



also a full, complete, and adequate remedy at law for any discovery necessary or practicable in aid of an action at law.

P. C. Knox, Atty. Gen., M. C. Burch, Sp. Asst. Atty. Gen., Carl Rasch, U. S. Dist. Atty., and Fred A. Maynard, Sp. Asst. U. S. Atty.

W. W. Dixon, A. J. Campbell, A. J. Shores, C. F. Kelley, John F. Forbis, and L. O. Evans, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill sets forth a series of trespasses, continuing over a period of some ten years, which are alleged to have been committed by all of the defendants jointly. The appellant had its remedy in such a case by an action of trespass to recover damages based upon the value of the standing timber when taken, or, if the trespass was knowingly and wrongfully committed, by an action in the nature of trover, to charge the appellees with the value of the timber, as manufactured into lumber. *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230. But the appellant, while admitting that it has a remedy at law to obtain redress for the acts complained of, denies that such remedy is as plain, speedy, or adequate as the remedy afforded by a suit in equity. The inadequacy of the legal remedy is said to consist in the trouble and difficulty of unraveling before a jury the devious and confusing methods adopted by the appellees in creating corporations, and in transferring property from one to the other thereof, and other devices to cover their tracks, and that these methods and devices may only be brought to light through an inspection of the books and records of those corporations. It is not denied that inspection of all of these books and records may be obtained in an action at law, but the contention is that it would be more convenient to present such complicated evidence in a suit in equity. But the greater convenience of the equitable remedy is no ground, in itself, for resorting to equity, or for depriving a party of his constitutional right to a jury trial. The controlling consideration is whether the equitable remedy will afford more complete or effectual relief in kind or degree than the legal remedy. If the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," it must be pursued. *Insurance Company v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, and cases there cited; *Scott v. Neely*, 140 U. S. 106, 110, 11 Sup. Ct. 712, 35 L. Ed. 358.

It is contended that the bill presents several grounds for equitable relief, one of which is the jurisdiction of a court of equity in matters of accounting. This, it is true, is one of the established grounds of equitable jurisdiction in cases where it is shown that an accounting cannot be fairly and adequately had in a court of law, or where there are fiduciary relations between the parties, or where the accounting is incident to recognized equitable relief sought by the bill. But there are no accounts in this case between appellant and appellees. The cause of action, as set forth in the bill, arises wholly in tort. A cause

of action arising in tort cannot be converted into a cause of action on an account at common law. *Sandeen v. K. Cy. & St. Jo. R. Co.*, 79 Mo. 278; *Albertson v. Grier*, 4 *Houst. (Del.)* 541; *Western & Atlantic R. Co. v. Mead & Co.*, 4 *Snead*, 107; *Spencer v. Hewett*, 20 *Ga.* 426; *Atchison, T. & S. F. R. Co. v. Wilkinson*, 55 *Kan.* 83, 39 *Pac.* 1043. Nor can the appellant, by resorting to equity, convert its cause of action which arises on the facts disclosed in the bill into a suit in equity for an accounting. In addition to this, no facts are alleged in the bill to show the necessity for an accounting. It is not alleged in the bill that an accounting is necessary to enable the appellant to ascertain the quantity of timber that has been wrongfully cut from the premises described therein. It is not even alleged that the desired accounting will develop such proof, nor is it alleged that the appellees cut no timber from lands other than those so described, or that they received no logs from other sources. The prayer of the bill in this connection is that the plaintiff recover from the defendants the profits, gains, and advantages which they have received or made by reason of the said trespasses and conversion of the timber so cut. The relief so prayed for is not obtainable upon the facts alleged by any form of suit or action. The right of the appellant is confined to damages for trespass, or damages recoverable in an action in the nature of trover, in an amount to be based upon the actual value of the manufactured product, and not upon the amounts, gains, and profits received by the appellees.

But it is said that the bill presents a case of mutual accounts. This is asserted upon the theory that the appellant had granted to the appellees licenses to cut timber on small portions of the tracts described in the bill, of which licenses the appellees took advantage to wrongfully cut timber from adjacent lands. How this presents a case of mutual accounts, we are unable to see. The acts with which the appellees are charged are a series of torts. As to the lands on which licenses were given to cut timber, no demand for damages for such cutting can arise in favor of the appellant, and as to those lands no relief is sought. Those transactions can occupy no place in an accounting.

It is claimed that the bill may be sustained on the ground that it is brought to establish a trust. The cases of *Newton v. Porter*, 69 *N. Y.* 133, 25 *Am. Rep.* 152, and *The American Sugar Refining Co. v. Fancher*, 145 *N. Y.* 552, 40 *N. E.* 206, 27 *L. R. A.* 757, are cited to sustain the doctrine that such a trust may arise through a tort. In the first of those cases it was held that the owner of negotiable securities stolen, and afterwards sold by the thief, might follow and claim the proceeds in the hands of the felonious taker, and that this right attached to any securities or property in which the proceeds may have been invested, so long as such proceeds could be traced and identified. But in that case the original tortfeasor was insolvent. There was no remedy at law. No redress was possible unless the owner could proceed in equity to charge with a trust the property in which the stolen securities were invested. So, in the case of *The American Sugar Refining Co. v. Fancher*, the sale of personal property had been induced by fraud on the part of the vendee, and the property was by him sold to another. The proceeds of the sale were specifically identified in the hands of the latter. Since the vendee was wholly insolvent, it was held that a court

of equity had a remedy to reach such proceeds and apply them for the benefit of the defrauded vendor. No such facts are presented in the present case. It is not alleged that any of the defendants is insolvent. On the contrary, it is shown that the estate of Marcus Daly, who, according to the allegations of the bill, was the initiator and principal actor in all the trespasses so complained of, and who, as one of the joint tort feors, would be chargeable with the whole of the damages recoverable on account thereof, amounts to \$12,000,000. Nor is it alleged in the bill that the profits fraudulently obtained by the appellees through the tort complained of have been invested or are now discoverable in any particular form of property which might be charged with a trust in invitum.

It is said that on the allegations of the bill the appellant is entitled to a discovery. But the appellant's remedy having been, as we have seen, an action at law, there is no necessity for resorting to equity to procure discovery in aid thereof. It has been held that in ordinary cases a pure bill of discovery cannot be maintained in the equity courts of the United States, for the reason that section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] renders it no longer necessary. *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Rindskopf v. Platto* (C. C.) 29 Fed. 130; *United States v. McLaughlin* (C. C.) 24 Fed. 823; *Preston v. Smith* (C. C.) 26 Fed. 885; *Paton v. Majors* (C. C.) 46 Fed. 210. Section 724 of the Revised Statutes enables a plaintiff in an action at law to obtain in that action all discovery of books, papers, and documents, as fully as it could be done in a suit in equity. Again, it is the settled rule that the federal courts are without jurisdiction of a suit for the discovery of evidence to be used in the enforcement of a legal demand. In *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the court said:

"The Constitution, in its seventh amendment, declares that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

In *Safford v. Ensign Mfg. Co.*, 120 Fed. 480, 56 C. C. A. 630, it was held that a federal court is without jurisdiction of a suit in which discovery and relief are sought, but the only ground for equitable relief appears to be the discovery of evidence to be used in the enforcement of a purely legal demand.

It is contended that the bill may be sustained for the reason that Margaret P. Daly is sued as executrix of the estate of Marcus Daly, deceased. It is true that courts of equity have exercised jurisdiction over controversies in which executors and administrators are parties defendant. But it is only in cases where such personal representatives are to be considered trustees for the heirs, legatees, devisees, or creditors. According to the allegations of the bill, Margaret P. Daly is not a trustee for the appellant. The appellant presents a claim for unliquidated damages. Margaret P. Daly is made a party defendant

only for the reason that she is the personal representative of Marcus Daly, who was the principal tortfeasor, according to the averments of the bill. She has the same right to a trial by jury that her husband would have had if living. There is no charge of fraud against Margaret P. Daly, as executrix, and no discovery of the assets of the estate in her hands is required. According to the bill, she is possessed of ample funds to meet the whole of the demand of the appellant.

The decree of the Circuit Court is affirmed.

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In re WAUGH.

In re CASKEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,051.

**1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—MOTION FOR ADJUDICATION ON PLEADINGS.**

Where, after the filing of answers to a petition in involuntary bankruptcy presenting issues of fact, the petitioners move for an adjudication on the pleadings, they thereby admit the facts properly pleaded in the answers, in accordance with the general rules of equity practice, and the only question presented is as to the legal sufficiency of the answers. If the motion is denied, defendants are entitled to a final decree dismissing the petition.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Washington, in Bankruptcy.

Chas. S. Wiley and Napthaly, Friedenrich & Ackerman, for petitioner.

George A. Hawley, William A. Peters, and John H. Powell, for respondents.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an original petition to this court, filed pursuant to the provisions of section 24, cl. "b," of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], to revise, in matters of law, certain involuntary bankruptcy proceedings in the court below. Those proceedings were initiated by the filing in that court by three corporations—Crane Company, Dexter, Horton & Co., and Washington National Bank of Seattle—of a petition entitled, "In the Matter of J. C. Caskey, J. C. Waugh, E. A. Freeman, and H. D. Freeman, Copartners Doing Business under the Name and Style of the North Avon Lumber Company, Bankrupts," in which it is alleged, in substance, that Caskey, Waugh, and the two Freemans, for the greater portion of six months next preceding the filing of the petition, had their principal place of business at North Avon, in the county of Skagit, state of Washington, and that all of them, except Caskey, during the same time resided at Mt. Vernon, in Skagit county; that Caskey dur-

ing the greater portion of the six-months period resided in the city of Seattle, and that each of them owed debts exceeding the amount of \$1,000; that the petitioners are creditors of the parties named, having provable claims amounting in the aggregate to more than \$500, over and above securities held by them, the nature and amount of which are as follows: That Crane Company's claim is for \$394.36, for merchandise sold and delivered to the alleged bankrupts, and the claims of the Washington National Bank and of Dexter, Horton & Co. are each for money in excess of \$2,000 loaned to the alleged bankrupts, evidenced by their promissory notes, executed under the name and style of the North Avon Lumber Company. It is alleged that they are insolvent, and that within four months next preceding the date of the filing of the petition they committed acts of bankruptcy, in that they did execute and deliver a certain deed of trust to Ira Bronson and C. F. Wiley, thereby transferring to them all the property of the North Avon Lumber Company, and that the alleged bankrupts did thereafter, and within four months next preceding the filing of the petition, being insolvent, suffer a receiver to be appointed under and by virtue of an order of the superior court of the state of Washington for Skagitt county, to take charge of the property of the said bankrupts, as the North Avon Lumber Company. Subpœna was issued on that petition and served on all the respondents; Caskey being served at Portland, Or., on which ground he appeared specially, and moved for a dismissal of the proceedings as to him for lack of jurisdiction, and on the ground that on June 3, 1904, he sold and conveyed all of his interest in the North Avon Lumber Company, since which time he has had no interest therein, and also on the ground "that for more than four months prior to the filing of the petition herein said respondent was not a resident of, or domiciled in, or doing business in, the above-named judicial district, or state of Washington, but was domiciled, residing, and doing business at Portland, in the state of Oregon, and that said respondent is now a bona fide resident of Portland, Or., and that said respondent was not served within the jurisdiction of this court with process." Waugh and the two Freemans filed answers controverting the facts alleged in the petition; that of the Freemans also averring that they are wage earners, within the definition of that term contained in the bankruptcy act.

The answer of Waugh not only put in issue the averments of the petition, but set up, among other things, the following affirmative defense: That he (Waugh), about August, 1902, owned certain machinery, wagons, horses, and other property which had been used by him in cutting lumber near Mt. Vernon, in Skagitt county, Wash., and had been selling the lumber to Caskey, then a resident of Seattle; that thereupon Caskey agreed with him (Waugh) that if the personal property mentioned was removed to a new mill site near North Avon, in the county of Skagitt, and the respondent Waugh were to acquire certain lands and timber near there, a corporation should be formed with a capital stock of \$16,500 (the estimated value of the property), and that Caskey would pay to Waugh \$5,500, whereupon one-third of the capital stock of such corporation should become the property of Caskey; that in accordance with that agreement the personal property mentioned was moved to the new mill site, which was leased to Waugh, and who also

acquired the timber and timber land contemplated, a part of which timber land was, however, conveyed to Caskey and Waugh, and was paid for with the proceeds of a note for \$3,000 executed on the 26th day of August, 1902, by Waugh and Caskey to the London & San Francisco Bank, Limited, of Seattle, which note has never been paid, and, because of Caskey's inability to pay his part of that note, he reconveyed to Waugh his interest in the lands on or about the 3d day of January, 1903; that the remaining \$2,500 of the \$5,500 which Caskey had agreed to pay Waugh for one-third of the capital stock in the proposed corporation was finally paid to him before January 1, 1903; that, when the mill was erected at the new site near North Avon, Caskey represented to Waugh that much new machinery would be required to make the mill a model one, with a capacity of about 35,000 feet of lumber per day, but that it would not be necessary for Waugh to put any money into such new machinery, as he (Caskey) had an abundance of money, and would purchase and install all the machinery required, and that, when the proposed corporation was effected and the new mill in operation Caskey would sell the lumber cut by such new mill, and from time to time reimburse himself for any such advances from the proceeds of the lumber, and that all machinery and supplies used in the erection of the new mill, excepting such as was furnished originally by Waugh as part of the outfit valued at \$16,000, was purchased and provided for the proposed corporation by Caskey under that agreement; that, as soon as the new mill was in such a condition as that it could be operated, they cut timbers for the superstructure thereof, and before it was finished rough lumber was begun to be sold by Caskey as agent of the proposed corporation, and that he continued so to sell the output of the mill from the time it was completed, in April, 1903, to about the end of May, 1903, "sending money to Mt. Vernon which this respondent [Waugh] understood to be proceeds from the sale of said lumber"; that about June 1, 1903, Waugh accidentally discovered that Caskey had borrowed money of certain banks in Seattle, and had executed notes signed with a rubber stamp containing the words, "North Avon Lumber Company, by ———, Manager," writing the name "J. C. Caskey" in the blank, and that all of these notes were negotiated upon the indorsement of Caskey, and that the respondent Waugh finally discovered that some of these notes were held by the Washington National Bank, and some by Dexter, Horton & Co., "which are probably the notes mentioned in the petition herein;" but respondent avers that said Caskey had no authority to borrow money in the name of North Avon Lumber Company or this respondent, or in any other way to bind this respondent by the execution of any promissory notes, nor had he authority to incur any indebtedness on the credit of this respondent, or to create any indebtedness for this respondent." The respondent Waugh further alleged in his answer that it became necessary at times to borrow money in the operation of the mill at North Avon, and that in such instances notes therefor were always signed by him and by Caskey as individuals. The answer of Waugh further set up that, if any merchandise was purchased of the Crane Company, it was purchased by Caskey under his aforesaid agreement to provide all necessary machinery and supplies for the new mill; that all arrangements and agree-

ments between Caskey and himself above mentioned were oral and not in writing, and that no partnership agreement or understanding was ever made, and that there was never any understanding or agreement that Caskey should have anything else than one-third of the capital stock of the proposed corporation, and the right to reimburse himself for all expenditures made in completing the new mill, which reimbursement should be made out of the proceeds of the sale of lumber cut in the new mill on its completion, and after the formation of the corporation; that Caskey never had the control or management of any part of the business at North Avon, and had nothing to do with it, except to sell such lumber as was cut by the mill there prior to January 1, 1903; that no goods, wares, or merchandise were ever bought by the respondents Waugh and Caskey, or either of them, under the agreements mentioned, for the purpose of being sold again, nor did Caskey and the respondent Waugh engage in trade, or the buying and selling of merchandise, or other mercantile pursuits, or transact any other character or kind of business than that above stated. The answer of the respondent Waugh also contains a denial that he is insolvent, and an averment that he should not be declared a bankrupt for any cause in the petition mentioned, and contains a prayer that the question of his insolvency and the commission by him of the alleged acts of bankruptcy be inquired of by a jury.

Upon the coming in of the answers and the motion of Caskey, the petitioners filed a motion for an adjudication of bankruptcy, which motion, it appears from the record, came on regularly for hearing upon the petition, the answers, and the motion of Caskey, after which the court "adjudged and decreed that said motion that said respondents be adjudged bankrupts be, and the same is hereby, overruled," whereupon the respondent Waugh moved the court for a judgment of dismissal of the petition, which motion was denied, to which ruling the respondent Waugh reserved an exception. The court thereupon, upon motion of the petitioning creditors, referred the cause to a referee in bankruptcy, "with power and authority and the direction of this court to try the issues presented by the pleadings filed herein with a jury, if a jury be demanded by either party, and to make such findings and orders therein as the findings of the jury and the law of the case shall warrant, and to take such other and further action herein as may seem meet and proper." To which action of the court the respondent Waugh also excepted.

Two questions are presented and argued on the present proceeding: First, was it the duty of the court below to enter a decree dismissing the proceedings upon its decision, based upon the pleadings, that the petitioners were not entitled to a decree that the parties proceeded against were bankrupts? And, second, did it err in making the order of reference above set out? An affirmative answer to the first question will, as a matter of course, dispose of the second, also.

Rule 37 of the rules established as general orders in bankruptcy of the Supreme Court November 20, 1898 (18 Sup. Ct. x), provides that:

"In proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as near as may be."

It is well settled that, except in certain specified particulars, proceedings in bankruptcy are of an equitable nature. *Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *In re Herzikopf*, 121 Fed. 544, 57 C. C. A. 606. The petitioning creditors took that view of the nature of the proceedings in the court below, for, waiving their right to test the truth of the matters of fact presented by the answers by replication and proof, they moved the court below, upon the pleadings, for an adjudication of bankruptcy against the respondents; thereby admitting all the averments of fact properly pleaded in the answers. *In re Taylor*, 102 Fed. 728, 42 C. C. A. 1; *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498; *Lake Erie & W. R. Co. v. Indianapolis National Bank et al.* (C. C.) 65 Fed. 690; *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425.

The sole question, therefore, that was presented to the court below, was one of law—that is to say, whether the answers presented a good defense to the petition—and when the court refused, as it did, to adjudicate the respondents bankrupt, it in effect held the answers sufficient in law to defeat the application of the petitioners. There was no question of fact to try, by jury or otherwise, and the respondents were entitled to a final decree dismissing the petition. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, and cases cited therein.

The District Court is therefore directed to vacate the order of reference and all proceedings subsequent thereto, and to enter a decree dismissing the petition, at the petitioner's cost.

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UNITED STATES v. GARDNER.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,040.

1. INDIANS—TITLE TO ALLOTTED LANDS—ACTION BY UNITED STATES TO RECOVER FOR TIMBER CUT.

Lands allotted to Indians in severalty subject to the conditions imposed by the general allotment act of February 8, 1887, c. 119, 24 Stat. 388, which provides that the United States shall hold such lands in trust for the allottee or his heirs for the period of 25 years, or so much longer as the President may determine, and then convey the same in fee to such allottee or his heirs, and that any conveyance or contract touching the same made before the expiration of such period shall be absolutely null and void, remain the property of the United States during such trust period, and it may maintain an action for timber unlawfully cut therefrom by a third person.

2. JUDGMENT NOTWITHSTANDING VERDICT—GROUNDS—INSUFFICIENCY OF EVIDENCE.

In the absence of any established practice of the state otherwise, a judgment notwithstanding the verdict can be granted only on the record, and the court in disposing of the motion therefor is not authorized to look to the evidence.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.



Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty.

Happy & Hindman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error was the defendant in an action brought against him by the United States to recover the sum of \$1,665.38 and interest, alleged to be the manufactured value of certain timber wrongfully and unlawfully cut and removed by the defendant in error from certain lands described in the complaint. These lands, prior to the cutting and removal of the timber, had been allotted to two certain Indians, 80 acres to each, pursuant to the act of Congress approved July 1, 1892, c. 140, 27 Stat. 62, and entitled "An act to provide for the opening of a part of the Colville reservation in the state of Washington and for other purposes," and the general allotment act of February 8, 1887, c. 119, 24 Stat. 388. The jury returned a verdict in favor of the United States in the sum of \$300. The defendant in error moved the court for a judgment notwithstanding the verdict, for the reason that the verdict was contrary to law and the evidence, and for the further reason that the plaintiff in error had no capacity to sue, and no title to the lands from which the timber was removed. Upon the latter ground the court sustained the motion, and judgment was entered for the defendant in error.

Section 4 of the act of July 1, 1892, contains the following provisions:

"That each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is so entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the congressional survey. \* \* \* Such selections shall be made within six months after the date of the President's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed, and when allotments have been selected as aforesaid and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the benefit of the allottees respectively, and afterwards conveyed in fee simple to the allottees or their heirs, as provided in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, and an act in amendment and extension thereof, approved February twenty-eighth, eighteen hundred and ninety-one. \* \* \* Provided that such allotted lands shall be subject to the laws of eminent domain of the state of Washington, and shall, when conveyed in fee simple to the allottees or their heirs, be subject to taxation as other property in said state." 27 Stat. p. 63.

Section 8 provides as follows:

"That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville reservation, whether that hereby restored to the public domain or that still reserved by the government for their use and occupancy."

Section 5 of the act approved February 8, 1887, contains the following:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the law of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." 24 Stat. 389.

The defendant in error contends that section 5 of the act of 1887, known as the "General Allotment Act," transferred the seisin and possession from the government to the allottees to all intents and purposes, and that the latter thereby acquired not merely a title, but an actual estate, which was created as effectually as if it had been done by a conveyance with livery of seisin at common law. In the recent case of the *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, the court was called upon to consider what interest, if any, the Indian allottee acquired in the land allotted to him under that act. Referring to the fifth section, the court said:

"The word 'patents', where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a 'patent,' showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine."

Concerning the question whether such allotted lands were subject to taxation for state or municipal purposes, the court further said:

"If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians, without any right in the Indians to make contracts in reference to them, or to do more than to occupy and cultivate them until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the state of South Dakota for state or municipal purposes to assess and tax the lands in question until at least the fee was conveyed to the Indians."

Later in the opinion the court considered the question whether the United States had such an interest in the controversy or in its subjects as to entitle it to maintain a suit to protect the Indians against local or state taxation. The court said:

"In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary."

The court further adverted to the facts that the lands are held by the United States in execution of its plans relating to the Indians without any right in the latter to make contracts in reference thereto, or to do more than occupy and cultivate them; that the Indians are yet wards of the nation, in a condition of tutelage or dependency; that they occupy the lands with the consent and authority of the United States, and under a national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized life and citizenship, in view of which considerations "there arises the duty of protection, and with it the power." The principles announced in that case are decisive of the present case, and lead directly to the conclusion that the United States had both the title to the land and the capacity to bring the action.

In *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589-592, 18 Sup. Ct. 208, 42 L. Ed. 591, the court said:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the Land Department of the Government. \* \* \* Wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent. \* \* \* It is, of course, not pretended that, when an equitable title has passed, the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. [Citing authorities.] In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed."

See, also, *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; *Pine River Logging Co. v. United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; and *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210.

The defendant in error attempts to sustain the judgment on the ground that there was no evidence in the case to sustain the verdict. If there was no evidence to sustain the verdict, the remedy of the defendant in error was to move for an instructed verdict. A judgment notwithstanding the verdict must be granted, if at all, solely upon the record; and the court, in disposing of the motion, is not authorized to look to the evidence. *Lewis v. Foard*, 112 N. C. 402, 17 S. E. 9; *Templeman v. Gibbs* (Tex. Civ. App.) 25 S. W. 736; *Stevens v. Logansport*, 76 Ind. 498. At common law, a judgment non obstante veredicto could only be granted upon the application of the plaintiff, and upon a plea to the declaration which confessed the cause of action and set up matters in avoidance, which, upon their face, were insufficient to constitute a defense or a bar. *German Ins. Co. v. Frederick*, 58 Fed. 144, 7 C. C. A. 122. The rule has been relaxed in most of the states so far as to permit a judgment on the pleadings notwithstanding the

verdict in behalf of either the plaintiff or the defendant. We find no statute of Washington or decision of the Supreme Court of that state further relaxing the rule so as to permit the consideration of the evidence in the case.

The judgment will be reversed, and the cause remanded, with instructions to render judgment upon the verdict for the plaintiff in error.

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MOORE v. NICKEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,017.

1 EQUITY—LACHES—SUIT TO RECOVER MINING STOCK.

A suit cannot be maintained in a federal court of equity to recover stock in a mining company under a written contract after a delay of nine years from the date of contract and eight years after complainant made a demand for the stock, where it would have been barred in five years under the law of the state where brought, and the only excuses for the delay are that complainant lived some 300 miles from the office of the company, that during a part of the time the company had ceased working its mine, and that for about four years the contract was lost, it having been recovered more than a year before the suit was brought.

2. SAME—PLEADING.

In a federal court it is not necessary, in order to let in the defense of laches, that a foundation should be laid by any averment in the answer.

Appeal from the Circuit Court of the United States for the District of Montana.

The appellant brought a suit in equity against the appellees to obtain the issuance and delivery to him of certificates of certain shares of the stock of the Britannia Mining Company, and to require the payment to him of certain sums which have been declared as dividends on said stock. The bill alleges: That Gilbert R. Nickey holds 22,163 $\frac{3}{4}$  shares of such stock in trust for the appellant, and that the Britannia Mining Company holds a like number of shares in trust for him, and that dividends in the sum of \$6,650 have been declared thereon. That on September 29, 1892, the mining company was organized under the laws of Wisconsin, with a capital stock of \$125,000 in shares of the par value of \$1 each. That on January 7, 1893, one J. J. Nickey and Joseph O. Hudnutt, who each owned 21,250 shares of the stock of said company, in consideration of the execution and delivery of the joint promissory note of the appellant and Theabauld Schweitzer for \$5,000, sold and transferred to them 15,833 $\frac{1}{3}$  shares of said stock. That at the time of the sale Nickey and Hudnutt had not received and did not have certificates for any of said stock, and in consequence thereof no transfer thereof was made, but it was mutually agreed between the parties that such stock should continue to stand in the name of the sellers until demand by or on behalf of the purchasers. That the sellers gave as evidence of such sale an instrument in writing as follows:

“Butte, Montana, Jan. 7, 1893.

“We, the undersigned, for and in consideration of the sum of five thousand (\$5,000) dollars to us in hand paid, the receipt whereof is hereby acknowledged, hereby transfer and assign to Charles A. Moore of St. Paul, Minn., and Thea Schweitzer of Butte City, Montana, the undivided one-third ( $\frac{1}{3}$ ) of our one-half ( $\frac{1}{2}$ ) of the Britannia Quartz Lode Mining Claim, situated in the Summit Valley Mining District in the County of Silver Bow, State of Montana, and designated as Lot No. 268 in the official survey of the United States.

Said one-third ( $\frac{1}{3}$ ) of the one-half ( $\frac{1}{2}$ ) interest to be in the capital stock of the company—the one-third ( $\frac{1}{3}$ ) of one-half ( $\frac{1}{2}$ ) of the capital stock to be transferred consists of all the capital stock less five thousand (5,000) shares of the capital stock of five thousand (\$5,000) dollars in case of sale of mine now pending—or in cash in case of sale which is now pending, also one-third ( $\frac{1}{3}$ ) of one-half ( $\frac{1}{2}$ ) of lease to be made to parties now working the mine.”

The bill further alleges: That by reason of the mutual mistake of all the parties the instrument did not, in certain respects, conform to their intention. That at the same time an agreement was entered into between the appellant and Schweitzer under which Schweitzer's interest subsequently passed to the appellant and the appellant paid said promissory note. That on or about September 22, 1894, the capital stock of said corporation was increased from 125,000 shares to 350,000 shares of the same par value, and the appellant's holdings were thereby increased from 15,833 shares to 44,333 $\frac{1}{2}$  shares. That prior to June 1, 1896, J. J. Nickey died, and after his death G. R. Nickey, who had full knowledge of the sale to the appellant and Schweitzer, transferred all of the certificates standing in J. J. Nickey's name on the books of said company, amounting to 62,450 shares, and including the stock held in trust by him for the appellant to himself, the said G. R. Nickey, by an indorsement made by himself on the back of said certificates, and he received from the company new certificates therefor, and of such new certificates he transferred 25,000 shares to the appellee Margaret M. Nickey, the widow of J. J. Nickey. That he disposed of an additional 1,500 shares, and that he still retains the balance of such stock, amounting to 35,950 shares. That certificates for 24,200 shares were issued to said Hudnutt, but none of the same was ever delivered. That all of such stock, including that held by Hudnutt as trustee for the appellant, was levied upon and sold under execution in two suits brought against Hudnutt in Milwaukee county, Wis., one of which suits was brought by said mining company as plaintiff prior to the increase of its authorized capital stock; and that the stock sold in that suit was bid in, 20,000 shares by the mining company, which it still holds, and 1,250 shares by one Emil Lenicheck. That the other of said suits was brought after the increase of the capital stock by G. R. Nickey as plaintiff, and the stock so sold, amounting to 2,950 shares, was bid in by him, for which he received from the mining company new certificates, which he still holds. That no summons or other notice was ever served personally upon the defendant in said actions, nor was there in either of them any attachment of the property of the defendant therein prior to judgment. That in connection with the second of said actions there was prosecuted a garnishee proceeding, but that it does not appear from the record that proof was made, or that the fact was that personal service of summons could not be made within the state of Wisconsin either before or within 10 days after the service of the garnishee defendant. That each of said judgments and all subsequent proceedings thereon were and are absolutely void. That in the year 1901 dividends amounting to 15 per cent. of the par value of such stock were declared and paid to G. R. Nickey upon all such stock held by him. That proper demand has been made for the transfer, issuance, and deliverance of certificates of stock owned by the appellant, and for the payment to him of the dividends thereon declared. That the stock is of the reasonable market value of \$1 per share. Schweitzer and Hudnutt, who were parties defendant to the bill, made no answer thereto. G. R. Nickey, Margaret M. Nickey, and John J. Berky, as administrator of the estate of J. J. Nickey, deceased, answered, denying in the main the essential averments of the bill, as did the Britannia Mining Company. Upon the issues joined testimony was taken, and thereupon the court, without making findings of the facts, entered a decree dismissing the bill.

John A. Shelton, for appellant.

Geo. W. Stapleton, Guy W. Stapleton, B. S. Thresher, and W. A. Pennington, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is assigned as error that the trial court held that by the testimony produced on behalf of the appellant he had not established by clear and satisfactory evidence that the bill of sale of January 7, 1893, by the mutual mistake and inadvertence of the parties, did not correctly express their intention, and that he had not shown that it was the intention of the parties to that instrument to thereby evidence the sale by J. J. Nickey and Joseph C. Hudnutt to the appellant and Schweitzer of one-third of one-half of 100,000 shares, less 5,000 shares, of the capital stock of the Britannia Mining Company. There are no findings and no opinion in the record, and we have no means of knowing what the court held concerning the effect of that instrument, or upon what grounds the bill was dismissed. As we read the instrument, we think it is reasonably clear from its terms, and without the aid of extraneous evidence, that, notwithstanding that it purports to sell an undivided one-third of one-half of the Britannia quartz lode mining claim, it was the intention of the parties to transfer, not an interest in the claim, but stock in the mining company, which at that time had an option on the claim, and shortly afterward obtained the title to it. The instrument specifies that the one-third of the one-half interest so transferred is to be "in the capital stock of the company." What company? Clearly they meant the company which had taken steps to acquire the claim, and which had issued the capital stock to represent it. If there be any doubt on this point, it is dispelled by the testimony, which shows, and it is not disputed, that the company referred to was the Britannia Mining Company; that in March, 1892, J. J. Nickey and J. C. Hudnutt had a lease and bond for a deed on that claim, and had made certain payments on the purchase price thereof, and that they had entered into an agreement with certain persons residing at Milwaukee, one of whom was G. R. Nickey, to form a corporation to be known as the Britannia Mining Company, with a capital stock of 125,000 shares; and that Nickey and Hudnutt were to relinquish to the company their lease and bond for a deed, and that of the said capital stock Nickey and Hudnutt were to receive one-half of 100,000 shares, less 5,000 shares. The records of the Britannia Mining Company show further that at a meeting of its stockholders held on September 30, 1892, a resolution was adopted requiring the president and secretary of the company to issue and deliver to Hudnutt and Nickey each 11,875 shares, and to one Z. T. Merrill, as trustee, 15,000 shares, upon the release and transfer to the company of the interest of J. J. Nickey and Hudnutt and others of their interest in the Britannia mine. There was proof also that said company never owned any property other than this mining claim.

The principal question, however, is whether or not the appellant is barred by his laches from prosecuting the present suit. The bill was filed on January 30, 1902, more than nine years after the date of the instrument upon which the suit is brought. The appellant seeks to excuse his laches on various grounds, one of which is that the stock was to remain in the names of the vendors until demand. There is nothing in the instrument itself to show that this was the understanding between the parties, nor is there any proof whatever that the sellers of the stock

were to occupy the relation of trustees to the purchasers. The testimony contains the admission of the appellant that in the summer or fall of 1893 he made demand on J. J. Nickey for the stock. Schweitzer, who was a witness for the appellant, testified that the understanding was that the stock was not to be delivered until the corporation obtained title to the mining claim, and that thereafter it was to be delivered upon demand. He testified further that at some time between January and July, 1893, he also made demand for the stock, and that later, in the summer of 1896, after the death of J. J. Nickey, he called upon G. R. Nickey, as an officer of the company, to transfer the stock in question, and for that purpose addressed a letter to him at his address in Milwaukee, and later in the same summer sent him a second similar communication. The appellant further seeks to excuse his delay by showing that with the decline of the price of silver in 1893, operation of the mining property ceased; that the office of the company was at Milwaukee, while the appellant lived at St. Paul; that the secretary of the company died, and that in 1896 the bill of sale was temporarily lost, and the possession thereof was not recovered until September, 1900. We are unable to find in any of these circumstances a sufficient excuse for the appellant's delay. If a temporary loss of the instrument presented an impediment to the institution of the suit, that excuse ceased to exist on September 20, 1900, when the instrument was again in his possession. It was no excuse that mining operations ceased, or that he deemed the property of insufficient value to justify a resort to litigation. There is no allegation or proof that any of the defendants deceived him either as to the extent or the cessation of the mining operations, or the value of the mining property. A party guilty of laches cannot screen his claim from the imputation of staleness merely by alleging an imaginary or unsubstantial impediment to the institution of proceedings to enforce the same. In *Johnston v. Standard Mining Company*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480, the court held that the defense of laches was particularly applicable where the thing in dispute is mining property, which is of uncertain character, and liable to suddenly develop a great increase in value. In that case the plaintiff, after a lapse of seven years, brought suit to enforce an agreement for the conveyance of an interest in mining property. The court held that his delay was fatal to his right to the relief sought. Section 518 of the Code of Civil Procedure of Montana, in reference to causes of the nature of the case at bar, provides, "An action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued," and the Supreme Court of that state has held that this statute applies as well to equitable suits as to actions at law. *Mantle v. Speculator Company*, 27 Mont. 473, 71 Pac. 665. Said the court in *Godden v. Kimmell*, 99 U. S. 210, 25 L. Ed. 431:

"Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this rather in obedience to the statute of limitations than by analogy."

But where there is no statute of limitations to govern a case, courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, stale demands by refusing to interfere where

there has been gross laches in prosecuting the same. In *Norris v. Haggin*, 136 U. S. 391, 10 Sup. Ct. 944, 34 L. Ed. 424, the court applied to the case the statute of limitations of the state of California and said:

"It is sufficient to say that, as a court of equity is governed by the analogies of the statute of limitations of a court of law, and as the object of this suit is to do what generally could be done at law, namely, recover possession of real estate, and as the plaintiff is equally guilty of the laches, which a court of equity regards in the same spirit it does the statute of limitations, this unexplained delay after the plaintiff had recovered whatever mental capacity he now has must stand as a sufficient bar to the successful prosecution of this suit."

In *Curtner v. United States*, 149 U. S. 676, 13 Sup. Ct. 985, 37 L. Ed. 890, the court, referring to the statute of limitations of the state of California, by which no action could be brought for the recovery of real property or the possession thereof except within five years after the cause of action accrued, held that, whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches were fatal to the maintenance of the suit. On the ground of laches the bill was, we think, properly dismissed. In the federal courts it is not necessary, in order to let in the defense that the claim is stale, that a foundation should be laid by any averment in the answer. *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S. 806, 24 L. Ed. 324.

The decree of the Circuit Court will be affirmed.

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#### MCDONNELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,062.

##### 1. CRIMINAL LAW—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

Where no motion is made for an instructed verdict by the defendant in a criminal case, and without objection the court is permitted to charge the jury on the assumption that there is sufficient evidence to justify the submission of the case to them, the objection that there was no evidence to support the verdict cannot be heard and considered in an appellate court.

##### 2. SAME—ORDER DENYING MOTION FOR NEW TRIAL.

An order of a federal court granting or denying a motion for a new trial in a criminal case rests in the sound discretion of the trial court, and is not reviewable.

In Error to the District Court of the United States for the Northern District of California.

The plaintiff in error was convicted of a violation of the provisions of section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696]. The evidence was that he had sent out through the mails to various persons in the state of California letters such as the following, which was sent to Clay A. Straley:

"Dear sir: I enclose a pawn ticket that is sent you by the way of restitution. The sender is at the point of death as the result of an accident. He

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¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 3067.



wishes me to say he once stole some money from you which he is unable to refund, but that the difference between the value of the locket and the amount it is pledged for is considerably more than the sum stolen. He hopes that in this way you will be able to reimburse yourself.

"Yours respectfully,

J. B. Taylor,

"Pastor Church of the Redeemed."

The pawn ticket which was inclosed purported to be that of "H. Epstein, 331 Kearney St., San Francisco," and contained on the margin the words: "No goods sent C. O. D. This certificate must be accompanied by Money Order when goods are ordered sent by express or registered mail." The proof was that "H. Epstein" was an alias of the plaintiff in error, and that there was no such person as J. B. Taylor, but that the plaintiff in error wrote the letter so purporting to have been signed by J. B. Taylor, and that he signed the name of H. Epstein to the pawn ticket. One of the persons to whom such a letter was sent addressed a letter to H. Epstein, inquiring the value of the locket which was pawned, and requesting information as to how he could get it. The plaintiff in error answered, a portion of his letter being as follows: "The sum due is \$12.50 which you may give to Wells Fargo Express Company, and they will call and get the property or if you prefer you can send me a Post Office Order and I will forward the locket on receipt. The locket is of gold ornamented with the figure of a deer's head and contains a small diamond set between the horns. Very truly yours, H. Epstein." No proof was introduced to show that in response to such letters any person ever sent money to the plaintiff in error, nor was there any proof, other than the contents of the letters, to tend to show what the plaintiff in error intended to do in case money were sent him. Evidence was introduced on behalf of the prosecution to show that when the plaintiff in error was arrested there were found upon his person several lockets such as he had described in his letters. The plaintiff in error proved by two jewelers, whose testimony was not disputed, that the lockets so found were sold to the plaintiff in error about July 1, 1903, and that they were of the full value of \$12.50 each, and were such as were usually sold at retail at that price.

Bert Schlesinger, for plaintiff in error.

D. E. McKinlay and Marshall B. Woodworth, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The indictment charged that the plaintiff in error fraudulently intended to cause Clay A. Straley to pay him the sum of \$12.50 in exchange for a locket of far less value than the sum of \$12.50. The court instructed the jury that the plaintiff in error could not be convicted upon this charge unless the evidence satisfied the jury beyond all reasonable doubt that the locket referred to in the indictment was of far less value than the sum of \$12.50. The assignments of error are that the court failed to instruct the jury to acquit the plaintiff in error, that the evidence was insufficient to justify the verdict, and that the court overruled the motion of plaintiff in error for a new trial. But there appears in the bill of exceptions no request for an instruction to acquit the plaintiff in error, and no exception to any of the instructions. It is well settled that where no motion is made for an instructed verdict, and, without objection, the court is permitted to charge the jury on the assumption that there is sufficient evidence to justify the submission of the case to them, the objection that there was no evidence to support the verdict cannot be heard and considered in an appellate court. *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L.

Ed. 496; Village of Alexandria v. Stabler, 50 Fed. 689, 1 C. C. A. 616; German Ins. Co. of Freeport v. Frederick, 58 Fed. 144, 7 C. C. A. 112; Pacific Mut. Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264; Crockett v. Miller, 112 Fed. 729, 50 C. C. A. 447. This court is precluded, therefore, from considering the question of the sufficiency of the evidence to justify the verdict. The granting or denying a motion for a new trial rests in the sound discretion of the trial court, and is not reviewable. This has always been the rule in the federal courts. Harless v. United States, 92 Fed. 353, 34 C. C. A. 400; Smith v. Hopkins, 120 Fed. 921, 57 C. C. A. 193.

The judgment of the District Court will be affirmed.

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### FOLGER et al. v. DOW PORTABLE ELECTRIC CO.

(Circuit Court of Appeals, First Circuit. November 15, 1904.)

No. 538.

#### 1. PATENTS—INVENTION—INSULATION FOR SPARKING PLUGS.

The Folger, Moriarty, and Jacobson patent, No. 696,670, for a sparking block for use in gas engines, the essential feature of which is the providing of a double axial and radial insulation, is void for lack of patentable invention in view of the prior art.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 128 Fed. 45

Nathan Heard, for appellants.

Edward P. Payson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity for relief against an alleged infringement of the several claims of letters patent No. 696,670, issued on April 1, 1902, to Henry Coleman Folger and others, entitled "Sparking Block." The decree of the Circuit Court dismissed the bill, and the complainants appealed to us. The first claim sufficiently indicates for present purposes the nature of all of them. It is as follows:

"1. In a device of the kind described, containing two spark electrodes and conductors leading thereto approximately parallel, an insulation between said conductors consisting of two contiguous parts composed of refractory insulating material, one part being mounted in close contact around one of said conductors, and the other surrounding the former, one of said parts extending integrally lengthwise of the device, and the other of said parts being made up of a series of layers extending radially of said lengthwise part, and means holding said insulation under longitudinal compression."

The nature and purpose of the invention are stated in the specification as follows:

"Accordingly our invention resides in providing insulation between the adjacent portions of the spark-plug circuit which will not break down or punc-

ture, no matter how high the voltage and frequency of the current and rapid the discharge thereof, and which will also stand the severe heat to which the plug is necessarily subjected in use. Stated broadly, our invention comprises, in connection with suitable circuit-terminals and conductors leading thereto, an insulation between the two parallel or adjacent portions of the circuit made up of a tubular portion of refractory insulating material—i. e., by 'tubular' we mean that the longitudinal layer is integral and imperforate from end to end, or is not made up of disks or radial sections—closely surrounding and extending longitudinally of the central conductor or core of the plug and another layer of refractory insulating material compressed around said horizontal tubular portion, and being made up of successive layers extending vertically to said horizontal insulation; or, in other words, the gist of our invention lies in the provision of two insulations compressed together as nearly solidly as possible, one insulation extending in a horizontal plane and the other insulation extending in a vertical plane—that is to say, the two insulations extend in opposite directions, and each is made up of suitable refractory insulating material capable of withstanding without fusion or reduction to another state the great heat to which the plug is subject—and one of said layers is integral in the direction of the length of the plug, and the other is integral in the transverse direction or radially of the plug.

"We have demonstrated by experiment and long practical tests in actual use that, even with heavy currents of the highest frequency capable of being generated by modern apparatus, there is no danger of this insulation, when constructed as will be explained more fully presently, being punctured or permitting a short circuit, or even permitting apparently any mutual influence between the two approximately parallel conductors of the spark-making circuit; but short-circuiting is prevented effectually and completely by one or the other of the two insulations whose layers of refractory material extend in opposite planes."

It is thus made plain that what was sought was, briefly, a method of insulation which would not only resist great heat, but also would be very refractory with reference to short-circuiting. In view of what is thus disclosed by the record, supported by the propositions submitted to us at bar, it is clear that the novel peculiarity of the complainants' patent is what was described at the bar as a "double axial and radial insulation." Bell, the expert called by the respondent, summarized as follows:

"In fact, insulating sleeves and washers were so familiar in the art that anyone skilled in the art of insulation would have been likely to use the two in all sorts of combinations, arranging sleeves and washers as best suited the particular problem in insulation which he had in mind."

In addition thereto, Bell testified as follows:

"All the claims of the patent in suit contain as part of the combination the combined radial and axial insulation." "And in view of the familiarity of both these elements and their previous use by various constructors of insulation for various purposes, I do not see how any novelty can reside in their combination at so late a date."

This testimony involves the practical condition of the art, and is not met by any proofs controverting it. Moreover, it entirely harmonizes with that common knowledge in which the court is entitled to share when it becomes, as on a hearing in equity on bill, answer, and proofs, a trier of the facts as well as of the law. While this general principle is not controverted, it was attempted to be met by Prof. Main, a well-known expert called by the complainant, as follows:

"Dr. Bell, however, takes the position that, in spite of failure to find the combination of the patent in suit anywhere in the prior art, the feature of

novelty was nevertheless lacking because the elements of the combination were familiar to electrical constructors. The weakness of this position appears to me to be self-evident. If correct in general, no new machine could be invented, inasmuch as screws, cams, levers, and other component elements of every machine are familiar to all mechanics. But when we pass over into electrical combinations and the peculiar conditions involved in gas engines, the results of new combinations are certainly even less obvious than in ordinary mechanical devices."

As we have said, this does not controvert Bell's testimony, but seeks to avoid it on the ground that the special method of insulation described by the patentees was for the first time used in gas engines, thus creating a novel combination. Of course, a proposition of this character establishes invention under certain special circumstances which have been so often pointed out by the decisions of the courts, especially of the Supreme Court, that they are entirely familiar. We may refer to a few peculiar applications of this exceptional rule which we cited in *Watson v. Stevens*, 51 Fed. 757, 2 C. C. A. 500, and in *Westinghouse Electric & Manufacturing Company v. Stanley Instrument Company*, in an opinion passed down on September 9, 1904. 133 Fed. 167. But neither the fact stated by Prof. Main nor any other fact in the record establishes such special circumstances. No question relative to the specific materials employed, or to the new results accomplished, arises in the patent in suit on the case as presented on this appeal, but patentability is founded solely on the employment of axial and radial insulation in a "sparking block" in gas engines. Upon this state of facts, and for the reasons already given, we do not perceive that the patent can be held to cover a patentable invention. Therefore the decree of the Circuit Court must be affirmed.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

## VOIGHTMANN et al. v. WEIS &amp; RIDGE CORNICE CO. et al.

(Circuit Court, W. D. Missouri, W. D. September 17, 1904.)

No. 2,520.

## 1. PATENTS—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.

When, on a state of proofs less favorable to the defendants, one court has held a patent invalid on the grounds that there is a lack of invention and that the devices employed are only aggregations, the rule or sentiment of comity will forbid another court from a different conclusion, unless it feels compelled thereto by a positive sense of duty.

## 2. SAME—INVENTION.

It being old to glaze fixed metal sash with wire glass and to use fusible links in places where any weight, such as a door, a valve, wires, shutters, or any other thing is to be kept suspended, until, on the breaking out of a fire, the same is closed by the action of heat, there was no invention in so glazing a pivoted sash, nor in using a fusible link to hold in an open position an automatically closing sash, more especially when it was old to hold such a sash open by means of a cord described in the patent to be the equivalent of a fusible link.

## 3. SAME—EXTENDED APPLICATION OF OLD IDEA.

The mere carrying forward or extended application of an old idea or thought is not invention, even though it results in improvement in degree.

## 4. SAME—NOVELTY—COMBINATION OF OLD ELEMENTS.

It is not the law that the asserted novelty of a patented combination can only be overcome by showing that all of the elements have previously been employed as a unit in the same relation to each other.

## 5. SAME—GENERAL USE AS EVIDENCE OF INVENTION.

No extent of use of a patented article can supply the want of actual invention or cure the vice of mere aggregation of parts.

## 6. SAME—FIREPROOF WINDOWS.

The Voightmann patent, No. 600,186, for an improvement in fireproof windows, claims 5, 6, and 7, are void for lack of invention, and also as being for mere aggregations.

In Equity. Suit for infringement of letters patent No. 600,186, for improvements in fireproof windows, granted to Frank Voightmann March 8, 1898. On final hearing.

Offield, Towle & Linthicum, for complainants.

Elliott & Hopkins, for defendants.

PHILIPS, District Judge. This is a suit instituted by the complainants against the defendants for the infringement of letters patent No. 600,186, granted to said Voightmann March 8, 1898, for an alleged improvement in fireproof windows. The said Pomeroy is joined as co-complainant as assignee of an undivided interest in the patent. The object of the bill is to enjoin the defendants from infringing claims 5, 6, and 7 of the patent, which read as follows:

"(5) In a fireproof window, the herein described automatically closing sash consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein, the destructible retaining device, M, N, by which said sash is held open; all substantially as shown and described.

"(6) In a fireproof window, the herein described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L,

pivoted therein, the retaining chain, M, having the fusible link, N, therein; all substantially as shown and described.

"(7) In a fireproof window, the herein described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein at a pivot, P, above its middle, the retaining chain, M, having the fusible link, N, therein at a point opposite the opening; all substantially as shown and described."

In briefer form, they involve a fireproof casing, a fireproof sash pivoted in the frame, so as to automatically close itself when released, and a destructible retaining device with a fusible link. The validity of this patent was recently passed upon by Judge Kohlsaat in the United States Circuit Court for the Northern District of Illinois in the case of Voightman et al. v. Perkinson et al., 133 Fed. 934. On a state of proofs less favorable to the defendants than in the record before me, he held the patent to be bad, on the grounds that there was a lack of invention by the patentee, and that the devices employed are only aggregations. The rule, or rather the sentiment, of comity would forbid a different conclusion by this court, unless it felt constrained thereto by a positive sense of duty. Out of respect for the earnest and able contention by complainants' counsel for a different ruling, I have given the questions involved the best consideration the limited time at my command permits. As the case passed upon by Judge Kohlsaat has already been appealed from, the like course will doubtless follow from any conclusion I may reach in the premises.

Much stress was laid in argument, by one of complainants' counsel, on the employment of wire glass in the window sash, as a part of the combination device. The importance attributed to this in performing the double office of transmitting light and resisting heat it may be conceded greatly augments the value of the use of the window in question. But an examination of the claims 5, 6, and 7, on which the bill is predicated, and the evidence, clearly demonstrate that the complainants' claim for relief cannot stand upon this argument. In the first place, while the invention is stated to consist "broadly of a window having a sheet-metal casing with clenched joints at its corners and elsewhere, which require no solder, and a fireproof glass set into the sash with metallic fastenings, one of the sash being hinged and held open by a retaining device which will be severed by the heat of a fire," the only reference to wire glass is at pages from 87 to 93 under the head "Further Details"; but this is followed by the statement, "But other glass or different material may, of course, be used, if capable of resisting heat." And when it comes to what the applicant for a patent claims in 5, 6, and 7 of the specifications, the term "wire glass" does not appear. And the complainants' star expert witness, in the last analysis of his testimony, frankly stated that the claim could not rest upon the fact of the employment of wire glass, the reason for which is obvious enough. The evidence shows quite satisfactorily that the product of wire glass had been discovered more than 17 years prior to the application for the patent in suit, and that long prior thereto it had been used in skylights and windows. Every quality, practically, attributed to it in argument, was

well known to the art and use years anterior to the complainants' employment of it. Therefore Voightmann could lay no claim to it as a novelty in the art discovered by him. He was well advised, no doubt, that, if he had laid claim to its use as a distinctive element in his combination, it would have been fatal to the validity of his patent, as being merely an aggregation of known devices.

As said by Judge Coxe in *Clark Pomace-Holder Co. v. Ferguson* (C. C.) 17 Fed. 79:

"If the elements of the combination act independently of each other, or if one element acts independently of the others, it is an aggregation of parts, and not entitled to protection as a combination."

This rule was expressed in *Hailes v. Van Wormer*, 7 Blatchf. 443, Fed. Cas. No. 5,904, as follows:

"The mere addition of an old device producing a specific result to another old device producing its own result in such wise that their combination produces the same two results, and no other, is not invention."

In *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241, Mr. Justice Strong said:

"All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention."

And in *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749, Mr. Justice Matthews said:

"In *Nimmo's apparatus*, it is perfectly clear that all the elements of the combination are old, and that each operated only in the old way. Beyond the separate and well-known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements all the constituents must so enter into it as that each qualifies every other. To draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seised each of every part, per my et per tout, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions; otherwise it is only a mechanical juxtaposition, and not a vital union."

Indisputably wire glass performs the same function in admitting light and resisting heat, and produces the same result, whether it be placed in a stationary sash or one working on a pivot, or whether it be in a metal or a wooden sash, or whether the sash itself be in a wooden, unriveted frame, or in a metal, riveted frame. In short, the wire glass produces its own results, independent either of the mechanical juxtaposition of the window sash or frame or being

operated in a sash fixed in its place or on a pivot, whether the sash and frame be metallic or wooden. A claim, therefore, based upon the employment of wire glass, would clearly come within the definition of an aggregation of mechanical devices fatal to the patent.

The same objection, it seems to me, lies against the claim predicated of the employment of "the retaining chain having the fusible link." It is not claimed that Voightmann invented this device. And, if it had been, the evidence, without contradiction, shows its anterior use, and patents granted to others. The retaining wire or chain, with fusible link, attached to the model of window in evidence, admitted to be correct, bears a stamp on the link: "F. G. Grinnell. Patented May 15, 1883." The Grinnell patent in evidence describes the device as being "used in places where a trust stop is required to sustain anything that is to be released by the action of heat in case of a fire. The spliced link \* \* \* is used in places where any weight, such as door, a valve, wires, shutters, or any other thing is to be kept suspended until on the breaking out of a fire the same is to be released. \* \* \* C, c, are two links of any desired length, spliced together by a beveled splice and held in place by the sleeve, b, made in two parts, and united by a solder fusible at a low temperature, so that by the fusion of the solder the strain on the links, c, c, will rupture the soldered joint and release the links." The Knight patent, in evidence, for improvements in fireproof shutters, describes a fusible strap, so applied to a shutter that, when melted by heat, the shutter will close automatically. The Briggs patent, in evidence, describes and exhibits a skylight shutter which closes automatically by gravity by the melting of a fusible link; and also, through the melting of this fusible link, turns on water at one side thereof, which is described as follows in the patent:

"In case of fire the temperature is raised sufficiently to cause the melting of the fusible wire, B, at that part nearest to the fire, so that the wire will part, and the shutter be closed by the action of the weights. \* \* \* In place of weights by which the automatic closing of the shutter is produced, springs or other equivalent may be employed."

And in the Moody patent, granted in 1896, for a fusible joint, almost the chain and fusible link of complainants' patent is described.

The evidence shows that George Hayes, an inventor of wide celebrity, had employed the mechanical equivalents of the fusible link appliance more than two years prior to its use by complainants in window lights. The fact that he and others used ropes or strings, sometimes kept saturated with coal oil to more easily ignite in case of fire, so as to let the window close, just as in the claim of the complainants, certainly could not entitle the latter to claim any invention for a mere substitute of wire with fusible link, already invented and in use. Such a substitute was purely mechanical, such as would occur to any ordinary mechanic.

How does the fusible link device, in the releasing cord, affect or control the automatic closing of the window sash? When released by hand, or by the burning of a cord, or anything else, the pivoted,



suspended window would close automatically, the same as when held open and released by a fusible link chain. This being so, it must follow that the office performed and result produced by the given sash is not affected or controlled by the use of the fusible link chain. In fact, the application for this patent concedes that the fusible link device is not claimed as prescriptive. After expressing a preference therefor, it says: "But in place of this link any other destructible connection which is inflammable or readily destroyed by heat or fire may be used." This is a concession that there is no claimed essential combination to the result sought between the use of the fusible link chain and "any other destructible connection which is inflammable or readily destroyed by heat or fire." So that, if these defendants had employed on their window a tow string or rope saturated with coal oil, instead of a wire with fusible link, it would in no degree have lessened complainants' right to assert an infringement. It seems to me that in its last analysis the claim resolves itself into this: that it must be sustained, if at all, upon the ground that Voightmann was first in the field of employing the fire window frame as described, and sash working on a pivot, retained by a cord, in open position, so as to close automatically by the releasing cord taking fire.

Without discussing other prior devices, such as skylights over theaters, as in Milwaukee, an examination of the automatic closing window before me (defendants' exhibit of the Heussler-Cluss windows, 1892, fireproof window frame and sash; used as skylight window, frame, and sash in St. Louis, Mo.) satisfies my mind that it required no patentable invention on the part of Voightmann to construct his device. The said window frame and sash are of sheet metal, with lapped, riveted joints, and a sash pivoted so as to close by the natural force of gravity, practically in the same manner as that claimed by complainants. A large number of these windows were in use long prior to complainants' patent, and are now in use in the St. Louis building. The sash is pivoted above the center, so as to close automatically when the cord holding it open is released, and when closed it is held, just as complainants', by a spring latch. The window is held open by a small cord, extending from the top of the sash at the middle of its length downwardly at a point opposite the opening, just as specified in claim 7 of complainants' patent. The sash is glazed with heavy skylight glass, making it a fireproof window as effectually as that of the complainants. This glass, it is true, is not so translucent as the wire glass; but of this the complainants cannot base a contention, for, as already demonstrated, the patentee in neither of his claims desired to be secured limited them to a prescribed wire glass; "but other glass of different material may, of course, be used, if capable of resisting heat." All that Voightmann had to do in devising his combination was to sit before this Heussler-Cluss window, and copy it, with some mechanical changes, and substitute for the grass rope one with a fusible link, which had long been in use in performing in mechanical arts a similar function. So that in point of fact Voightmann made what is termed "a mere extended application

of an old idea," which was only an improvement in degree, a substitution of mechanical equivalents. Therefore, unless the law is that such asserted novelty can only be avoided by the defendants by showing that all of the claimed elements had hitherto been employed as a unit in the same relation to each other, the case is with the defendants. I do not understand such to be the law. It has been repeatedly asserted and maintained by the courts that the mere carrying forward or a mere extended application of the original thought is not invention, even though it results in improvement in degree. *Consolidated Roller-Mills v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64. In *Kelly v. Clow*, 89 Fed. 297, 303, 32 C. C. A. 211, 60 U. S. App. 338, the court, quite appositely to this issue, said:

"Similar combinations are found in many prior patents, but all of the elements found in complainants' combination are shown not to have been used together in any one of the prior patents in the same relation to each other. It is insisted that the novelty of the combination can only be destroyed by showing that all of its elements have been used together before, and in the same relation to each other. The contrary is well established." See *loc. cit.*

We may well conclude this branch of the discussion with what was said by the Court of Appeals of this Circuit in *Tiemann v. Kraatz et al.*, 85 Fed. 437, 29 C. C. A. 257, 56 U. S. App. 545, in which it was held that "it is not invention to improve a known structure by substituting an equivalent for either of its parts." The writer of the opinion observed:

"What is an invention, within the meaning of the patent laws, is a question more easily to be answered by negation than by affirmation. While the courts have not been able to entirely harmonize on any exact scientific or arbitrary definition of this term in its practical application to all cases, it may safely be said that it is not mere novelty, 'for the statute provides that things to be patented must be invented things, as well as new and useful things.' *Thompson v. Boisselier*, 114 U. S. 11, 5 Sup. Ct. 1042, 29 L. Ed. 76; *Gardner v. Herz*, 118 U. S. 191, 6 Sup. Ct. 1027, 30 L. Ed. 158. All are agreed that there must be originality of conception, which springs spontaneously, and not 'by a necessity of human reasoning in the minds of those who became acquainted with circumstances with which they had to deal.' *Walk. Pat. Pers.* 23, 24. It results logically from this idea that it is not invention to produce a device which a skilled mechanic, upon suggestion of what was required, would produce; especially so when he is aided in the work of construction by devices and appliances in practical use pregnant with suggestions of larger and better use. In this day of increasing demand for new and enlarged mechanical appliances, the first natural result is the production of a large class of skilled and experienced mechanics and artisans, and, second, a more studious and constant development in applied mechanics. And, as such advance plainly points out to the attentive and assiduous workman the natural, larger, practical adaptation of existing, known mechanical devices, to invest each one of these developments with the immunity of a monopolizing patent would not only be a perversion of the term 'invention,' but would utterly extinguish the doctrine of mechanical equivalents."

While it is to be conceded to the complainants that the evidence taken on their part shows extensive use of their window with the wire glass, that it is largely favored by underwriters in fire insurance, this use is by no means conclusive evidence of invention. No extent of use can supply the want of actual invention or cure

the vice of mere aggregation. *Adams v. Bellaire Stamping Company*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 15 Sup. Ct. 871, 39 L. Ed. 1055; *Olin v. Timkin*, 155 U. S. 141, 15 Sup. Ct. 49, 39 L. Ed. 100; *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552. This is well summed up by Mr. Justice Brown in *McClain v. Ortmyer*, 141 U. S. 420, 12 Sup. Ct. 79, 35 L. Ed. 800:

"While this court has held in a number of cases that in a doubtful case the fact that a patented article has gone into general use is evidence of its utility, it is not conclusive even of that; much less of its patentable novelty."

Further on the learned justice said:

"That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market, and large commissions to dealers as by the intrinsic merit of the articles themselves. The popularity of a proprietary medicine, for instance, would be an unsafe criterion of its real value, since it is a notorious fact that the extent to which such preparations are sold is very largely dependent upon the liberality with which they are advertised and the attractive manner in which they are put up and exposed to the eye of the purchaser. If the generality of sales were made the test of patentability, it would result that a person by securing a patent upon some trifling variation from previously known methods might by energy in pushing sales, or by superiority in finishing or decorating his goods, drive competitors out of the market, and secure a practical monopoly, without in fact having made the slightest contribution of value to the useful arts."

It results that the bill of complaint should be dismissed.

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#### WARREN FEATHERBONE CO. v. AMERICAN FEATHERBONE CO. et al.

(Circuit Court, N. D. Illinois, N. D. November 28, 1904.)

No. 26,569.

#### 1. PATENTS—INVENTION—FEATHERBONE.

The Warren & Holden patent, No. 559,827, for an improved process for making featherbone for use in corsets, etc., and the resulting product, marked a distinct advance in the art. It was not anticipated, nor is it void for prior public use; and in view of its utility, as shown by the marked success of the new product in the market, it must be conceded to disclose invention. Also held infringed.

In Equity.

Offield, Towle & Linthicum and S. C. Mastick, for complainant.

Lysander Hill, Max Guthman, and Chas. S. Hill, for defendants.

KOHLSAAT, District Judge. Complainant files this bill to restrain infringement of patent No. 559,827, for a "corset stiffener and method of making same," granted to E. K. Warren and J. H. Holden May 12, 1896, on an application filed March 5, 1895, of which patent complainant is now the owner. Defendants set up in their answer three defenses: (1) Want of invention; (2) anticipation; (3) public use more than two years prior to the filing of the application.

Edward K. Warren, president of complainant, and one of its grantors in said patent, was the original inventor of featherbone,

a substitute for whalebone in women's apparel, as set out in letters patent No. 286,749, issued to him October 16, 1883, and letters patent No. 311,621, issued to him February 3, 1885. The former pertains to the winding of the strands made from feather quills into cords, and the latter covered the winding of the cords side by side to form a tape or flat blade. The patent in suit purports to provide in claims 1 and 2 for a process for overcoming the defects in the featherbone of the said preceding patents, which were so serious as to make featherbone impractical as an article of commerce, and in claims 3 and 4 for the result of the process as a finished product. It is claimed by complainant that ever since the granting of the said prior patents it was continuously engaged in the effort so to perfect its featherbone as to make the blade smooth, flat, thin, continuous (in part independent of the winding), and, when desired, more strong and elastic. The process of the patent is as follows, viz.: After the blades have been wound and stitched as indicated in said prior patents, they are then passed through a suitable sizing of glue and other constituents, in strips as long as desirable, until thoroughly saturated. They are then passed into a drying device, so heated as to dry the same as thoroughly as they can be heated by such means. They are then passed through a steam-heated pipe, which is itself passed through a larger steam-heated pipe, and so thoroughly heated as to soften the fibres of the quill. The specifications claim that in this manner the quill will be almost melted. When thus heated, the featherbone is passed out of the pipe, while yet hot, between cold rollers, made male and female, to receive the bone, and compressed and formed into the size desired. For this process it is claimed that the sizing causes the thread to adhere to the fibers, and fills up the interstices between the fibers, so that when cooled off and dried the result is a composition that unites very firmly with the fibers, and connects the thread tightly thereto. It is further claimed that in the passage of the blade through the heating tube the heat softens the sizing and the quill, and makes the blade pliable and easy to bend, and so soft that it retains its shape when bent, and that it recovers its elasticity in cooling. It is also claimed that when the heated blade is passed through cold rollers, the pressure crowds the fibers into the blade so as to form a continuous blade in appearance. The temperature used approximates the boiling point. The result is claimed to be a perfected and superior article; one which, while it resembles whalebone in appearance, yet will not split, is resilient, and can be sewed through without injury to the texture.

The success of the substitute for whalebone, it is claimed, began about the last of the year 1893 or the first of the year 1894. From a table of sales in evidence it appears that the sales advanced from 195,144 yards in 1893, when the alleged infringed process and product were not yet perfected, to 403,752 yards in 1894, and reached the enormous figure of 9,942,104 yards in 1902. Complainant alleges this to have been the result of merit. The defendants ascribe it to judicious advertising. It may fairly be said to be the result of both.

The alleged infringing product is practically identical with that of complainant. The process, defendants claim, is different, and is described as follows: The featherbone blade of the prior and expired Warren patent, No. 311,621, is first passed through a hot glue solution. It is then passed between tongued and grooved steel or rubber rollers to remove the surplus sizing. It is then moved back and forth through a steam-heated drying box, and thoroughly dried, and then, without regard to its temperature, passed through hot tongued and grooved steel rollers whereby it is compressed and smoothed.

Considering the defenses in the order named above, it becomes necessary first to inquire whether the record discloses invention. In determining this question it is proper to bear in mind the condition of the trade as well as the art to which the patent in suit is allied. Whalebone, which had for many years been the stay in several senses of manufacturers of women's apparel, was rapidly disappearing from the market by reason of the scarcity of the whale, from which it was obtained. Its scarcity led to the production of numerous devices as substitutes, the numerous patents for which are shown in the record herein. Fragments of whalebone combined with hemp and other materials; scapes of feather spun into fabric; tampico or sisal grass combined with some adhesive substance; strips of whalebone combined with horn or similar substances; horsehair saturated with rubber; and many other materials and combinations are claimed as proper substitutes. In all of these some article of sizing is used, but none of the articles seems to have met with marked success. Even the Warren patents of 1883 and 1885, before referred to, failed to win the market for various reasons. The bone covered by them was rough and clumsy. It was too heavy and brittle. It contrasted to its disadvantage with whalebone used in a manner which called for symmetry, neatness, lightness, resiliency, and style. It would naturally be the subject of caprices and fault-finding. Thus every slight advance was magnified into importance. In such a case the step between an indifferent reception by the public and a hearty adoption of a device may not be distinguishable, but must, in the nature of things, be marked. It may have scarcely other tokens of advance than the winning of popular favor. In that case the favor would be a potent element in determining the invention. It is somewhat difficult to ascertain from the record just what was the last step in perfecting the product of the patent in suit, and to distinguish it distinctly from the prior art. There seem to have been continual efforts to overcome annoying defects. The character and manner of applying the sizing, the methods of applying heat and pressure, find something of similarity in the prior art. But when all is said and done, the difference between the stiffener of the patent in suit and those disclosed in the prior art is the difference between success and failure, and I am therefore constrained to hold that the patent discloses invention.

In the next place, it is urged by defendants that the patent in suit was anticipated in the prior art. I have considered this defense in connection with the foregoing discussion of invention, and disposed of it.

Much stress is laid in the briefs of defendants upon the alleged fact that the invention claimed in the patent in suit had been in prior public use more than two years prior to the filing of the application. The testimony is conflicting. The patentees are not examined. Various other features of the record would seem to leave the mind in doubt as to just what are the facts. From the correspondence introduced, it seems to be certain that complainant and its grantors were constantly engaged in perfecting the stiffener. Considering the fact that Warren was the first inventor of featherbone, that he and his grantors were constantly endeavoring to cure defects in the construction, and the rule of law which requires that every reasonable doubt as to the prior art should be solved in favor of the patent, I have no hesitancy in finding that no such prior use was had in this case as would bar complainant from asserting its rights under the patent.

It remains only to consider the question of infringement. The two products are substantially the same as above stated. The two processes may be compared as follows, viz.:

*Patent in Suit.*

(1) The wound and stitched blade passed through sizing of glue and other suitable constituents.

(2) The blade is then passed into a drying device, and dried as thoroughly as can be done in that way.

(3) It is then passed through a steam-heated pipe inclosed within a larger steam-heated pipe, and heated to such a degree as to soften the fibers of the quill.

(4) When thus heated, it is passed out of the pipe, while hot, between cold rollers, made male and female (or tongued and grooved), and compressed and formed into the size and shape desired.

*Defendants' Device.*

(1) The featherbone blade of Patent 311,621 is passed through a hot glue solution.

(2) It is then passed between tongued and grooved steel or rubber rollers to remove surplus sizing.

(3) It is then moved backward and forward through a steam-heated drying box, and thoroughly dried, and then reheated by passing it through a bath of hot glue.

(4) And then, without regard to its temperature, it is passed through hot tongued and grooved rollers, whereby it is compressed and smoothed.

Thus it will be seen that the only apparent difference between the two processes consists in the use of the heated blade and cold rollers in the last step by complainant, and the use of hot rollers, without regard to the temperature of the blades, by defendants. Is not the use of the hot roller by defendants the equivalent of the hot blade and cold roller of complainant? It is the presence of heat and the result attained by subjecting the blade to pressure that fills the interstices, and makes the blade solid and serviceable. The mere fact that complainant may claim other results which do not follow from defendants' method cannot serve to deprive it of the right to secure to itself the substantial benefits of the patent which defendants have appropriated.

Defendants' reply brief seems to concede all but infringement. Being satisfied that the record shows infringement, the court finds that the prayer of the bill must be granted as to all claims.

Complainant's counsel may prepare a decree in accordance herewith.

## BRADLEY v. ECCLES et al.

(Circuit Court, N. D. New York. December 27, 1904.)

No. 7,062.

## 1. PATENTS—SUIT FOR INFRINGEMENT—JOINDER OF DEFENDANTS.

A bill against two defendants for infringement of a patent, which alleges that defendants, "conjointly contriving" to injure complainant by infringing his patent, have done certain acts of infringement, one by selling and making infringing articles at one city, and the other by using and vending infringing articles in another city, and that they have on hand at their respective places of business large quantities of the infringing article, which they are "conjointly, severally, and individually" advertising, selling, and offering for sale, is not demurrable on the ground that defendants are improperly joined, the acts charged, if done "conjointly" or by agreement, constituting a joint infringement.

Demurrer by defendant Eccles to bill of complaint in equity for injunction to restrain alleged infringement of letters patent for thill couplings.

See 120 Fed. 947; 122 Fed. 867, 871.

Howard P. Denison, for complainant.

Wm. A. Megrath (C. H. Duell, of counsel), for defendant Eccles.

RAY, District Judge. The validity of complainant's letters patent has been adjudicated by this court and the Circuit Court of Appeals, Second Circuit. The ground of demurrer is that Eccles and Saul are improperly joined as defendants; that joint infringement is not alleged.

In this action the main question is whether or not the acts complained of constitute an infringement. This question will not be gone into at this time. This court refused to punish the defendant Eccles for contempt in making the alleged infringing article, but put complainant to his action, because there is doubt whether the making and selling of the article in question constitutes an infringement. The seventh subdivision of the bill of complaint reads as follows:

"Seventh. And your orator further shows unto your honors that the defendants, Richard Eccles and Charles F. Saul, well knowing the premises and the rights secured to your orator as aforesaid, but jointly, separately, and severally contriving to injure and deprive him of the benefits and advantages which might and otherwise would have accrued unto him after the issue of said letters patent No. 609,928, and prior to the filing of this bill, the said Richard Eccles did, at the city of Auburn, N. Y., and within the Northern District of New York, manufacture and sell thill couplings without the license or allowance and against the will of your orator, and in violation of his rights, and in infringement of the aforesaid letters patent No. 609,928, unlawfully and wrongfully did manufacture, use, and sell, and is still using and vending in the Northern District of New York, and is unlawfully and wrongfully manufacturing, using, and vending since the date of the letters patent and prior to the commencement of this action, large numbers of thill couplings embodying the inventions and improvements and discoveries of said letters patent No. 609,928, whereby the said defendant has unlawfully realized large profits and your orator has unjustly suffered large losses and damages, all of which doings of the said defendant are contrary to good conscience and equity; and the said defendant Charles F. Saul did at the city of Syracuse N. Y., and within the Northern District of New York, use and vend thill

couplings for vehicles, and placed the same upon vehicles manufactured, used, and sold by him, said thill couplings so used and sold by him being without the license or allowance and against the will of your orator, and in violation of his rights, and in infringement of the aforesaid letters patent No. 609,928, unlawfully and wrongfully did use and vend, and is still using and vending, in the Northern District of New York, and is unlawfully and wrongfully using and vending since the date of the said letters patent, large numbers of thill couplings embodying the inventions and improvements and discoveries of the said letters patent No. 609,928, whereby said defendant Charles F. Saul unlawfully realized large profits and your orator has unjustly suffered large losses and damages, all of which doings of the said defendant are contrary to good conscience and equity."

The ninth subdivision reads as follows:

"Ninth. And your orator further shows unto your honors on information and belief that the defendant Richard Eccles, in the city of Auburn, N. Y., and the defendant Charles F. Saul, in the city of Syracuse, N. Y., now have on hand ready for sale at their respective places of business, all within the Northern District of New York, large numbers of thill couplings embodying the invention set forth in said letters patent sued upon, and are now conjointly, severally, and individually advertising, soliciting sales, and are offering and exposing for sale large numbers of thill couplings embodying the inventions, discoveries, and improvements of the said letters patent aforesaid, and which thill couplings and all necessary parts thereof the said defendants threaten to sell in the cities of Auburn, N. Y., and Syracuse, N. Y., and elsewhere in the Northern District of New York, and in violation of your orator's rights under said letters patent."

So far as the defendants are severally and individually making and selling or using thill couplings in infringement of complainant's patent or rights, it cannot be doubted that the defendants are improperly joined. *Blake v. Greenwood Cemetery* (C. C.) 16 Fed. 676; *Colgate v. Western Elec. Co.* (C. C.) 28 Fed. 147; *Diamond Match Co. v. Ohio Match Co.* (C. C.) 80 Fed. 117; *Consolidated C. H. Co. v. American Elec. H. Co.* (C. C.) 82 Fed. 993-998. Does the bill allege a joint making and selling, or a joint using, or a joint making and using, of the alleged infringing article or device by the defendants? The bill says that they have on hand at their respective places of business, to wit, said Eccles at Auburn, N. Y., and said Saul at Syracuse, N. Y., large numbers of the infringing thill couplings, "and are now conjointly, severally, and individually advertising, soliciting sales, and are offering and exposing for sale large numbers \* \* \*, and which thill couplings and necessary parts thereof the said defendants threaten to sell in the cities of Auburn, N. Y., and Syracuse, N. Y., and elsewhere in the Northern District of New York," etc. The substance of the seventh subdivision is that Eccles and Saul, conjointly contriving to injure the complainant by infringing his patent, have done certain acts, viz., Eccles at Auburn, N. Y., has done certain acts, and Saul at Syracuse, N. Y., has done certain like acts, to wit, the using, selling, and vending of infringing thill couplings. The one defendant, it is alleged, resides and has his place of business at Auburn, N. Y., the other at Syracuse, N. Y. "Conjointly" means that the defendants are acting together, the one with the knowledge and consent and aid of the other, and pursuant to an agreement or understanding. If, pursuant to such an agreement, one makes and the other sells, the infringement is a joint infringement. If there is no such agreement, then, if one



makes and the other sells, the trespasses or wrongs are several and distinct; the defendants are not joint infringers, and they are not properly joined. It would seem that some action might be taken that would compel the complainant to disclose whether he relies on joint infringement pursuant to an agreement or understanding, or on independent acts committed by each in the absence of such an agreement or understanding.

The demurrer is overruled, with costs, but defendant may answer on payment of such costs.

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NATIONAL WAISTBAND CO. v. MONHEIT et al.

(Circuit Court, S. D. New York, November 19, 1904.)

1. PATENTS—INFRINGEMENT—WAISTBANDS.

The Katz patent, No. 562,616, for a waistband for boys' trousers, discloses a patentable invention of utility, which was not anticipated, nor rendered void by prior public use; also *held* infringed by a structure in which the change from the patented article was merely colorable.

In Equity.

This is a suit for an injunction and an accounting. The complainant alleges that the defendants have infringed both claims of letters patent No. 562,616, dated June 23, 1896, and issued to Sam Katz, for a waistband for boys' trousers. The patent was assigned to the complainant, a domestic corporation, and such assignment includes the right to damages accruing before such assignment, if any. It is asserted that the defendant Schelinsky manufactures the infringing waistbands, and sells them to the defendants Monheit & Robinson, who complete the infringing structure by attaching the same to trousers. The defendants, in their answer and on the trial, claim noninfringement, want of invention, that the device shown and described in the patent in suit is not the invention of the patentee Katz, aggregation, and prior public use.

Briesen & Knauth (Henry M. Turk, of counsel), for complainant.  
William R. Davis, for defendants.

RAY, District Judge (after stating the facts as above). The claims of the complainant's patent read as follows:

"(1) The combination with a folded U-shaped strip of fabric and loops of elastic cord with their ends secured therein by sewing, of a waistband-strip of longitudinally-folded fabric having buttonholes and also having eyelets through which pass the loops of elastic cord forming yielding buttonholes, the two strips being sewed together near their lower edges, substantially as set forth.

"(2) The combination with a folded U-shaped strip of fabric and loops of elastic cord with their ends secured therein by sewing, of the longitudinally-folded fabric forming a waistband and having buttonholes and also eyelets in the fabric below the buttonholes through which eyelets said loops of elastic cord pass, the two strips being sewed together near their lower edges, substantially as set forth."

The proof shows that the manufacture of waistbands of the description described in the complainant's patent, claims and specifications thereof, is an industry by itself, and such waistbands are sold by the manufacturers to the makers of boys' knee pants, who attach them to

the inside of the waist of the pants, so as to provide a convenient method for attachment to the wearer's shirt waist.

The construction consists of a longitudinally folded strip of fabric forming the body of the band having between its folds a U-shaped piece of fabric, between the sides of which are secured the ends of the elastic loop. The free end of the loop passes out through an eyelet formed in the body of the band, and the opposite ends of the elastic cord are secured to the U-shaped strip on the side of the fabric opposite the loops. An undulating line of stitches joins the sides of the waistband as to assist in keeping the U-shaped strip in place. The elastic loop is secured within the U-shaped strip by sewing, and the U-shaped strip and the body of the band are attached together near their lower end by a line of stitches. This last-mentioned line of stitches is made by the maker of the pants when the waistband is stitched to the trousers. The waistbands have buttonholes to attach them to the shirt waist, and the drawings of the patent show such buttonholes situated directly above the eyelets and loops above mentioned. Claim 2 of the patent is limited to this arrangement of buttonholes above the eyelets, and this arrangement is the one employed by the defendants. The office of the elastic loop is to give a yielding structure at the point where the greatest strain comes at the back of the wearer of the trousers, and prevents the tearing out of the buttonholes or of the button when the wearer bends over. The folded U-shaped strip serves to form a reliable and a secure connection of the loop with the waistband, and also aids in protecting the loop from perspiration, thereby prolonging the usefulness of the loop. Further, it enables the strain upon the waistband where the loop is attached to be distributed over a considerable area of the waistband, so that such strain is not concentrated at one point. If this U-shaped piece were not used, the waistband would be much more liable to rupture. This use of the U-shaped piece makes it possible and practicable to use a lighter and a cheaper material in the manufacture of the waistband without the sacrifice of security, and also facilitates the manufacture of the waistband.

If buttonholes alone were used, the buttons would come off or tear out. If elastic loops alone were used, they would quickly be stretched out of shape, torn, or broken. Therefore the claims require buttonholes, eyelets, elastic loops, and U-shaped strips, and these elastic loops are protected by at least two thicknesses of fabric. The evidence shows that this structure is strong, slightly, well adapted to the purposes sought to be attained, and that it has become popular. It overcomes certain defects in prior structures which arose from certain defects in construction, which were of such moment that the structures would not hold together.

It may be that each element of the complainant's patent, standing by itself, is old, but the combination is new, and has produced new and useful results—results sought to be attained by others, but they have not been attained before. This invention has gone into quite extensive use.

I am constrained to hold, after a careful examination of the evidence, and do hold, that the structure referred to and fully described in the patent in suit, and alleged to be infringed, shows a patentable invention,

and is entitled to protection. I also find and hold that Sam Katz, the patentee named in such patent, No. 562,616, dated June 23, 1896, for a waistband for trousers, was the inventor, and that such described invention is the invention of the patentee, Katz. There is no want of invention, and no prior public use has been shown.

The defendants make the same structure described in the Katz patent, but they cut the U-shaped strip into separate pieces, instead of making it in one continuous piece, as is described in the patent; and the defendants claim that, under the reading of the claims of the patent in suit, the complainant is so limited to a single U-shaped strip of fabric, with loops of elastic cord, with their ends secured therein by sewing, fastened to a waistband strip, etc., they are at liberty to make the precise structure described in complainant's patent, provided this U-shaped strip is made or cut into separate pieces before being sewed or attached to the waistband of the boys' trousers. With this contention this court cannot agree. The effective part of the U-shaped strip is where it takes hold of and secures the loop. Between the loop-holding parts this U-shaped strip has no substantial function that would be affected by cutting such strip. See *Standard Caster Co. v. Caster Socket Co.*, 113 Fed. 162-168, 51 C. C. A. 109; *Bundy Mfg. Co. v. Detroit Time Register Co.*, 36 C. C. A. 375, 94 Fed. 524. The change that is made by the defendant in this U-shaped strip is merely colorable. It neither omits an element of complainant's patent, nor adds a new element. The structure or completed garment is not improved. It is substantially the same. In effect, it is a cutting of this U-shaped strip into pieces, and then a sewing of such pieces together again, which is accomplished when the strip is attached to the completed garment. It then becomes, in effect, one continuous, U-shaped strip.

This court has carefully examined the Spitz patent, No. 446,270, dated February 10, 1891, and the Terry patent, No. 464,402, dated December 1, 1891, and all the other patents put in evidence by the defendant, but is far from satisfied that anticipation or prior public use has been made out.

It may be well to remark that the court does not give full faith and credit to the testimony of the witnesses Spitz, Green, Enright, and Barrett. It is sufficient to say that the court has carefully examined the evidence in the case, the briefs of the respective counsel, and the cases cited, and is satisfied that the defenses alleged are not sustained.

The patent of the complainant is for a device of proven usefulness in a limited field; anticipation, in view of the prior art, is not shown; and the claims of the patent are limited to the structure invented by the applicant. Both novelty and utility are shown to exist in the complainant's device or invention. There is no question but that defendants' structure infringes, and the complainant is therefore entitled to the usual decree for an injunction and an accounting.

## FARBENFABRIKEN OF ELBERFELD CO. V. HARRIMAN.

(Circuit Court, D. Massachusetts. November 17, 1904.)

No. 1,842.

## 1. PATENTS—INFRINGEMENT—PHENACETIN.

The Hinsberg patent, No. 400,086, for a new pharmaceutical product, called "phenacetin," held valid and infringed, and an injunction granted, and an accounting ordered by defendant, who, although a retail druggist, shown to have sold only a small quantity of the infringing drug, was selling an adulterated article, which might be very deleterious to the public health.

In Equity.

Anthony Gref, Livingston Gifford, and William Oldin, for complainant.

Parsons & Bowen, for defendant.

HALE, District Judge. This suit in equity is brought for infringement of patent No. 400,086, issued March 26, 1889, on an invention of Oscar Hinsberg, of Barmen, Germany, and assigned, after several mesne assignments, to the complainant. The invention covered by the patent is a pharmaceutical product known as "phenacetin." The specification contains a description of the new pharmaceutical product, and of the inventor's process of production. The opening of the specification is as follows:

"My invention relates to the production of a new pharmaceutical product, a new anti-pyretic and anti-neuralgic, obtained by reducing nitro-phenotol, and melting the phenetidin-chlorhydrate thus formed with dried sodium acetate and acetic acid."

The single claim of the patent is as follows:

"The product herein described, which has the following characteristics: It crystallizes in white leaves, melting at 135° centigrade; not coloring on addition of acids or alkalis; is little soluble in cold water, more so in hot water; easy soluble in alcohol, ether, chloroform, or benzole; is without taste; and has the general composition  $C_{10}H_{13}O_2N$ ."

The patent has been sustained by the United States Circuit Court of Appeals in the Third Circuit. *Maurer v. Dickerson*, 113 Fed. 870, 51 C. C. A. 494. The Supreme Court of the United States afterwards denied an application for certiorari. 186 U. S. 481, 22 Sup. Ct. 941, 46 L. Ed. 1266. The patent has been before the courts in other cases. Its validity and the infringement have not been denied by any testimony offered by the defendant, although the answer makes a general denial of all matters alleged in the bill. Full testimony has been taken by the complainant to sustain the bill, but no evidence has been offered by the defendant, and at the hearing before the court no argument of counsel was submitted in behalf of the defendant.

The infringement to which the attention of the court is called in the record is by the defendant, a retail druggist, who appears by the testimony to have sold an infringing product called "phenacetin," and described in the claim of the patent to which we have referred. It appears from the testimony further that the defendant sold the phenacetin

adulterated with acetanilid and carbohydrate. It further appears that the offending drug has been generally purchased by retail druggists from itinerant peddlers, who have imported the drug in small quantities, in many instances in counterfeit and adulterated packages. The evidence in the record before us tends to show that acetanilid is a drug which must be treated with great caution. A chemist of high reputation testifies:

"The authorities with which I am thoroughly familiar agree that acetanilid is a very active heart depressor, and a drug which should be used with the utmost caution. By this I mean that it is a drug which physicians do not prescribe except in cases where they are quite certain there is no heart affection. Physicians freely prescribe phenacetin where, because of some known heart trouble, the use of acetanilid is contra-indicated. By the substitution I have mentioned, the druggist furnishes to the patient precisely what the physician intended not to give him. There are cases on record where a comparatively small dose of acetanilid produces cyanosis and death, and, inasmuch as the usual dose of phenacetin is about eight grains, the substitution of the acetanilid mixture is quite likely to result seriously wherever the patient's heart is affected."

The defendant is a retail druggist, and has not been guilty of long-continued or extensive infringement. The relief of a court in equity, however, is properly invoked from the fact proven in the record that defendant has been guilty of some infringement, and that he is using a drug which may be very detrimental to the public health. And so we are of the opinion that the case does not come within the class of cases where, on account of the triviality of the infringement, courts have sometimes refused an accounting, although they have granted an injunction.

Many of the matters to which the attention of the court has been called by learned counsel in argument and in their brief are matters which cannot receive the attention of the court until after an accounting before a master.

Decree for the complainant for an injunction and for an accounting, with costs.

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**STADLER et al. v. MISSOURI RIVER POWER CO.**

(Circuit Court, D. Montana. November 21, 1904.)

No. 674.

**1. CONTRACTS—CONSTRUCTION—INSTRUMENTS EXECUTED AT SAME TIME.**

Different instruments executed between the same parties on or about the same date, relating to the same subject-matter, are to be construed together as a single contract, and as considerations one for the other.

**2. EASEMENT—CONSTRUCTION OF GRANT—INCIDENTAL RIGHTS.**

Defendant owned and maintained a dam on the Missouri river for the generating of electrical power, and plaintiffs owned land above it. As the result of negotiations between the parties following condemnation proceedings, defendant purchased and took a conveyance from plaintiffs of some 600 acres of land, and also at the same time made a lease of such land to plaintiffs for a term of 20 years at an annual rental of \$1, reserving the right to flood the land at any time; the lease to terminate, should the dam be washed away. The lease also contained a provision

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¶ 1. See Contracts, vol. 11, Cent. Dig. § 746.

that plaintiffs, on behalf of themselves, their heirs, etc., "hereby agree to permit and recognize the right of said first party to flood said premises by the waters of the Missouri River as they may be raised by the dam belonging to the said first party \* \* \* as the said dam now exists or as the same may be hereafter raised or lowered, without claim for damage." *Held*, that in view of the entire transaction, the evident purpose of which on the part of defendant was to acquire the right to raise its dam without liability for damages, such covenant must be construed as a grant of such right, and as a release of any claim for damages resulting from its exercise to other lands owned by plaintiffs in the vicinity, which would incidentally be flooded by the flooding of those described.

### In Equity. Suit for injunction.

The complainants brought this action against the defendant corporation, which is a citizen and a resident of the state of New Jersey, praying for an injunction to restrain the defendant from keeping or maintaining a dam across the Missouri river at any greater height than it was on August 1, 1902, or from erecting or maintaining any structures or works whereby the waters of the Missouri river are raised or kept back or prevented from flowing over the uppermost surface of the defendant's dam, as the same existed on August 1, 1902, and for general relief. Complainants allege that prior to the year 1902 the defendant company constructed a dam of masonry across the Missouri river at Canyon Ferry, Mont.—the dam being of the height of about 32 feet—by means of which dam, and the water stored above the same, the defendant generated electrical power, which it transmitted and sold in and about the cities of Helena and Butte, in Montana; that the defendant corporation was organized for the purpose, among others, of constructing said dam to carry on the business of generating and selling electrical power, and that it has been engaged in such business for more than three years prior to the date of the institution of the suit, to wit, April 14, 1903, and that it was still engaged in such business; that complainants, since January, 1899, have been owners of certain lands in Broadwater county, Mont., bordering on and adjacent to the Missouri river, above the place where the defendant's dam was constructed and maintained, a more particular description of said lands being as follows: Lot 12 in section 6; lot 9 in section 6; lot 14 in section 5; the N.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 8; lots 3 and 4 in section 8; lot 11 in section 6; and lots 1, 10, and 11 in section 8—all in township 9 N., of range 1 E., comprising in all 289.49 acres. Complainants further allege that they have been copartners as cattlemen, and that the lands mentioned have been used by them in connection with their cattle business, and that said lands are very well adapted for feeding, grazing, and attending to cattle, and that they cultivated large portions of the lands in hay, and had built thereon a dwelling house, sheds, stables, and other buildings in which to feed and keep various classes of stock; that the lands had living springs of fresh water upon them, and that these springs remained open at all seasons of the year, and were accessible to the cattle; and that on the lands there was an extensive growth of willows, which furnished shelter to which the cattle resorted during storms. It is also alleged that at divers times since August 1, 1902, the defendant corporation has raised and caused to be raised its said dam across the Missouri river by means of works constructed on top of its said dam as it has theretofore existed, all of which was done without notice to complainants; that in consequence of the construction of said works by the defendant since August 1, 1902, the waters of the Missouri river have been backed up so that they have flooded and submerged the lands of the complainants as described, and obliterated the springs referred to, rendered unavailable the shelter of the willows, and the sheds, stables, granary, and corrals, and rendered all of the lands hereinbefore described, so submerged, valueless while they so remained submerged. Complainants aver further that defendant intends to continue to maintain its dam at the present height, with a superstructure, and that it intends to replace the structures now erected on its masonry dam, which are of a temporary character, with more permanent works, by means of which the said dam will be permanently raised to a height at least 10 feet above that which it was prior to August 1, 1902. Complain-

ants further allege that the lands are so situated that if the said dam is raised to any height greater than it was prior to August 1, 1902, more or less of the said lands will be submerged by the waters of the Missouri river, and that the defendant threatens to continue to perpetrate the wrongs complained of, and to continue to flood the lands as described, thereby inflicting great and irreparable injury to the said lands.

The defendant corporation admits the construction of a dam prior to August 1, 1902, to a height of about 32 feet; admits that it stored the waters, and has generated electrical power, which it transmitted for sale in and about the cities of Butte and Helena; admits the alleged ownership of lands by the complainants, except that it denies that complainants own lot 11, section 7, mentioned in complainants' bill; admits the use of lands by the complainants, and the erection by complainants of a dwelling house, sheds, stables, and other buildings upon the lands, but denies the existence of numerous living springs of fresh water upon the lands, from which the cattle drink, and alleges that any springs which may be upon the property are inaccessible during the winter. The corporation admits that at divers times since August 1, 1902, it has raised and cause to be raised its said dam across the Missouri river, but denies that it was done without notice to complainants; denies that, in consequence of the construction of the said works, since August 1, 1902, the waters of the Missouri river have been backed up so as to flood and submerge all or nearly all of the lands of the said complainants, or obliterate the springs, or render unavailable for shelter any willow trees, or sheds or other buildings mentioned in the complainants' bill, or rendered any of the lands valueless by reason thereof. Defendant then admits that it intends to continue to maintain its dam at its present height, with a superstructure erected as it existed prior to the 1st day of August, 1902, but denies it intends to replace the structures now located on its masonry dam with works of masonry or permanent works, by means of which said dam shall be permanently raised to a height of 10 feet above that which it was prior to August 1, 1902; denies that complainants' lands are so situated that if the said dam is raised to any height greater than that which it had prior to August 1, 1902, more or less of the said lands will be submerged; and denies that it threatens to continue to perpetrate any wrong, or, except as hereinafter stated, to flood at all any of the lands belonging to the complainants; and alleges that it never has flooded and will not flood any of the said lands, except as it has acquired the right to flood the same. Defendant then avers that, at the time of the alleged trespass and wrongs complained of, it was, and is now, the successor in interest of the Helena Water & Electric Power Company, a Montana corporation, and, as such successor, is entitled to have, possess, and enjoy, and is the owner of, all the rights, privileges, easements, property, and servitudes of the said Helena Water & Electric Power Company in the state of Montana. It is alleged that the said Helena Water & Electric Power Company was duly authorized to construct a dam across the Missouri river in Montana for the purpose of producing and generating power for mining, mechanical, and other useful and beneficial purposes, and had at said dates built and constructed a dam therefor, and was entitled to possess, hold, and enjoy all real estate necessary and convenient in connection therewith, and to sell and convey the same, including and embracing the rights, property easements, and servitudes hereinafter set forth; that the said Helena Water & Electric Power Company, having in contemplation the raising and extending its said dam, and for the purpose of securing the right so to do, made and entered into a certain tripartite agreement with the said complainants, copies of which are annexed to and made part of the defendant's answer; and that the exhibits constituting said tripartite agreement comprise a part of one and the same transaction, and, as a whole, constitute a contract and agreement of the parties concerning the alleged damage, trespass, and wrongs complained of; and that, when the contract and agreement referred to were made, the defendant alleges that the complainants were the owners and possessors of the premises therein described, and were at that time owners of and possessors of other property described in their complaint, with full power to create rights, easements, and servitudes therein. The defendant avers that in consideration of the sum of \$22,487.55 paid to the complainants by the said Helena Water & Electric

Power Company, and as the chief and only objects thereof, it was stipulated and agreed by the said tripartite agreement that the defendant should have and secure the right to raise said dam to a sufficient height to flood and submerge the lands therein described, and that, as incident and necessary to the enjoyment of said grant to the extent aforesaid, there is involved the alleged trespass and damage complained of; that, in consideration of the said sum of \$22,487.55 so paid for the right of raising said dam and backing up said water, said complainants by said tripartite agreement released and discharged the said Helena Water & Electric Power Company, its successors and assigns, from any and all damages complainants might sustain on account thereof; that said dam has not been raised to the height so contemplated, nor have said lands been submerged, except as the right to do so was acquired according to said contract and agreement; that defendant has never yet raised the waters of its dam to a height to flood all of the premises mentioned in said tripartite agreement; that, incidental to the rights and grant aforesaid, and so contemplated as aforesaid, the alleged trespass and damages necessarily arise; and that the claim now made by complainants would entirely defeat and destroy the said grant, and the benefit thereof, notwithstanding the valuable and large consideration paid therefor.

For further answer the defendant alleges that the Helena Water & Electric Power Company was authorized by its charter to purchase, hold, develop, improve, use, sell, and convey water power and sites therefor; to construct dams and reservoirs and to use the waters, as well as to sell them for public and private use; to sell water and water power; to use the same for mechanical and other useful purposes, including electrical power, and to establish telegraph and telephone lines, and to use such power in connection therewith; and also to use such electric power directly, as well as for the purpose of transmitting and conveying and using and selling the same for use in mines, smelters, concentrators, and other useful purposes; that the said Helena Water & Electric Power Company instituted a suit in the district court of the First Judicial District of the state of Montana, in and for the county of Lewis and Clarke, in December, 1897, against several parties, including these complainants, to have said court determine and ascertain the interests of the several parties in said lands and premises sought to be condemned by said Helena Water & Electric Power Company in said action, and asking that the use for which said plaintiffs in said action sought to appropriate the premises might be determined to be a public use under the laws of the state of Montana, and that the said premises were necessary and required for said public use, and prayed the appointment of three persons as commissioners to determine and ascertain the amount to be paid by the plaintiffs in said action to each of the defendants in said action as damages of their premises by the plaintiff; that, when commissioners reported, an order might be made that the said Helena Water & Electric Power Company, upon paying into court the damage as ascertained and determined by the said commissioners, should be allowed to enter into the possession of the premises in its said complaint described, and to use and possess the same during the pendency and until the final conclusion of the proceedings; that thereafter, on December 26, 1897, all of the parties in said action having appeared, and it appearing to the court that the matters and facts set forth in the complaint were true, the court ordered and determined that the use for which the said Helena Water & Electric Power Company sought to appropriate said premises was a public use, under the laws of the state, and appointed commissioners to examine the lands sought to be condemned, and ascertain and determine the amount to be paid by the plaintiff therein to each of the defendants, respectively, as damages; that thereafter, on January 3, 1898, the commissioners entered upon the discharge of their duties and reported to the court that they heard testimony and examined the property, and found the value of the lands of these complainants to be the sum of \$8,346.50; that Stadler and Kaufman appealed from the award relating to the property of Stadler and his wife and Kaufman, and that thereafter, on June 18, 1898, the appeal came on to be heard before the judge of the District Court of the First Judicial District of the state of Montana, and a jury of 12, and that, upon the trial of the appeal from the commissioners' report, it was an issue to determine the damage that



would be occasioned to said Stadler and wife and Kaufman by reason of the construction, erection, and maintenance of said dam by the said Helena Water & Electric Power Company and its successors in interest, and the damage that would be occasioned to said premises and the improvements thereon, as described in the complaint of the Helena Water & Electric Power Company, as belonging to the said Stadler and his wife and Kaufman, and particularly described as follows, to wit: The east half of the southwest quarter, the south half of the southeast quarter, and the northwest quarter of the southeast quarter, and lots 10, 11, and 13 of section 31, township 10 north, range 1 east; also lots No. 4 of section 32, township 10 north, range 1 east and lots 3, 4, and 19 of section 6, township 9 north, range 1 east; that the property just above described and so sought to be secured constituted only a portion of a larger parcel of land then belonging to complainants herein, the remainder of said parcel being described as follows, and belonging to complainants: Lots 4, 5, 6, and 7 of the southeast quarter of the northeast quarter of section 5, township 10 north, range 1 east; also lots 5, 7, 8, 9, 10, 11, and 12 of section 6, township 10 north, range 1 east; also the northeast quarter of section 7, township 10 north, range 1 east; also the southeast quarter of the southwest quarter and lot 13 in section 6, township 10 north, range 1 east; and it is alleged that it became and was an issue in said cause upon the trial of the appeal from the commissioners' report to determine the damage which would accrue to the said last described land and the improvements thereon by reason of its severance from the portion so sought to be condemned, and by reason of the construction and maintenance of the said dam by said Helena Water & Electric Power Company and its successors. Defendant alleges that included in the issues tried on the appeal was the question of damage, by reason of the construction and maintenance of a dam, to the land, and the business and the uses of the lands for stock growing, and as to the amount of damage that would result to the complainants by reason of the backing up of the waters of the Missouri river occasioned by the construction and maintenance of the dam by reason of the ownership of said lands, and the improvements thereon, described in the complaint of the Helena Water & Electric Power Company, and sought to be condemned, by reason of the adaptability of said lands and improvements to the purposes of stock raising, and by reason of the damage occasioned to said lands and to said complainants, and by reason of the obliteration, destruction, and availability to certain springs mentioned in complainants' complaint, and on account of the flowage of water upon said lands. It is alleged that thereafter, on June 27, 1898, the jury in the appeal case made special findings, and on June 29th the court entered judgment to the effect that the Helena Water & Electric Power Company should pay to the complainants herein the sum of \$8,309.10, with interest, and that upon said payment plaintiff and its successors should have the right to construct and maintain the improvements, and to take, use, and appropriate the property hereinabove described for the uses and purposes for which the land has been condemned. It is alleged that thereafter the money was paid to the complainants herein, and that the judgment is in full force and effect now, as between the parties hereto, and that the defendant is the successor in interest of the said Helena Water & Electric Power Company in respect to the matters and things adjudicated in said action, and that they are the same matters and issues involved in this suit between the complainants and the defendant. It is then alleged that on the 17th of January, 1899, the said Kaufman and Stadler and wife, for a valuable consideration, executed and delivered to the Helena Water & Electric Power Company their certain deed of release, which is made a part of the defendant's answer, and that in said deed of release certain land is described as "also the land on the island in the Missouri River, near said above-mentioned property," which said land, as thus described, defendant alleges, embraces the identical land described in complainants' complaint as lot 14 in section 5 north, half of northwest quarter of section 8, lot 3 in section 8, and lot 4 in section 8, all in township 9 north, range 1 E. Defendant then avers that it has not raised or caused to be raised the waters of the Missouri river by its dam, or at all, to such height as to flood all of the premises mentioned in said deed of release, and will not do so.

Exhibits A, B, and C are as follows:

**Exhibit A.**

"This Indenture, Made this seventeenth day of January, A. D. one thousand eight hundred and ninety-nine, between Louis Stadler, and Mary Stadler, his wife, and Louis Kaufman of the City of Helena, County of Lewis and Clarke, State of Montana, parties of the first part, and Helena Water and Electric Power Company, a corporation, organized under the laws of the State of Montana, the party of the second part, Witnesseth; That the said parties of the first part for and in consideration of the sum of Twenty-two thousand four hundred and eighty-seven and  $\frac{55}{100}$  Dollars (\$22,487.55) lawful money of the United States of America to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents, grant, bargain, sell, convey, warrant and confirm unto the said party of the second part, and to its successors and assigns, forever, the hereinafter described real estate, situated in the County of Lewis and Clarke, and State of Montana, to wit: The East one-half of the Southwest Quarter (E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ), South half of the Southeast quarter (S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ), Northwest quarter of the Southeast Quarter (N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ), and lots numbered ten (10), eleven (11) and thirteen (13), all in section thirty-one (31), Township ten (10) North, of Range one (1) East. Also lots numbered three (3), four (4) and nineteen (19), in Section six (6), Township nine (9) North of Range one (1) East. Also lot numbered four (4) in Section Thirty-two (32), Township ten (10) North, of Range one (1) East; and lots numbered four (4), five (5), six (6) and seven (7), and the southwest quarter of the northwest quarter (S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) in Section five (5), Township nine North of Range one (1) East. Also Lots numbered five (5), seven (7), eight (8) and ten (10), in Section Six (6), Township nine (9) North of Range one (1) East of the principal Meridian of Montana, in all amounting to (637.42) six hundred thirty-seven and  $\frac{42}{100}$  acres. Together with all and singular the hereinbefore described premises, together with all the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also the estate, right, title, interest, right of dower and right of homestead, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances thereto belonging. To have and to hold all and singular the above mentioned and described premises unto the said party of the second part, and to its successors and assigns forever. And the said parties of the first part, and their heirs do hereby covenant that they will forever warrant, and defend all right, title and interest in and to the said premises and the quiet and peaceable possession thereof, unto the said party of the second part, its successors and assigns, against the acts and deeds of the said parties of the first part, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

"In Witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first hereinabove written.

"Louis Stadler. [Seal.]

"Mary Stadler. [Seal.]

"Louis Kaufman. [Seal.]

"Signed, sealed and delivered in the presence of Thos. C. Bach, witness for all.

"[United States Revenue Stamps.]"

**Exhibit B.**

"This indenture, made the seventeenth day of January, 1899, between the Helena Water and Electric Power Company, a corporation, by C. W. Whitley, its general manager thereto duly authorized, party of the first part, and Louis Stadler and Louis Kaufman of Lewis and Clarke County, Montana, parties of the second part, witnesseth:

"That in consideration of the rents hereinafter reserved and the covenants hereinafter contained on the part of the said Louis Stadler and Louis Kaufman, their executors, administrators and assigns, to be observed and per-

formed, the said Helena Water and Electric Power Company does hereby let and rent unto the said parties of the second part for the term of twenty years, except as hereinafter stated and limited, the following described premises: The east one-half of the Southwest Quarter (E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ), South half of the Southeast Quarter (S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ), Northwest Quarter of the Southeast Quarter (N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ ), and lots numbered ten (10), eleven (11), and thirteen (13), all in Section Thirty-one (31), Township ten (10) North, of Range one (1) East; also lots numbered three (3), four (4) and nineteen (19) in Section six (6), Township nine (9) North of Range one (1) east. Also lots numbered four (4) in section thirty-two (32), Township ten (10), North of Range one (1) east; and lots numbered four (4), five (5), six (6) and seven (7), and the southwest quarter of the northwest quarter (S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) in section five (5), Township nine (9) North, of Range one (1) East; also lots numbered five (5), seven (7), eight (8) and ten (10) in section six (6), township nine (9) North of Range one (1) East of the Principal Meridian of Montana; also such other land as the party of the first part now owns on the island in the Missouri River near the above-mentioned property, reserving, however, to the said party of the first part, its successors and assigns, the right at all times hereinafter to flood any or all of the said premises by the waters of the Missouri River as the same may be raised by the dam belonging to the said first party, at Canyon Ferry, Lewis and Clarke County, Montana, as the same now is or the same may be hereafter raised or lowered, and this lease is given subject to this right.

"In consideration whereof the said parties of the second part agree to pay unto the said first party, the yearly rent of one dollar for the use of said premises, payable on the 17th day of January, 1900, and every year thereafter during the continuance of this lease. The said second parties for themselves, and each of themselves, their and each of their heirs, executors and assigns, do hereby agree to permit and recognize the right of said first party to flood said premises by the waters of the Missouri River as they may be raised by the dam belonging to the said first party at said Canyon Ferry, Montana, as the said dam now exists or as the same may be hereafter raised or lowered, without claim for damage. It is hereby mutually agreed and understood that if at any time hereafter the dam of the said party of the first part at said Canyon Ferry as it now exists or as it may hereafter be altered or changed shall be washed away so that it does not afford sufficient power to the said first party, that this lease shall then and there terminate.

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"Helena Water and Electric Power Company,

"By C. W. Whitley, General Manager.

"Louis Stadler. [Seal.]

"Louise E. Kaufman. [Seal.]

"In presence of Thos. C. Bach, Witness for all.

"[U. S. Revenue Stamps.]"

#### Exhibit C.

"Know all Men by These Presents, that we, Louis Stadler and Mary Stadler, his wife, and Louis Kaufman, for and in consideration of the sum of one dollar, and other valuable considerations to us in hand paid, by the Helena Water and Electric Power Company, a corporation, have forever released and discharged and do hereby forever release and discharge the said Helena Water and Electric Power Company, its successors and assigns, from all damages or claim for damages which we have or claim to have, or may hereafter claim, against it by reason of it (said company) having flooded or hereafter flooding by the waters of the Missouri River, the following described real estate, or any thereof, to wit: The east half of the southwest quarter (E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ ), South half of the southeast quarter (S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ), Northwest quarter of the southeast quarter (N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ ), and lots numbered ten (10), eleven (11), and thirteen (13), all in section thirty-one (31), township ten (10) north of range one (1) east. Also lots numbered three (3), four (4) and nineteen (19) in section six (6), township nine (9) north of range one (1) east. Also lots numbered four (4), five (5), six (6) and seven (7) and the southwest quar-

ter of the northwest quarter (S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ ) in section five (5), Township nine (9) North of Range one (1) East. Also lots numbered five (5), seven (7), eight (8) and ten (10) in section six (6), township nine (9) north of range one (1) east, of the principal meridian of Montana. All in the County of Lewis and Clarke, State of Montana; also the land on the island in the Missouri River near said above-mentioned property.

"In Witness Whereof we have hereunto set our hands and seals this sixteenth day of January A. D. 1899.

Louis Stadler. [Seal.]

Mary Stadler. [Seal.]

"Louis Kaufman. [Seal.]

"In presense of Thos. C. Bach, witness for all."

Complainants made replication stating that they would aver and prove their bill to be true. Testimony was ordered heard before the standing Master in Chancery of the court.

T. J. Walsh, for complainants.

Nolan & Loeb, Toole & Bach, and Carpenter, Day & Carpenter, for defendant.

HUNT, District Judge (after stating the facts as above). I have given very careful consideration to the evidence, and, without reciting in detail the testimony, will briefly state my conclusions in respect to the whole case:

Stadler and Kaufman, by their deed of conveyance, Exhibit A, granted to defendants, among other tracts, lot 4 in section 31, without reference to its being an island. And at law it would have made no difference in the validity of their title whether there was or was not an island of part of said lot, provided they owned it at the time of their grant to defendant. Now, defendant, having become the owner, leased back to Stadler and Kaufman lot 4, section 31, together with the other property specifically described. But in the lease, after so specifying lot 4 and the other property which they had theretofore granted to the defendant, there is included "such other land as the party of the first part now owns on the island in the Missouri River near the above-mentioned property." The words used indicate that the parties believed that the defendant owned, or might own land "on" the island in addition to lot 4, and, if it did, the evident intent was to lease it, and it was included. The language used excludes the idea that lot 4, which was a part of a tract designated as the "Yellow Island" on plaintiffs' Exhibit B, was included in the general words, because lot 4 had been already described. Therefore, looking for other property as embraced within the general language, we find that defendant believed it had a claim to certain land on what was known as the "Little Island," a tract of land lying south of and near to the lands specifically described, shown in the government maps to be surrounded by water courses, and designated therein as an island, and spoken of by some of the witnesses at the trial as the "Moran Tract," by others as the "Little Island." I therefore conclude that the evidence sustains the defendant in its contention that this was the land meant in the lease.

But if we assume that complainants are correct in respect to the identity of the tract described in the lease, and that it is a part of the Yellow Island, still the assumption cannot avail them under the law as it must be applied to the written contracts. It is clear that defendant wanted to acquire lands to flood as the demands of its business

required. In accordance with this general purpose, it proceeded with the condemnation suits in the state courts. After the suits in condemnation had been tried and adjudicated, and before payment to the complainants of the sum awarded by the court, defendant and complainants entered into a contract; such contract being made up of the three distinct contracts, Exhibits A, B, and C. These agreements were made and delivered about the same time. They related to the same matters, as parts of substantially one transaction, and should be construed together, as considerations one for the other. Civ. Code Mont. § 2207; *Bailey v. Railroad Co.*, 17 Wall. 108, 21 L. Ed. 611. The evidence shows that they were all executed for the purpose of making permanent settlement between the complainants and defendant with respect to the acquisition of lands and the flooding of lands, and any damages, past or future, consequent upon flooding by the dam as it was then constructed or might thereafter be raised.

Examining these contracts, we find that the object of the power company in acquiring the lands (637 acres) conveyed by the Deed A was to flood them by their dam. Under the Deed A, the company has a right to flood the lands so acquired, but none other.

Through the Lease and Contract B, the complainants, for an annual rental of \$1, obtained a lease for 20 years on the lands they had just theretofore conveyed, and certain other lands which it was believed defendant then owned, or claimed an interest in or ownership of; and in this same contract the defendant corporation acquired the right to flood all of the leased land, and, as an incident, all of the lands of the complainants that might be flooded by raising the dam. The considerations expressed in Exhibit B are "the rents hereinafter reserved and the covenants hereinafter contained \* \* \* for the term of twenty years, except as hereinafter stated and limited." The rental price of \$1 was clearly nominal, and is of itself evidence of the importance of the other covenants contained in the instrument.

The reservation of the lease was as follows:

"Reserving, however, to the said party of the first part, its successors and assigns, the right at all times hereinafter to flood any or all of said premises by the waters of the Missouri River as the same may be raised by the dam belonging to the first party, at Canyon Ferry, Lewis and Clarke County, Montana, as the same now is or the same may be hereafter raised or lowered, and this lease is given subject to this right."

By this reservation the defendant company was secured in the right to flood the land leased to any height by the dam as it existed at the date of the agreement, or as it might be raised thereafter during the life of the lease. The court is not called upon to decide whether the right acquired by the reservation quoted reserved to the defendant the right to flood adjoining lands of complainants, if such flooding were a natural consequence of flooding the particular land leased. A reservation being interpreted in favor of the grantor (section 1473, Civ. Code Mont.), the contract under consideration might have to be so construed. But no opinion is expressed on the point, because we find the following covenant in the lease between these parties:

"And the said second parties for themselves, and each of themselves, their and each of their heirs, executors and assigns, do hereby agree to permit and

recognize the right of said first party to flood said premises by the waters of the Missouri River as they may be raised by the dam belonging to the said first party at said Canyon Ferry, Montana, as the said dam now exists or as the same may be hereafter raised or lowered, without claim for damage."

I construe this covenant as both a grant and a release. The words granting the right to flood the lands described in the lease as may be consequent upon raising the dam created an easement with the burden of a corresponding servitude upon the lands of complainants. The words "without claim for damage" expressly release the defendant from any and all liability for damage for flooding the lands of complainants by reason of raising the dam.

Now, when complainants agreed to permit the defendant to flood the premises described in the lease, and to recognize its right to flood them by raising the dam to any height desired, they granted a right to flood any other land, at least in that vicinity, then owned by complainants, and necessarily flooded by raising the dam, as incident to flooding the land leased. And the evidence and the contracts go to show that the power company contemplated an extensive flooding of lands, and that its agents were looking to future demands for the power to be generated by it, and it is but reasonable to regard the grant as one which could be utilized with such incidents as are necessary to the enjoyment of the right to flood the leased lands by raising the dam. Complainants consented, so far as their rights were concerned, to a right to flood by raising the dam, and they cannot now be heard to complain.

The expression of the covenant "to permit and recognize the right of" is both permission to flood, and recognition of the right permitted, with its necessary incidents, while the words "without claim for damage" are a release from any and all damage that may be done by flooding not only the leased land, but any other land flooded by raising the dam to any height. All the parties were well aware of the fact that, if the leased lands were flooded as a consequence of raising the dam to a certain height, other lands on about the same level near by would naturally be flooded. Complainants took their chances as to the probability of defendant raising its dam. If it should not be raised, their lease was doubtless a very valuable one. If it should be raised, and their lands were flooded, it was of much less value. The presumption is that, when complainants granted the right to the defendant to raise its dam to any height desired, they granted whatever is essential to the use. Civ. Code Mont. § 4613; *Bushnell v. Proprietors*, 31 Conn. 157; *Washburn on Easements* (3d Ed.) p. 46; *St. Anthony Falls Water Co. v. Minneapolis* (Minn.) 43 N. W. 56.

The release was broad in its terms, and carried with it whatever was necessary to its enjoyment. *Updegrove v. Pennsylvania Sch. V. R. Co.*, 132 Pa. 540, 19 Atl. 283, 7 L. R. A. 213; *Burrow v. Terre Haute & L. R. Co.*, 107 Ind. 432, 8 N. E. 167. Like a grant, it is to be construed against the releasor. *Jackson v. Stackhouse*, 1 Cow. 126, 13 Am. Dec. 514.

There is another limitation in the lease, which reads as follows:

"It is hereby mutually agreed and understood that if at any time hereafter the dam of the said party of the first part at said Canyon Ferry as it now exists or as it may hereafter be altered or changed shall be washed away so

that it does not afford sufficient power to the said first party, that this lease shall then and there terminate."

There was always the possibility of the work being carried away, and the agreement by which the lease should be terminated, and the land revert to the defendant in such event, goes to show that it was for flooding purposes that defendant acquired the land, and that the price paid covered the rights and easements which were incorporated in the Lease and Agreement B. Goddard on Easements, 109.

Exhibit C is really a release to the defendant for past damages, although it covers damages for future flooding, should there be any arising from the dam as it existed at the time of the execution of the release. As before stated, in my judgment the covenants in Exhibit B were intended to release the defendant company from liability for further damages on account of flooding complainants' land by means of the dam as it then existed or might in the future be raised, while the Release C was designed particularly to release for past damages. It is to be observed that there is no limitation of time in the Release C, while B may be terminated within 20 years, and is only for the term of 20 years. The provisions of B would therefore prevail if doubt arises. The general intent of the whole contract was, I think, that B and C should relate to different conditions pertaining to the same subject; C pertaining to past damages, and B to future damages.

The learned counsel for the complainants earnestly urges the doctrine that grants by implication are not favored. It is true that many decisions to this effect may be cited. But on the other hand, it is a well-established principle that the use and enjoyment of premises granted as were the premises involved in this case necessarily imply, as an incident, the right to flood other lands, if necessary to the enjoyment of the grant, and is, in effect, a grant of such incident. It follows, therefore, that, the complainants having no right to damages as to the lands actually conveyed, the relinquishment of damages precludes their right to damages for the flooding of other lands.

The case must be determined upon the construction of the Instruments A, B, and C, and oral testimony is only possibly material to solve a question which seemed to me to be one of ambiguity, namely, what tract was referred to in the exhibits as on the island in the Missouri river.

Nor does it appear to me that the doctrine of "Expressio unius est exclusio alterius" has application to the case. The grant made by the complainants to the defendant for the purpose of flooding carries with it the right to do those things which are absolutely necessary to the enjoyment of the purpose specified and included in the grant. Civ. Code Mont. § 1250, subd. 10; *St. Anthony Water Co. v. City of Minneapolis* (Minn.) 43 N. W. Rep. 56; *Washburn on Easements*, p. 34; *Lammott v. Ewers*, 106 Ind. 310, 6 N. E. 636, 55 Am. Rep. 746; *Horne v. Hutchins* (N. H.) 51 Atl. 645; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377; *Hodge v. Railroad Co.* (C. C.) 39 Fed. 449.

Believing, therefore, that the complainants have given defendant the right to do those things which it seeks to enjoin them from doing, their prayer for injunction is denied. Section 4606, Civ. Code Mont.

## THE ANNIE.

(District Court, S. D. New York. October 15, 1904.)

## 1. SEAMEN—WAGES—DISCHARGE BY CONSUL FOR INSUBORDINATION.

The discharge of seamen by the United States consul at the port where the outward voyage terminated, because of their insubordination and refusal to assist in discharging cargo as required by their articles, *held* justified, and to defeat their claim for wages during the return voyage.

In Admiralty. Suit by seamen to recover wages.

Daly, Hoyt & Mason and Roy M. Hardy, for libellants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by the libellants, Edward Jorgensen and Anthony Nelson, to recover wages claimed to be due at the rate of \$30 per month from September 21st 1903, the date of their detention in St. Thomas, West Indies, to the 7th day of December following, when the vessel reached New Haven, Connecticut, her port of discharge, with penalties for non-payment amounting to \$200 each. The defence is that the libellants refused to assist in discharging cargo, which it was their duty to do, and became intoxicated, disorderly, violent and insubordinate and were summoned before the United States Consul, before whom they had a hearing and were duly discharged in accordance with law.

The evidence shows that the men agreed in the shipping articles to handle all cargoes and ballast required. There was no trouble on the outward voyage but, on reaching St. Thomas, they refused to discharge cargo and altercations arose between the men and the officers of the vessel, which resulted in the master calling in the services of the United States Consul, who after a hearing discharged them for insubordination. The master thereupon paid the Consul the wages then due and took his receipt for them. To avoid further trouble the Consul detained the men while the vessel sailed.

The libellants have doubtless suffered some hardship from the Consul's act but are not entitled, in view of their insubordinate conduct, to any redress from the vessel. The master's act was fully justified and the libel must be dismissed.



## UNITED STATES v. WONG DU BOW.

(District Court, D. Montana. November 23, 1904.)

No. 946.

## 1. CHINESE EXCLUSION—CLAIM OF CITIZENSHIP—EVIDENCE CONSIDERED.

Evidence offered in behalf of a Chinese person, arrested as being unlawfully in the United States, to establish his claim that he was born in this country, considered, and *held* insufficient to sustain the burden resting upon him on the issue, in view of a previous statement made and signed by him after his arrest that he was born in China.

On Appeal from Order of Deportation Made by a Commissioner.

Sanders & Sanders, for appellant.

Carl Rasch, U. S. Atty.

HUNT, District Judge. Wong Du Bow, a Chinaman, appealed from an order of deportation to China, made by a United States commissioner in this district. At his hearing before this court he interposed a plea to the jurisdiction upon the ground that he was born in the United States, and is therefore not subject to any law providing for the exclusion of Chinese. This plea was overruled because the fact to be determined was whether or not he is a native of the United States or China. The hearing proceeded. Several Chinamen testified that they knew defendant's parents in San Francisco, and the house where he said he was born, and that they had seen him from time to time since he was a child and up to the time of his departure for Montana, about 1896, and up to the present. Another Chinaman, a merchant living in Helena, testified that he was the uncle of the defendant, and that in the summer of 1896 he had sent \$150 to a certain Chinese mercantile firm in San Francisco for the purpose of bringing the boy and his mother to Helena. On cross-examination it was proven that he had recently signed a bail bond for the appearance of another Chinaman, whose case is still pending before the court under a different name from that which he gave at this particular hearing. The difference in names was material in this respect. In testifying that he was the uncle of this defendant he gave his name as Wong Quong Chung, thus giving one of the defendant's names, while in the bond referred to he had signed his name as Quong Chung. When confronted with the bond and his signature, he first denied ever having signed the instrument at all, but later on admitted that he had. He also said that when he had remitted the money to bring the boy and his mother from San Francisco to Montana he bought a bank draft in Helena, and, while he could not remember the particular bank where he bought the draft, he said he had done business generally at two of the principal banks in the city, and named them. The District Attorney introduced as witnesses the cashiers of the institutions referred to by the witness and of another principal bank in Helena, each of whom testified that no draft was drawn in favor of the payee

¶ 1. Citizenship of the Chinese, see note to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. Same*, 35 C. C. A. 332.

named by the witness during June, July, August, or September, 1896. The witness could produce no books showing any entry or item of this \$150, and excused himself from doing so by saying that he took his account books back to China a few years ago, where they were lost or destroyed. Another Chinaman, who testified that he had known defendant in San Francisco, said that he had traveled with the mother and child from San Francisco to Helena by way of Portland, but he gave two days as the time consumed in the journey. An American, named Mackey, testified that he had attended a feast in Chinatown, San Francisco, about Christmas in the year 1885, the occasion being said to be the rejoicing at the birth of a child to one Mar Shee, a Chinese woman, said by the defendant to have been his mother, and who was said to have died at Helena several years ago. Witness saw no child at the feast. This witness said he had been a newspaper distributor in San Francisco, and had several times in the early 90's seen a little boy with Mar Shee, whom he knew; that he left San Francisco in 1896, and that several years afterwards—about 1902—when witness was a policeman in Helena, a boy spoke to him, recalled himself, and witness then recognized him as the same person whom he had seen some six or seven years before as a child in San Francisco, with Mar Shee. I was not favorably impressed with the manner of the witness. He was reluctant in his answers, and did not testify as if he felt at all satisfied that this defendant was the boy he had seen as a child. Nevertheless, I have carefully considered what he said, and, if I were able to give credence to the story of the defendant told in court, I should be disposed to hold that he had made out a sufficient case to entitle him to be discharged. But I cannot believe what the defendant here said. He testified that he was born on Dupont street, in San Francisco, in 1885, had never been to China, and that he had been to a Chinese school in San Francisco; that he was a cook by occupation; that his father had gone to Mexico about 1895, and that he had never heard from him since that time; that he came to Montana with his mother in 1896, and had lived here since. But when he was apprehended by the inspector at Ft. Assinniboine he made a statement over his signature to the effect that he was born in China in 1885, and that he had come to the United States in the year 1898, having landed at Portland, Or.; that it cost him \$400 in Mexican money to get in; and that his friends arranged the matter of his landing. He also said at that time that his father lived in China, and never had been in the United States. This statement, taken by the inspectors, and put into writing, was in English, and made through a Chinese interpreter, Moy, who is regularly employed by the government to aid the inspectors. It was read over to defendant before he signed it. The defendant now denies having made the statements therein contained. There is evidence that defendant did not come to the office at Ft. Assinniboine where the inspectors were, although ordered to do so by the military authorities, but that he tried to flee from them, and was overtaken back of the buildings at the fort. His explanation of this incident was that he was cooking for an officer, and was merely going to a vegetable garden at the fort, and had no intention of trying to get away. An effort was made to prove that the interpreter misunderstood the

questions and answers when the statement was taken before the inspector. But the interpreter seems to be very careful, and, so far as one who is unfamiliar with the language can judge, his services upon this and other hearings before me have been faithfully and accurately rendered. If they had not been, the interpreter who was called by the defendant, and who sat by the government interpreter throughout the hearing, would have exposed any mistakes or willful misinterpretations.

It is also argued that when the defendant was arrested he was intimidated and frightened, and that his statement before the interpreter ought not to be given any weight. In support of this contention defendant, several days after the close of the testimony, and just before the argument, asked and was granted leave to take the witness stand again. He said that when he was arrested in April last at Ft. Assiniboine, near the garden referred to, the inspector who took him pointed a pistol at him, although he (defendant) was doing nothing, and had nothing in his hands but some spinach. Defendant did not testify to this when he was first on the stand, and it is before the court that the inspector, Boyd, who is said to have pointed the pistol, is now in St. Louis. The evidence of Mr. Ebey, the particular inspector who took defendant's statement, is to the effect that defendant did not appear to be under any fear, and was not threatened, or influenced by any means whatsoever to say anything or to make any statement unfavorable to himself, or not in strict accord with the truth.

The learned senior counsel for defendant has addressed a considerable part of his interesting argument to the general features of the exclusion laws, and urges that they are not applicable to one born in the United States, though of Chinese parents. But the evidence of defendant in this case fails to prove what the law requires him to establish—that he is a native of the United States—for, considering his two statements, with all the facts and circumstances, I am compelled to believe he was truthful in the first and false in the second; hence that he is unlawfully within the United States, and must be deported.

So ordered.

## DURYEA v. AMERICAN WOODWORKING MACH. CO.

(Circuit Court, D. New Jersey. November 22, 1904.)

## 1. CORPORATIONS—STATE LICENSE FEE—NEW JERSEY STATUTE.

Act N. J. 1884 (P. L. 1884, p. 234, § 4), and amendments thereto, impose a yearly license fee or tax on corporations, and require the State Board of Assessors to report the amount to the Comptroller on or before the first Monday in June of each year, providing that the tax shall thereupon become due and payable. By decision of the highest court of the state it is held that such tax is one imposed arbitrarily as a condition to the continued existence of the corporation, and is valid when imposed upon a corporation after it has been decreed insolvent and a receiver appointed for its property, but before it has been legally dissolved. Act 1896 (P. L. 1896, p. 319) provides that, if any corporation "shall for two consecutive years neglect or refuse to pay the state any tax" assessed against it, the charter of such corporation shall be void, unless the Governor shall give further time for the payment, and that, if the tax of any company remains unpaid on the 1st day of July after it becomes due, it shall thenceforth bear interest. *Held*, that a corporation could not be said to have "neglected or refused" to pay the tax until July 1st following its assessment, and that the failure of a corporation and its receiver for more than two years to pay the tax assessed against the corporation in 1899 did not operate to dissolve the corporation, in any event, before July 1, 1901, and the tax assessed in the June preceding became a valid and preferred claim against the estate.

## 2. SAME—EFFECT OF FEDERAL RECEIVERSHIP.

The state does not lose the right to enforce such annual license fee against the property of an insolvent corporation because at the time of its assessment such property was in the hands of receivers appointed by a federal court in a suit instituted by creditors for its distribution under the general equity jurisdiction of the court, since the receivers took the property subject to such preferred debts as might thereafter and before distribution become due from the corporation to its creator, the state, under the provisions of law then existing.

In Equity. On exceptions to master's report.

Grey, McDermott & Enright, for exceptants.

Robert H. McCarter, Atty. Gen., for State of New Jersey.

LANNING, District Judge. The question raised by the exceptions to the master's report is whether the state of New Jersey is entitled to have paid to it by the receivers of the defendant company, as a preferred claim, a "license fee or franchise tax" of \$3,500 imposed on the defendant company in 1901. The company was incorporated under the New Jersey corporations act on December 11, 1897, and it was adjudged to be insolvent and receivers were appointed for it by this court in this cause on September 6, 1899.

By section 4 of the New Jersey act of 1884, entitled "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof" (P. L. 1884, p. 234), it was provided that every corporation of the class to which the defendant company belonged should pay "a yearly license fee or tax" of one-tenth of 1 per centum on the amount of its capital stock. The section was amended in 1892 (P. L. 1892, p. 137); the only change, so far as the question now presented is concerned, being that the so-called tax was denominated an "annual license fee or franchise tax." By

a supplement to the act of 1884 approved February 19, 1901, which went into immediate effect (P. L. 1901, p. 31), the imposition is again denominated an "annual license fee or franchise tax." By section 6 of the act of 1884 it is provided that "such tax shall also be a preferred debt in case of insolvency."

In considering the validity of an imposition of a "license fee or franchise tax" upon a corporation after the Court of Chancery of New Jersey has decreed it to be insolvent and appointed a receiver for it, the highest court of New Jersey, in the United States Car Company's Case, 60 N. J. Eq. 514, 43 Atl. 673, said:

"Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The state, in creating a corporation, has the right to impose upon its creature such conditions as the Legislature, within constitutional limits, may deem proper; and the acceptance by the corporation of the franchises, powers, and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers, and privileges, and the conditions themselves remain unrevoked by the Legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them either by its officers and directors, or through a receiver. The sole test in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or nonexistence of the corporation."

It was accordingly held that the tax imposed on the United States Car Company after it had been decreed to be insolvent and after a receiver had been appointed, but before the company had been legally dissolved, was a valid claim against the assets in the hands of the receiver, and entitled to priority of payment over the claims of general creditors.

In the case at bar, however, the counsel for the receivers insist that the defendant company has been legally dissolved before the tax of 1901 was imposed. That insistence is based on a certain portion of section 1 of the act of 1896 (P. L. 1896, p. 319), which is as follows:

"If any corporation heretofore or hereafter created shall for two consecutive years neglect or refuse to pay the state any tax which has been or shall be assessed against it under any law of this state and made payable into the state treasury, the charter of such corporation shall be void, and all powers conferred by law upon such corporation are hereby declared inoperative and void, unless the Governor shall, for good cause shown to him, give further time for the payment of such taxes, in which case a certificate thereof shall be filed by the Governor in the office of the Comptroller, stating the reasons therefor."

The tax of 1899 was never paid by the defendant company, but was paid by the receivers after February 11, 1903, more than three years after it became due and payable. The argument is that the defendant company became dissolved by operation of law at the expiration of two years after the tax of 1899 became due and payable. The fifth section of the act of 1884, as amended in 1892 (P.

L. 1892, p. 140), required the State Board of Assessors to report to the State Comptroller, on or before the first Monday of June in each year, the amount of tax assessed against each corporation for such year, and declares that "such tax shall thereupon become due and payable." It follows that the tax imposed on the defendant company in 1899 became due and payable not later than the first Monday of June in that year, which was June 5th. The tax imposed in 1901 became due and payable not later than the first Monday of June in that year, which was June 3d. There is no proof that the State Board of Assessors reported to the State Comptroller the tax assessed upon the defendant company, in either of the two years mentioned, before the first Monday of June. It must be assumed, therefore, that the tax for each of those years became due and payable on the first Monday of June, and not earlier. If the "two consecutive years" within which the tax for 1899 should have been paid are to be understood as two calendar years, the tax for 1901 was imposed, and became due and payable, two days before the expiration of the limited period. On such construction of the act, it is clear that the defendant company could not have been dissolved by mere operation of law before the tax for 1901 was imposed and became due and payable.

But section 1 of the act of 1896 (P. L. 1896, p. 319) also provides that "if the tax of any company remains unpaid on the first day of July, after the same becomes due, the same shall thenceforth bear interest at the rate of one per centum for each month until paid." As no penalty is imposed for the nonpayment of the tax before the 1st day of July, and as the provision of the law is that the charter of a corporation shall be void only in case the corporation "shall for two consecutive years neglect or refuse to pay" the tax, failure to pay before the 1st day of July can neither be considered as neglect, nor as refusal to pay. The two-year period should begin to run on the 1st day of July next ensuing the date when the tax becomes due and payable. By this construction, which seems to me the more reasonable one, the defendant company could not have become dissolved by mere operation of law before July 1, 1901. As the tax for that year was required to be assessed, and became due and payable, not later than the first Monday in June, it was assessed and became due and payable while the company was in being.

This conclusion makes it unnecessary to consider the question discussed by counsel, whether a corporation becomes dissolved by operation of law immediately upon the expiration of two years after the tax for any particular year becomes due and payable, and before the Governor, under section 2 of the act of 1896, issues his proclamation declaring the charter of the company to be repealed.

The first objection to the tax is therefore not sustained.

The second objection to enforcing the payment of the tax by the receivers is that they hold the property of the insolvent corporation in trust exclusively for those who were its creditors when insolvency was adjudged. The adjudication of insolvency was made, and the receivers were appointed, nearly two years before the tax now

sought to be collected was imposed. The counsel for the receivers insist that this tax is not recoverable from the receivers for the reason that their powers are not derived from the statute of New Jersey concerning the appointment of receivers of insolvent corporations, but from the trust-fund doctrine developed in the decisions of our federal courts—a doctrine, they say, wholly independent of statutory law, and limited to cases where the parties instituting the proceedings are judgment creditors or mortgagees or lienholders of insolvent corporations, and to cases instituted by simple-contract creditors where no objection to the jurisdiction is interposed. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. It is not necessary to consider the merits of this contention. It is doubtful if it is correct. *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1, 20, 62 C. C. A. 23; *Darragh v. H. Wetter Manufacturing Co.*, 78 Fed. 7, 23 C. C. A. 609; *Jones v. Mutual Fidelity Co. (C. C.)* 123 Fed. 506. But assuming that in the case at bar the jurisdiction exercised is the equitable jurisdiction above referred to, and wholly independent of the provisions of the New Jersey corporations act concerning the administration of the assets of insolvent corporations, the tax complained of must be paid by the receivers. When the tax, or, more properly speaking, the license fee, was imposed, the corporation was still in existence. The receivers took into their possession all the property of the corporation. The highest court of the state, in construing the statute concerning the imposition of such a fee, has declared that it may be imposed upon a corporation for each and every year intervening between the date of appointing a receiver and the date of its legal dissolution, and that it is payable as a preferred debt out of the corporation's assets. In *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447, it was said:

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

Although the state of New Jersey is not a party to the record in this case, except by intervention as a preferred creditor, it has lost none of the rights it might have enforced if the assets of the defendant company had been administered in the state Court of Chancery. The receivers took the property of the defendant company subject to such liens and preferred debts as existed at the time of their appointment, and subject also to such preferred debts as might thereafter, and before distribution of the assets, become due to its creator, the state, under the provisions of law existing at the time of their appointment.

An order will be made overruling the exceptions to the master's report.

## UNITED STATES v. SCHLIERHOLZ.

(District Court, E. D. Missouri, E. D. November 18, 1904.)

No. 5,106.

**1. EXTORTION—OFFICERS OF UNITED STATES SUBJECT TO PROSECUTION—SPECIAL AGENT OF LAND OFFICE.**

A special agent of the General Land Office, whether appointed by the Secretary of the Interior or by the Commissioner of the General Land Office, is not an officer of the United States within the meaning of article 2, § 2, of the Constitution, or of Rev. St. § 5481 [U. S. Comp. St. 1901, p. 3701], providing for the punishment of "every officer of the United States who is guilty of extortion under color of his office," and is not subject to indictment and prosecution under said section.

On Demurrer to Indictment.

D. P. Dyer, Dist. Atty., for the United States.

Brizzolara, Fitzhugh & Hellshear, for defendant.

ADAMS, District Judge. The indictment charges that on the 10th day of September, 1901, the accused "was an officer of the United States, to wit, a special agent of the General Land Office, duly appointed, qualified, and acting as such," and that under color of his office as such special agent he extorted a large sum of money from the Monroe Lumber Company, in violation of the provisions of section 5481 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3701]. This section is as follows:

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than one year, except those officers or agents of the United States otherwise differently and specially provided for in subsequent sections of this chapter."

A demurrer interposed to this indictment raises the question whether a special agent of the General Land Office is an officer within the meaning of the statute just referred to. Article 2, § 2, of the Constitution of the United States ordains:

That the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

In the case of *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482, the Supreme Court of the United States had under consideration the section of the statutes now involved in this case, and had occasion to consider and determine who are embraced within the term "officer" as therein employed. After calling attention to the provisions of the Constitution just quoted, Mr. Justice Miller, speaking for the court, said:

"This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instru-



ment. It is therefore not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as 'servant,' 'agent,' 'person in the service or employment of the government.'"

It is not contended that the position of special agent of the General Land Office falls within the category of offices to be filled by Presidential appointment, but it is contended that this position is an inferior office created by Congress, to be filled by the head of the Department of the Interior. It is not contended that Congress has ever in express terms created this office, or in express terms imposed the duty of filling it upon the Secretary of the Interior; but it is contended that the duty is so imposed upon the Secretary of the Interior by necessary implication arising from the general character of the duties imposed upon him, and that the averment of the indictment to the effect that he was duly appointed is, in legal effect, an averment that he was directly or indirectly appointed by the Secretary of the Interior. It therefore becomes necessary to examine the legislation of Congress on this subject, for the purpose of ascertaining whether the position of special agent of the General Land Office has been made an office so as to constitute the incumbent an officer of the government within the meaning of the Constitution, or whether, on the other hand, it has been made a mere agency or employment, thereby constituting the incumbent an agent or employé of the government. The General Land Office is one of the working subdivisions of the Department of the Interior. The statutes (sections 446-451, Rev. St. [U. S. Comp. St. 1901, pp. 255-257]) provide for the appointment by the President of the several officers of the General Land Office, amongst them a commissioner, assistant commissioner, recorder, and certain secretaries. The Secretary of the Interior (by section 441, Rev. St. [U. S. Comp. St. 1901, p. 252]) is charged with the general supervision of public business relating to public lands, and the Commissioner of the General Land Office (by section 453 [U. S. Comp. St. 1901, p. 257]) is required "to perform under the direction of the Secretary of the Interior all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands." These general executive and supervising duties are required by law to be performed by officers. But there are a large number of duties involving the detail work of enforcing the laws relating to the public lands—such as the stone and timber act of June 3, 1878, c. 151, § 1, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], as amended and enlarged by the act of August 4, 1892, c. 575, § 2, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1547]—and a large number of clerical duties necessary in the conduct of the General Land Office, which require the employment of divers agents and clerks. Industrious counsel have not pointed out any express statutory authority for the employment of such agents and clerks, and I, in my independent investigation, have not been able to find any such, but that such authority exists by necessary implication I have no doubt. The duty imposed by law upon the Secretary of the Interior to have supervision over public lands, and the duty imposed by law upon the Commissioner of the

General Land Office to perform all the duties appertaining or in any wise respecting such public lands, under the general supervision of the Secretary of the Interior, necessarily requires these officers to act by and through the agency of others. Many of their duties, necessarily delegated, may well be performed by minor agents, special employés, or servants. The right to employ these agents is incidental to the obligation to enforce the law. *Gratiot v. United States*, 15 Pet. 370, 10 L. Ed. 759; *United States v. Fillebrown*, 7 Pet. 43, 8 L. Ed. 596; *United States v. Germaine*, *supra*. For a full and instructive consideration of this subject, reference may be had to the opinion of the First Comptroller in the Meigs Case, found in volume 4, *First Comptrollers' Decisions*, pp. 588, 602, etc.

The existence of the distinction between officers and agents of the kind just considered is frequently recognized in the statutes and in their judicial interpretation. For instance, section 452 [U. S. Comp. St. 1901, p. 257], immediately following the authorization of the President to appoint certain officers of the General Land Office, enacts as follows: "The officers, clerks and employees in the General Land Office are prohibited," etc. Here is found a legislative assumption that there must be and are clerks and other employés of the General Land Office, and the specification of them after the word "officers" clearly indicates that Congress did not intend that they should be comprehended within that term, or that they should be officers of the General Land Office, within the meaning of the constitutional provisions already referred to. In the case of *United States v. Germaine*, *supra*, it is said that a person "may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officer."

As evidence that Congress deems special agents of the kind involved in this case to be servants or employés, and not officers, reference may be had to many, if not all, of the appropriation acts whereby money has been appropriated by Congress to meet the expenses of protecting timber and the public lands. It is in these appropriation acts only that the existence of "special agents of the General Land Office" has received legislative recognition, and, when so recognized, it is found they are invariably classified as employés. For instance, the deficiency appropriation act of June 16, 1880, c. 234, 21 Stat. 238, 246, under the heading "Public Lands Service," reads as follows:

"For the settlement of the accounts of receivers of public moneys for expenses incurred in examination of timber depredations, under the act of June third, eighteen hundred and seventy-eight, and for expenses of 'special agents' employed by the General Land Office for the suppression of depredations upon timber on the public lands, fifteen thousand five hundred dollars, or so much thereof as may be necessary."

So in the appropriation act approved June 4, 1897, c. 2, 30 Stat. 32, under the heading, "Depredations on Public Timber," after specifying the sum appropriated, is found the following: "Provided that agents and others employed under this appropriation shall be allowed," etc. In like manner, in the appropriation act approved August 5, 1892, c. 380, 27 Stat. 349, 368, concerning the depredations on public timber and

protecting public lands, the words, "agent and others *employed* under this appropriation," etc., are used.

The foregoing considerations are sufficient to indicate that Congress has invariably classified agents of the General Land Office of the kind now under consideration as employés, and not as officers. They are agents or employés, so far as appears from any legislative recognition, with no fixed tenure of service, no fixed emolument, and no fixed duties. Persons of such precarious and uncertain standing in the government service are not, in my opinion, officers of the government within the meaning of the constitutional provision or the criminal statute already adverted to.

The foregoing observations are made on the theory of counsel for the government, namely, that the indictment charges in legal effect that the accused was duly appointed by the Secretary of the Interior to the position of special agent as charged. Even if he was so appointed by the head of the Interior Department, it is clear from what has preceded that he was not appointed as an officer, but as one of the many inferior clerks, agents, servants or other employés incidentally necessary for the performance of the great detail work of the Land Office. If it should turn out that the accused was in fact appointed by the Commissioner of the General Land Office, without any participation by the head of the Department of the Interior, as the certificate brought to my attention at the argument indicates, it is the settled law, as I read the case of *United States v. Germaine*, *supra*, that he could not be an "officer" within the meaning of section 5481 [U. S. Comp. St. 1901, p. 3701], under which he is indicted.

The demurrer must be sustained.

## MILLER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, November 11, 1904.)

No. 1,997.

**1. UNITED STATES MAILS—SCHEME TO DEFRAUD—STATUTES—CONSTRUCTION.**

The amendment of section 5480, Rev. St., by the act of March 2, 1889, 25 Stat. 873, c. 393, § 1 [U. S. Comp. St. 1901, p. 3696], did not detract from the effect of that section, nor limit its scope to the schemes, artifices, or devices prescribed in the amendment, or to those of like character, but it added to the offenses denounced by the original act those specified in the act of 1889.

**2. INDICTMENT—REQUISITE AVERMENTS.**

An indictment must allege the facts which constitute the offense charged so clearly that the court can determine upon inspection whether or not those facts will sustain a conviction under the law, so distinctly as to advise the accused of the charge he has to meet, so fully as to give him a fair opportunity to prepare his defense, and so particularly as to enable him to avail himself of a conviction or acquittal in defense of a second prosecution for the same offense.

**3. UNITED STATES MAILS—CONSPIRACY TO DEFRAUD.**

Facts which clearly show a conspiracy to devise a scheme or artifice to defraud, an intention to defraud, an intention to use the post-office establishment as a part of the scheme for the purpose of executing it, the use of that establishment for that purpose, and the scheme or artifice itself, are essential to a valid indictment under section 5440, Rev. St., to commit the offense described by section 5480 [U. S. Comp. St. 1901, pp. 3676, 3696], and must be alleged in the pleading.

**4. SAME—INTENTIONAL FRAUDULENT USE OF LAWFUL CONTRACT MAY CONSTITUTE SCHEME TO DEFRAUD.**

The intentional use of a legal contract or transaction for the purpose of defrauding another may constitute a scheme or artifice to defraud, under section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], although the use of the same contract or transaction with an honest intent for a proper purpose would be lawful and innocent.

**5. SAME—SUFFICIENCY OF DISCLOSURE IN INDICTMENT.**

An indictment which charges the defendants with a scheme to use the post-office establishment of the United States, and a contract between the board of directors of a mutual insurance corporation and one of the defendants to procure from its members large sums of money, to appropriate these sums to the defendants, and thereby to render the corporation insolvent, fairly discloses a scheme to defraud the members of the corporation, under section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], by inducing them, by means of communications through the post-office establishment, to pay their money into the possession and control of the defendants, to the end that they may defraud them of it.

**6. SAME—AVERMENT THAT SCHEME IS "TO BE EFFECTED" BY USE OF MAILS DISCLOSES INTENTION TO SO USE THEM.**

An allegation that a part of a scheme to defraud, which the defendants conspired to devise, was that the scheme "was to be effected" by opening correspondence or communication by means of the post-office establishment with unknown persons, is a sufficient averment of an intention by the accused to use the mails to execute their scheme.

**7. SAME—INDICTMENT—OMISSION OF NAMES OF PERSONS TO BE DEFRAUDED.**

An indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown to the grand jury is not vulnerable because the names of these persons are not stated in the indictment, if it contains a true averment that these persons are not known to the grand jury.

**8. SAME—DEFAUDING PERSONS UNKNOWN—NOT IMPAIRED BY SHOWING THAT PERSONS KNOWN WERE ALSO DEFAUDED.**

It is not a valid objection to an indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown to the grand jury that it shows on its face that the defendants were also guilty of the offense—with which they are not charged in the indictment—of conspiring to defraud persons known to the grand jury.

**9. EVIDENCE—ADMISSIONS—ATTORNEY'S STATEMENTS—ADMISSIONS OF CLIENT.**

The statements in an attorney's argument and presentation of one case to a court or tribunal are not competent evidence against his client in another case between him and another party which involves other issues.

**10. CONSPIRACY—PRIOR FRAUDULENT INTENT OF ONE ALLEGED CONSPIRATOR—EVIDENCE.**

Facts which show that one of several alleged conspirators had conceived a fraudulent intent before he entered into the conspiracy do not constitute competent evidence that his alleged co-conspirators, who had no knowledge of those facts, had such an intent before or at the time the conspiracy was formed.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of North Dakota.

C. A. Severance, Charles E. Wolfe, and Frank B. Kellogg, for plaintiffs, in error.

Edward Engerud and Patrick H. Rourke, for the United States.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. Percy W. Miller, Arthur M. Gilder, and Allen G. Randall, the plaintiffs in error, who will be called the defendants in this opinion, were convicted under section 5440 of the Revised Statutes of conspiring to commit the offense of devising a scheme to use the post-office establishment of the United States to defraud, which is denounced by section 5480 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3676, 3696). The indictment upon which they were tried contained four counts. The first charged them with the offense of conspiracy, described in section 5440, and the other three with the offense of devising a scheme to defraud, specified in section 5480. At the close of the trial the jury found them guilty under the first count, and acquitted them of the offense charged in the other three. This writ of error therefore challenges the trial under the first count only, and counsel for the defendants allege that they were wrongfully convicted, because this count of the indictment charged no offense, and because in the proceedings at the trial the court made numerous erroneous rulings.

The sufficiency of the indictment will first be considered. The general nature of the offense which the evidence on behalf of the government tended to charge upon the defendants at the trial was a conspiracy to devise a scheme to use the post-office establishment of the United States to defraud persons to the grand jury unknown, who were or became members of the State Mutual Insurance Company of North Dakota, by inducing these persons to pay moneys to that corporation in the belief that these moneys were necessary

for, and would be applied to, the payment of the legitimate expenses and genuine losses of the company, when in fact they were not requisite to pay these expenses or losses, and when they should be paid the defendants would have obtained control of the funds and business of the corporation, would convert this money to their own use, and would make the corporation insolvent and leave its losses unpaid, by means of a certain contract which they would then have obtained from the corporation to pay certain commissions to the defendant Gilder. The indictment is attacked on the grounds (1) that a scheme to defraud, of the character disclosed, is not violative of section 5480, since the amendment of that section by the act of March 2, 1889 (25 Stat. 873, c. 393, § 1); (2) that the indictment does not fairly disclose the scheme or artifice to defraud presented by the evidence for the government; (3) that it does not state the way in which the mails were to be used to effect the fraud; (4) that it fails to show that the use of the mails was a part of the scheme or artifice; (5) that it shows that the conversion of the money was the only unlawful act charged; that this conversion was not aided by the use of the post-office establishment; that it was effected after the scheme or artifice had been executed; and that the conversion was no part of that scheme; (6) that the indictment does not charge the defendants with intending to defraud a certain party whose name was known to the grand jury, and whom the indictment shows the defendants did intend to despoil; and (7) that the indictment does not allege that the defendants had any intention to defraud any one.

Section 5480 reads in this way:

"If any person having devised or intending to devise any scheme or artifice to defraud, or (to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, or by what is commonly called the 'sawdust swindle' or counterfeit 'money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to) be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any postoffice, branch postoffice, or street or hotel letter box of the United States, to be sent or delivered by the said postoffice establishment, or shall take or receive any such therefrom, such person so misusing the postoffice establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

This section was originally enacted on June 8, 1872 (17 Stat. 323, c. 335, § 301). On March 2, 1889, the portion of it inclosed in parentheses was inserted by amendment. 25 Stat. 873, c. 393, § 1. The position of counsel for the defendants is that the effect of this amendment was to repeal the original section, and to enact another, in which the schemes and artifices denounced are restricted to those which are to be effected by means of some of the swindling devices or spurious articles specified in the amendment, or by means of some device or article of a similar character. In support of this contention they cite *United States v. Beach* (C. C.) 71 Fed. 160. But the construction of this amended section suggested in the opinion in that case, and pressed upon us by counsel for the defendants, does not commend itself to our judgment. The original act was leveled at the use of the post-office establishment to effect any scheme or artifice to defraud. The amendment was in the disjunctive. The statute, when amended, denounced any scheme or artifice to defraud, or any scheme or artifice of the character described in the amendment. Instead of limiting the offenses denounced to those specifically described in the amendment and to those of the same nature, it retained the original denunciation against every scheme or artifice to defraud, and added to it any scheme or artifice "to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin," et cetera, as well as "any scheme or artifice to obtain money by or through correspondence or by what is commonly called the 'sawdust swindle' or 'counterfeit money fraud,'" or the other devices specified in the amendment. The only purpose of the construction of a statute or act of Congress is to ascertain or effectuate the intention of the legislators who enacted it. The act of March 2, 1889, when it is read in connection with the previous enactment, has forced the conviction upon our minds that it was the intention of the Congress by its passage not to subtract from, but to add to, the fraudulent schemes punishable under the original act, not to limit or restrict, but to enlarge and broaden, the scope and effect of that statute, to the end that the citizens might be more effectually protected from, and the mails might be purged of, the fraudulent schemes and devices described in the acts of Congress. The result is that the amendment of section 5480 by the act of March 2, 1889, did not detract from the effect, nor limit the scope, of the original act, to the schemes, artifices, or devices described in the amendment, or to those of a similar character, but its effect was to add to the offenses denounced by the original section those specified in the act of 1889. *Culp v. United States*, 82 Fed. 990, 992, 27 C. C. A. 294; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Weeber v. United States* (C. C.) 62 Fed. 740.

A minor objection to the indictment is that it contains an averment that the persons whom the defendants conspired to defraud are unknown to the grand jury, while it shows upon its face that, if they agreed to defraud any one, they conspired to defraud the State Mutual Insurance Company, and that the name of this company

was well known to the grand jury when the indictment was drawn. Conceding, without deciding, that the conspiracy of the defendants included a scheme to defraud the insurance company, as well as its members, although the latter must have been the actual sufferers from their fraudulent acts, the grand jury were not required to return an indictment against the defendants for conspiring to defraud the insurance company, and the fact that they did not do so cannot affect the validity of the indictment which they have presented. This indictment charges the defendants with a conspiracy to devise a scheme to defraud persons to the grand jury unknown only. It does not charge them with conspiring to devise a scheme to defraud the insurance company, because that company does not fall within the category of persons unknown to the grand jury. It is not a valid objection to an indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown that it shows upon its face that they were also guilty of the offense—with which the indictment does not charge them—of conspiring to defraud persons known to the grand jury. The objection that the grand jury did not charge the defendants with conspiring to defraud the insurance company cannot be sustained.

Nor is it a tenable objection to an indictment that it fails to state the names of the parties whom the defendants are alleged to have conspired to devise a scheme to defraud, if it contains a true statement that these persons were unknown to the grand jury. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

The contention upon which counsel for the defendants seem to rely most confidently is that the indictment does not disclose the scheme or artifice to defraud with the necessary clearness and certainty. Every man is presumed to be innocent until his guilt is established. When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction. *United States v. Hess*, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; *United States v. Post* (D. C.) 113 Fed. 852.

The use of the post-office establishment of the United States to execute a scheme or artifice to defraud, the intention to use it in this way as a part of the scheme or artifice, the scheme or artifice to defraud itself, and the intention of the defendants to defraud, are



essential elements of the offense described in section 5480 of the Revised Statutes; and allegations of facts which fairly show the existence of all these essentials, together with an allegation of a conspiracy to commit the offense, are indispensable to a valid indictment under section 5440. *United States v. Ryan* (D. C.) 123 Fed. 634; *United States v. Clark* (D. C.) 121 Fed. 190, 191; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. The intentional use of a legal contract or transaction for the purpose of defrauding another may constitute a scheme or artifice to defraud, under section 5480, although the use of the same contract or transaction with an honest intent to accomplish a laudable object would be lawful and innocent. *Durland v. United States*, 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709; *United States v. Loring* (D. C.) 91 Fed. 881, 887.

A mutual insurance company organized under the laws of the state of North Dakota has no stock or stockholders, and is composed of the persons who are insured by the corporation, only. Rev. Codes N. D. 1899, § 3105. These insured persons are the members of the corporation. Its business is conducted by a board of directors chosen by the members. The members are liable to pay the expenses and losses of the company, and are entitled to all its profits, in proportion to the amounts and terms of their insurance. All the property of the corporation is held by its board of directors and officers, and all its business is conducted in trust for these members. They are the only parties liable for its obligations, and the only parties entitled to its gains, and their payments are the only source of its revenues. They are the real parties in interest in its property and in its business. Sections 3108-3114, 3086-3089, 2861. The indictment which the defendants challenge must be read in the light of these statutes of the state of North Dakota, in the light of the character of a mutual insurance company of that state and of its relation to its members, and in the light of the general rules of law and of pleading to which we have adverted. Let us so read the first count of this indictment for the purpose of ascertaining whether or not it fails to disclose the scheme to use the mails of the United States to defraud the unknown members of the State Mutual Insurance Company, which the evidence in behalf of the United States indicated that they had planned and executed, and which we have described. Omitting unnecessary verbiage, this indictment contains averments that the defendants conspired to commit the offense disclosed by these alleged facts: They devised this scheme or artifice to defraud divers persons to the grand jury unknown. The State Mutual Insurance Company was a purely mutual insurance company organized under the laws of the state of North Dakota. The defendants planned to cause the board of directors of this corporation to make an agreement or arrangement with the defendant Gilder to the effect that he should be the manager, and should have the possession of the funds and the control of the business of that corporation, and to cause them to appoint him such manager without the knowledge or consent of the members of the corporation who were not officers thereof, so that while

the property of the corporation would appear to be in the possession of, and its business would appear to be managed by, the officers chosen by its members, they would in fact be held and directed by the defendants. They intended, by means of Gilder's possession and control of the funds and business of the corporation, to procure and secure to themselves from the corporation and its members large sums of money, and thereby to cause the corporation to become insolvent. They were to effect this scheme by opening correspondence with divers persons to the grand jury unknown by the use of the post-office establishment of the United States. After they had agreed upon this scheme, and after they had obtained possession and control of the funds and business of the corporation by means of the contract with Gilder, they placed in the post office at Hankinson, in North Dakota, to be sent and delivered by mail to their respective addresses, more than 2,000 letters directed to these unknown persons, of the tenor and effect of a certain letter which is set forth in the indictment, and which purports to have been written by the insurance company to one of its members, and to notify him that the board of directors of the corporation had made an assessment to pay losses, so that the amount of his obligation to the company was \$21.60, against which he held a certificate of loss of \$33.60, and that the balance due to him would be promptly paid. By means of these letters the defendants obtained \$75,000 from the members of the corporation ostensibly to satisfy assessments levied to pay losses of the corporation. They did not pay the losses, but converted this money to their own use. The question is whether the foregoing facts adequately disclose the scheme to defraud which the evidence for the government tended to establish. Counsel argue that this scheme is not adequately disclosed, because the averments of the foregoing facts do not show by what means or by what method the defendants planned to fraudulently appropriate the money of the members of this corporation to themselves. They say that the indictment fails to show whether the large sums of money were to be secured by the defendants by means of the embezzlement of the funds by Gilder, by means of contracts made by him with his confederates without adequate consideration, or by one of a thousand other feasible but fraudulent ways not yet imagined. Is the indictment justly vulnerable to this criticism? Let us bear in mind that it does not charge a scheme to defraud the insurance company, but a scheme to use the post-office establishment of the United States to defraud persons to the grand jury unknown. Let us remember that the only persons connected with the insurance company who would suffer by the gathering and conversion of moneys ostensibly raised to pay the losses of the company were its members. Now, the indictment contains averments that the scheme of the defendants was to have Gilder secure the possession and control of the funds and business of the corporation by means of "a certain arrangement or agreement" between him and the board of directors, and that this scheme was to get from the corporation and from its members, and to secure to the defendants, large sums of money, to bankrupt the corporation, and to use the

post-office establishment of the United States as a part of this scheme to accomplish its object. When these averments are thoughtfully considered in the light of the fact that, under the law of its being, the only source of the corporation's revenues was the moneys to be collected from its members upon assessments to pay losses and expenses, that every dollar taken from the corporation was in reality taken from them, and that the insolvency of the corporation was in fact the misfortune of the members, it is difficult—indeed, it is impossible—to escape the conclusion that neither the defendants nor the court could have failed to perceive, upon an inspection of this count of the indictment, that it charged the defendants with devising a scheme to defraud the members of the insurance company by the use of the post-office establishment of the United States, through which the false notices of unnecessary assessments would be sent, and by the use of the contract or agreement between Gilder and the board of directors of the corporation.

It is said that the indictment discloses no scheme to defraud, because a contract with Gilder that he should be the general manager of the corporation, in possession of its funds and in control of its business, was a lawful agreement. But there are two answers to this proposition: In the first place, if a legal contract is conceived and intended to be used, and if it is actually used, to defraud or despoil another, the intentional procurement and use of it is a scheme or artifice to defraud. In the second place, this indictment charges much more than the mere procuring and using of the contract with Gilder. It charges that the defendants schemed and intended to use, and that they did use, the post-office establishment of the United States, together with the contract with Gilder, to procure from the members of the corporation, and to secure to themselves, large sums of money, and to make the corporation insolvent. The intentional bankrupting of the corporation by procuring and appropriating to themselves large sums of money which belonged to the corporation and to its members is inconsistent with an honest purpose, and indelibly stamps the entire scheme and transaction with bad faith and fraud.

It is contended that the averment that the scheme "was to be effected by the said Miller, Gilder, and Randall by opening correspondence and communication with divers persons to the grand jury unknown, by means of the post-office establishment of the United States," contains no notice that the plan charged was to communicate with the members by means of letters and circulars signed, sent, or received by the insurance company, and that communications of that character were inadmissible in evidence. But when it is considered that previous allegations had declared that it was a part of the scheme to place and keep the control of the business of the corporation in the hands of Gilder without the knowledge of the members who were not its chosen officers, and to procure the moneys which the defendants intended to, and did, appropriate to themselves from these members, this averment could not have failed to give to even the casual reader complete notice that it was a part of their scheme to use the name of the corpora-

tion and the mails of the United States to send misleading letters and circulars to the unknown members of the corporation to induce them to pay the moneys which the defendants sought to secure. Our conclusion is that the facts alleged in the first count of this indictment fairly disclose the scheme to defraud the members of the insurance company which the evidence for the government tended to prove, a scheme to defraud them by the use of the post-office establishment, to communicate to them misleading notices of unnecessary assessments, and the misleading appearance of the control of their corporation by the officers they had chosen, by means of which and of the contract with Gilder the defendants would procure and appropriate to themselves the moneys of the members.

After the pleader had averred in the first count of this indictment that the defendants conspired to devise a scheme to defraud unknown persons, and after he had alleged in his description of this scheme that the defendants were to get the possession of the funds and the control of the business of the corporation by means of the contract with Gilder, without the knowledge of the members who were not officers, and that they were to procure the large sums of money from the corporation and its members, to secure these sums to themselves, and to thereby render the corporation insolvent, he made this averment:

"And the scheme and artifice to defraud aforesaid was to be effected by the said Miller, Gilder, and Randall by opening correspondence and communication with divers persons to the grand jury unknown by means of the post-office establishment of the United States."

This allegation is challenged by counsel for the defendants again and again. They insist that it is insufficient (1) to show any intention to use the mails to commit the fraud; (2) to sustain the claim that the defendants conspired to use the mails as a part of their scheme to defraud; and (3) to permit proof of the use of the mails to transmit communications between the corporation and its members. The third objection has already been considered. The first is dignified by the sustaining opinion of Judge Wellborn in *United States v. Long* (D. C.) 68 Fed. 348, 350. It is, however, met by the stronger reasons and by the decision of the Supreme Court in *Stokes v. United States*, 157 U. S. 187, 189, 190, 15 Sup. Ct. 617, 39 L. Ed. 667. In that case the government first alleged that the defendants conspired to commit the offense described in section 5480 by devising a scheme to defraud persons unknown, and then alleged that the scheme was to be carried out by making certain representations; that it was to be further effected by ordering goods; and "that the post-office establishment of the United States was to be used for the purpose of executing such scheme and artifice to defraud" by opening correspondence with persons unknown. The court declared that the last averment was a sufficient statement of the defendant's intention to effect the scheme by the use of the post-office establishment. If this is the true interpretation of an allegation that the post-office establishment is to be used to execute the scheme, it must be the fair meaning of an averment that the scheme is to be effected by the use of that establishment,

for the two expressions are practically interchangeable. Moreover, this is the natural interpretation of the averment in the absence of all authority. It appears in the indictment as a part of the pleader's description of the alleged scheme to defraud which he averred the defendants conspired and agreed to devise. They could not have conspired and agreed to plan to effect their scheme by the use of the post-office establishment without an intention to use it for that purpose, and the averment that it was a part of the scheme they agreed upon to use the mails to execute that scheme is an adequate allegation of their intention to use them for that purpose.

The second objection is that the allegation challenged does not show that the defendants conspired to use the mails as a part of their scheme to defraud, and here it is confidently asserted that the averment fails because it does not set forth the method by which the defendants planned to use the mails—whether by correspondence to obtain the contract with Gilder, or to secure moneys from the members of the company. But when it is considered that the indictment contains no charge of a scheme to defraud the insurance company by means of the contract with Gilder or otherwise, when the earlier part of the indictment is read, its averments that the defendants conspired to devise the scheme to get control of the funds and business of the corporation to procure from its members their money, and to appropriate it to the defendants, when we consider that these averments are followed by this allegation that they planned to use the mails to effect this scheme, and when we remember that the members of the corporation were the only parties in interest in it, that their payments constituted its only source of revenue, and that it was their moneys that the pleader alleged the defendants conspired to secure, the fair and rational conclusion must be that the indictment shows with adequate clearness that the use of the post-office establishment to communicate with the members of the corporation to induce them to pay their money to the defendants was a part of the scheme to defraud which the defendants conspired to devise.

Another contention of counsel for the defendants is that the only unlawful act alleged in the indictment is the conversion of the money by the defendants that this is alleged to have taken place after all the acts conceived as parts of the scheme to defraud had been done, that the wrongful conversion was not attributable to any of those acts, and therefore that all the parts of the alleged scheme to defraud were lawful, and the indictment must fail. It is not true, however, that the conversion of the money was the only unlawful act alleged in the indictment, nor is it true that this conversion was not in any way attributable to the other acts which were a part of the scheme to defraud. The intentional use of the mails to procure from the members of the corporation moneys which the defendants intended to appropriate to their own use, the intentional use of the contract with Gilder to obtain this money for themselves, as well as the actual appropriation of it from members, were alike unlawful, as long as they were all conditioned, as the indictment alleges that they were, by the prior conspiracy of

the defendants to devise and to execute them as parts of their scheme to despoil the members of the insurance company.

Finally it is seriously argued that the indictment contains no adequate averment that the defendants ever had any intention to defraud any one, and the case of *United States v. Post* (D. C.) 113 Fed. 852, is cited in support of this proposition. The alleged facts in that case bear so little analogy to those here presented that the opinion in it is neither controlling nor persuasive. This indictment contains averments to the effect that the defendants conspired and agreed to devise a scheme to use the mails of the United States and the contract with Gilder to procure from the members of the State Mutual Insurance Company large sums of money, to appropriate these sums to the use of the defendants, and thereby to render the corporation insolvent. These allegations adequately disclose an intention on the part of the defendants to defraud the members of this corporation. They could not have committed the acts which they agreed to devise and to do without despoiling them. Every one is presumed to intend the natural and inevitable consequences of his acts. The defendants could not have agreed to do these acts, the patent consequence of which was to defraud the members of this corporation, without intending to defraud them. The objection that the indictment does not adequately show the intention of the defendants to defraud the members of the insurance company cannot be sustained.

The attack upon this indictment has been earnest, persistent, and determined. The objections to it have been carefully and patiently considered. It is seldom, if ever, that any pleading so clearly and concisely states the alleged facts that it might not be improved after the criticism of an assailant and the trial of a case; and it may be that, in the light of the argument of counsel for the defendants, a more admirable indictment could be drawn. But our conclusion is that this pleading fairly meets all the tests prescribed for a statement of the offense charged against the defendants.

Upon the trial of the case evidence was introduced which tended to show that in the year 1901 the defendants were in the control and management of the State Mutual Insurance Company of North Dakota under a contract between that company and Gilder made on January 19, 1901, which provided that he should be the general manager of the corporation, should receive 25 mills on all hail and 30 mills on all fire insurance applications written by the company during that year, and that he should pay all agents' commissions, express, telegraph, officers' salaries, and all other expenses of the company, except attorney's fees, postage, interest, losses, and exchange, and that he should also pay the existing indebtedness of the company, which was then \$5,290.99. There was evidence to the effect that the unpaid losses of the company in December, 1901, were about \$18,000; that the commissions of Gilder under his contract amounted to about \$65,000; that the aggregate amount he was required to pay out under his agreement was about \$30,000; that the defendants caused the members of the company to be assessed and to pay in more than \$70,000 to satisfy alleged losses

and expenses; and that they appropriated to their own use more than \$35,000 of these moneys, and made the corporation insolvent. In April, 1901, Mr. Charles E. Wolfe, an attorney at law, was retained by the corporation for the purpose of persuading the Insurance Commissioner of North Dakota to deny a certain rival insurance company the privilege of doing business in that state. Under this employment he wrote one letter to his client, the State Mutual Insurance Company of North Dakota, which is marked Exhibit 70, and four to the Insurance Commissioner, which are marked Exhibits 71, 72, 74, and 75. He enclosed in Exhibit No. 75 certain newspaper clippings. These letters and clippings contained statements relative to the acts of the officers of the rival company, the Farmers' Mutual Hail Insurance Company of Kansas City, which were calculated to persuade the Insurance Commissioner to refuse that company admission to the state of North Dakota. Evidence had been introduced that the information on which the statements in the letters to the Insurance Commissioner were based and the newspaper clippings had been furnished to the attorney, Wolfe, by one or more of the defendants, but there was no evidence that any of them ever saw the letters, or knew what statements they contained, before they were produced at the trial. In one of Wolfe's letters to the Insurance Commissioner, he vividly portrayed a scheme to defraud, of the character of that charged against the defendants in this case, and stated that the officers of the rival company had repeatedly devised and executed such schemes. In another letter he wrote that, in order to substantiate his charges, he must get the record of the officers of that company from Amboy, Minn., Omaha, Neb., Pierre, S. D., and Kansas City, Mo. One of the newspaper clippings contained what purported to be an account of a part of a trial of a charge against P. W. Miller, president, C. M. Harris, vice president, and C. C. White, treasurer, of the Grain Growers' Mutual Insurance Association of Omaha, for the embezzlement of \$9,000 from the stockholders of that corporation. In this state of the record, the letters and clippings were offered in evidence on the part of the government for the purpose of showing the intent of the defendants, as their admissions that the insurance companies mentioned in the letters and clippings were schemes to defraud, and as their admissions that they participated in them before they organized the conspiracy charged in the indictment under which the trial was in progress. The defendants objected to them on the ground that they had no knowledge of their contents before the trial, and on the ground that Wolfe's authority as an attorney was limited to opposing the admission of the rival company to the state of North Dakota, and to acts pertinent to the trial of that issue. These objections were overruled, and the letters and clippings were read to the jury. This ruling seems to be erroneous. The crucial issue upon the trial was whether or not the defendants intended by the contract with Gilder, and by their operation under it, to defraud the members of the State Mutual Insurance Company of North Dakota. That issue had not arisen, it had not been suggested or imagined, it did not

exist, in April, 1901, when Wolfe wrote the letters and sent the clippings which were received in evidence. He had not been employed by the defendants to make any statements or admissions or to act in any way in their behalf in respect to this issue. The letter, Exhibit 70, was a communication from the attorney, Wolfe, to his client, the insurance company. It had no competency to prove any fact against or intent of the defendants, and it is here dismissed. The other letters were sent by Wolfe, with the newspaper clippings, to the Insurance Commissioner, to persuade him to refuse to admit the Kansas City insurance company to do business in North Dakota.

Conceding that the defendants were in effect the North Dakota insurance company, and that whatever power Wolfe had from that corporation he also had from the defendants, the limit of his authority was to make arguments and to present statements to the Insurance Commissioner on behalf of the defendants upon the single issue whether or not the Kansas City company should be permitted to do business in the state of North Dakota. Upon that issue, and in favor of the parties to that controversy, the acts and admissions of their attorney, Wolfe, were the acts and admissions of the defendants. But are these acts and admissions chargeable to the defendants in the trial of other issues between them and the United States, or other parties not interested in the issue before the commissioner? Unless Wolfe was authorized by these defendants to speak for them through the letters and clippings of April, 1901, upon the issue tried in this case in 1903, so that his admissions were their admissions, the letters and clippings he presented to the Insurance Commissioner did not rise to the dignity of hearsay, even. What the defendants admitted, if Wolfe had not this authority, was that which they said to him. If their communication to him was not privileged, and if Wolfe had related under oath exactly what they said or wrote to him upon the subjects treated in the letters and clippings, that statement would have been their admission. But the letters and clippings in evidence do not purport to contain what the defendants, or any of them, said or wrote to Wolfe or to any other person. The evidence goes no farther than to show that some of the defendants furnished the clippings and the information upon which Wolfe based the statements in his letters. The repetition of such communications as those which these defendants made to their attorney is always subject to great imperfections. It should be received with great caution. The parties who make the communication may not have correctly expressed their meaning. They may have been misunderstood. A slight alteration of the words, without any design of intentional misrepresentation, may have entirely varied the effect of their saying or writing. The repetition of such communications should never be received unless it appears with reasonable clearness that it is a correct statement of what the parties to be charged said or wrote. It should never be received unless it is clear that the saying or writing was brought home to their knowledge. How the defendants furnished the information to their attorney, whether they furnished it orally or in



writing, in what words they communicated it, the record contains not a shadow of evidence to show. There is no proof in it that any of the defendants knew the contents of any of the letters or of the clippings, or that any of them ever said or wrote that any of the statements therein were true. The fact is that the statements contained in the letters and in the clippings are nothing but the argument of defendants' attorney upon the trial before the commissioner of the issue of the admission of the rival company to North Dakota. If Wolfe had written to that officer that the defendants had told him or had written him that every statement in his letters and in the clippings was true, that statement would have been nothing but written hearsay, and would have been utterly incompetent as proof of an admission or of knowledge of the defendants. He did not do even this. He made the statements in his letters, and presented those in the clippings, not as the statements of his clients, but as his argument upon information furnished by them. The proverbial variance between a client's relation of the facts of his case to his attorney, and the latter's statement of them in his argument of the issue to the determining tribunal, marks the wide margin below the rank of hearsay, to which these letters and clippings must fall unless the attorney, Wolfe, was so authorized to speak and write for the defendants that his acts and writings in the case which involved the admission of the Kansas City company to do business in North Dakota were the acts and writings of the defendants upon their trial for conspiracy to devise a scheme to defraud two years later. Had he any such authority? Were his statements in his letters and the statements in the clippings from the newspapers which formed parts of his argument in that case the statements and admissions of the defendants in this case?

It is a general and a salutary rule that one ought not to be and cannot be prejudiced in the hearing and determination of any case or issue by the pleadings, arguments, or acts of his counsel in the trial of another case or proceeding which involved a different issue. Some of the reasons which have induced the establishment of this rule are (1) that an attorney employed to try one case or issue is not presumed to be instructed in, and is generally ignorant of, the facts which condition the other cases and controversies in which his client is interested; (2) that neither client nor attorney should be prejudiced in the subsequent trial of a case or issue not in the mind or contemplation of either by the attorney's allegations, admissions, or arguments in the trial of another case involving a different controversy; and (3) that the wide variance between the client's statement of the facts of a case to his attorney, and the latter's presentation of those facts at the trial of the issue it involves, is so marked and proverbial that the client ought not to be prejudiced by the latter's statement in any other case involving different issues. The courts, even, do not consider themselves bound by opinions which they may express upon issues which they are not deciding, when those issues subsequently arise for careful consideration and determination. In the execution and enforcement of the general rule to which reference has been made, Con-

gress has expressly provided that no pleading of a party, and no evidence obtained from him by means of any judicial proceeding, shall be given in evidence or in any manner used against him in any criminal proceeding (Rev. St. § 860 [U. S. Comp. St. 1901, p. 66]); and a similar provision is found in the statutes of North Dakota (Rev. Codes N. D. 1899, § 5281). If solemn admissions in a verified pleading are not competent evidence against a party who makes oath to them, when he becomes a defendant in a criminal proceeding, much less are the fugitive statements in the arguments of his counsel upon a different issue in a less formal proceeding. Admissions of counsel in one suit or proceeding are not competent evidence as admissions of his client to prejudice him in the trial of a different issue in another action or proceeding. *Wilkins v. Stidger*, 22 Cal. 232, 239, 83 Am. Dec. 64; *Harrison's Devisees v. Baker*, 5 Litt. (Ky.) 250; *Elting v. Scott*, 2 Johns. 157, 162; *Phillips on Evidence*, \*479; *Boileau v. Rutlin*, 2 Exch. R. 665, 677; *Doe d. Bowerman v. Sybourn*, 7 Term R. 2, 3; *Young v. Wright*, 1 Camp. 139, 141; *Parkins v. Hawkshaw*, 2 Stark. 239, 240. The letters and newspaper clippings which the attorney, Wolfe, presented to the Insurance Commissioner upon the issue whether or not a rival insurance company should be permitted to do business in North Dakota, were not competent evidence against the defendants of their admission of the truth of any of the statements which those letters and clippings contained upon the trial in 1903 of the issue whether or not the defendants were guilty of a conspiracy to devise a scheme to defraud the members of the North Dakota company which they had operated.

For the same reason, these letters and clippings were not competent evidence that the defendants had any knowledge of any of the alleged facts stated in them. They were not evidence of such knowledge because Wolfe was unauthorized to admit for the purposes of the trial of the issue below that the defendants had this knowledge, and because, in the absence of such authority, the statements in the letters and clippings are much less competent than mere hearsay. The suggestion that the letters and clippings were properly received in evidence because they were a part of the things done by the defendants in execution of the alleged scheme to defraud is not persuasive. It is only those acts in execution of the scheme which have some tendency to prove or to disprove the charge that the defendants conspired to devise and execute it that constitute competent evidence upon the trial of the issue which that charge presents. The attempt to prevent a rival insurance company from doing business in a state has no such tendency. It is a proceeding as usual and characteristic of a legitimate insurance corporation as of an insolvent company, or of a fraudulent scheme to operate one. This evidence was not offered for any such purpose, but to prove the admissions and prior evil intent of the defendants; and, under the established rules of law to which reference has been made, it was not competent for any purpose. The receipt of these letters and clippings in evidence against the defendants was prejudicial and fatal error.

There is another reason why these exhibits should not have been admitted in evidence. They failed to show that any of the defendants were participants in any of the schemes to defraud which they mention, or that they had any knowledge concerning them before they formed the conspiracy for which they were tried below. They mention but two such schemes—that of the Kansas City company and that of the Grain Growers' Association of Omaha. The only suggestion of the connection of any of the defendants with either of these companies to be found in them is the narration of a part of the trial of Miller and others for embezzlement in one of the newspaper clippings where he is named as the president of the Omaha company. But this clipping from the newspaper was no evidence of the fact that he was ever the president of that company. It was nothing but hearsay of hearsay. Now, the theory of the offer of these exhibits was that they indicated the evil intent of the defendants, disclosed by their participation in the earlier schemes to defraud to which they refer. Inasmuch, therefore, as they did not tend to show that any of the defendants did participate in, or that they had knowledge of, those earlier schemes, they did not tend to show their evil intent in entering upon this scheme, and they had no place in the evidence against the defendants.

One of the important issues in the case was whether or not the plan of the defendants was a scheme to operate the State Mutual Insurance Company temporarily for a few months for the purpose of defrauding its members, or a plan to establish and operate a permanent and successful insurance business. If the contract with Gilder was so unfair and unconscionable as to imply fraud and bad faith, that fact tended distinctly to show that their plan was to defraud the members of the company, while, if the agreement with Gilder was just and fair, that fact would go far to persuade to the opposite conclusion. In December, 1901, the unpaid losses of the company were about \$18,000. At that time the board of directors of the company defeated a motion made by Gilder to authorize the company to renew his contract for another year; and when Gilder was upon the stand his counsel asked him whether or not, in connection with his application for a renewal of his contract, any proposition was made by him to the company in relation to the procurement of money to satisfy its unpaid losses, and the court refused to permit him to answer the question upon the ground that the inquiry was irrelevant. The presumption from the record is that the answer, if it had been received, would have been favorable to the defendants; that it would have been that the witness offered to obtain the money and to pay the unpaid losses of 1901, as he had agreed to pay those of the year 1900. If he was willing and offered to assume the burden of these losses in consideration of a renewal of his agreement, that fact would indicate much more strongly that his plan and purpose were to establish a permanent and successful business, than it would that he intended to bankrupt the corporation and to defraud its members by making their contracts of insurance worthless. The question related to the issues, and the witness should have been permitted to answer it.

In view of the fact that this case must be retried, attention is called to a few questions which may not be so presented that any ruling of the court upon them is properly challenged. In some instances books of record which were incompetent as evidence were admitted for reference only, and then witnesses who had no knowledge of the facts disclosed by the books, except such as they derived from an examination thereof, were permitted to testify what facts these books disclosed. Obviously, if books are not themselves competent evidence of the facts they relate, the testimony of witnesses who do not know these facts, and who did not prepare the statement of them contained in the books, cannot be competent evidence of the facts there disclosed, and the admission of the books for reference only cannot change the rule. After books are properly proved and admitted in evidence in proof of facts which they recite, a witness may examine them, summarize their evidence, and testify to the summary. But this may be lawfully done only when the books themselves are competent evidence of the facts summarized, or when they constitute memoranda made by the witness which can be used to refresh his memory of the facts.

In the course of the attempt of the government to establish the intent of the defendants by their alleged participation in earlier schemes to defraud, it introduced evidence which it claimed indicated that the Grain Growers' Association of Omaha and the Farmers' Mutual Hail Association of Watertown were formed and conducted in the same way as was the State Mutual Insurance Company of North Dakota. But it did not produce any evidence which had any tendency to show that the defendant Gilder participated in, or was aware of, the organization or operation of either company before he engaged in the organization of the North Dakota company, or that the defendant Randall was before that time aware of, or in any way connected with, the Grain Growers' Company. At the close of the evidence for the plaintiff, and again at the close of all the evidence, Gilder made a motion to strike out, as to him, the evidence relative to both these companies, and also relative to the Western Farmers' Company of Topeka; and Randall moved to strike out, as to him, the evidence in reference to the Grain Growers' Company, and also relative to the State Mutual Hail Insurance Company of Hankinson. These motions were denied, and the court did not instruct the jury that any of this evidence should not be considered by them in determining the guilt or innocence of the defendants who did not participate in the organization or management of any of these companies. These companies were organized and operated before the conspiracy to defraud charged in this case was formed. The knowledge and intent of one of the defendants prior to the formation of the conspiracy in issue constituted no evidence of the knowledge or intent of the others, and even if the defendant Miller was aware of, or connected with, the formation and conduct of these earlier companies, that fact did not tend to show any knowledge or fraudulent intent of Gilder before or at the time the conspiracy on trial was formed. If Gilder and Randall had no connection with or knowledge of the operation of the Grain

Growers' Association before they entered into the alleged conspiracy upon trial, the formation and conduct of that company could not have indicated that they had conceived any fraudulent intention when they entered upon the scheme which is challenged in this case, and, as to them, the evidence concerning the Grain Growers' Association should have been withdrawn from the jury. Nevertheless the motions were properly denied because they were too broad. They included the evidence in reference to the Topeka company, with which Gilder was connected, and in reference to the Hankinson company, in which Randall may have been interested.

The judgment below is reversed, and the case is remanded to the District Court, with instructions to grant a new trial.

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UNITED STATES SAVINGS & LOAN CO. v. CONVENT OF ST. ROSE.

(Circuit Court of Appeals, Ninth Circuit. November 7, 1904.)

No. 1,063.

1. BUILDING AND LOAN ASSOCIATIONS—CONTRACT WITH BORROWING STOCKHOLDERS—APPLICATION OF PAYMENTS.

Where a borrowing stockholder in a building and loan association for eight years made the monthly payments required, and acquiesced in their application, in accordance with the terms of the written contract, with full knowledge of such terms, a court will not make a different rule for their application merely because the borrower may have believed, when the contract was made, that a different application should be made, but the contract, if enforceable at all, will be enforced as the parties made it.

2. SAME—DEFENSE OF ULTRA VIRES—ESTOPPEL.

Where the contract between a building and loan association and a borrowing stockholder which is a private corporation has been fully executed by the association, and the borrower has received and used the money, it cannot defeat the enforcement of the contract against it, in accordance with its terms, on the ground that the contract on its part was ultra vires because of its want of power to become a stockholder in another corporation.

3. SAME.

Where a private corporation organized for benevolent purposes, and having no power under the laws of the state to become a stockholder in another corporation, subscribed for stock of a building and loan association, from which it also borrowed money, and made the payments required by the contract until the amount paid in dues, premiums, and interest exceeded the sum borrowed, with legal interest, such payments must be applied in satisfaction of the loan, which is the only lawful part of the contract, and the corporation is not estopped, under the rule of the Supreme Court of the United States or of the Supreme Court of the state of Washington, to set up its want of power as ground for cancellation of the contract as to any further liability. Per GILBERT, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

Corwin S. Shank and Winfield R. Smith, for appellant.

J. C. Cross and J. B. Bridges, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Appellee is a religious corporation formed, organized, and existing under the laws of the state of Washington. Appellant is a corporation organized and existing under the laws of the state of Minnesota, and engaged in business as a building and loan association in the sale of stock, and the loaning of moneys received on account of such stock, to its stockholders only, on what is generally known as "the building and loan association plan." In January, 1893, appellee made application in writing to appellant for a loan of \$7,000, and (as was required by the rules and regulations of the appellant) subscribed for 70 shares of stock therein, of the par value at maturity of \$100 each, and, upon the acceptance of the application by appellant, the mortgage in controversy was duly executed by appellee. Appellee in May, 1901, brought this suit to cancel and set aside the mortgage upon the ground that the mortgage indebtedness has been fully paid and discharged, and upon the further ground that the contract as made was *ultra vires*, in that appellee was incapable of entering into a valid contract to acquire, own, or pay for stock in another corporation. The pleadings and evidence herein threshes out the "old story," which has been so often discussed in cases of this character, whether the contract is to be construed as a simple loan of money with interest thereon, and whether the amounts paid for premiums on the stock should be credited on the loan. It was stipulated that the answer should be treated as a cross-complaint. The circuit court, upon the proofs in said cause, adjudged and decreed "that the defendant herein surrender for cancellation the bond, stock certificates, and mortgage referred to in the complainant's bill, and that the defendant execute an acknowledgment of satisfaction and discharge of the mortgage herein mentioned and referred to, sufficient to authorize the cancellation of record of the said mortgage in the office of the auditor of Chehalis county, Washington," and for costs. From this decree the appeal herein is taken. The assignments of error raise the question whether the written contract was unconscionable, or made under false representations of the appellant's agent, which appellee believed at the time to be true; and upon the further ground as to whether the plea of *ultra vires*, which the court below held to be good, can be sustained.

1. Upon the first ground but little need be said. It is claimed that a pamphlet published by the appellant led the appellee to understand that there was no premium to be paid in connection with the loan. The testimony does not support this claim. Father Deichman, who was the convent's chaplain and business adviser, testified that he had read the pamphlet and all of the writings that were signed; that he wrote out the application for the loan, and witnessed the certificate for 70 shares of stock issued by appellant to appellee, etc. In his examination the witness testified as follows: "Q. State whether or not any premium was to be paid. A. Not that I remember." The testimony also shows that in all things in connection with this loan he took an active, zealous interest to obtain favorable consideration for the convent. It also shows that he was anxious to get the loan. "Q. Had you had any

personal correspondence with the company prior to the making of your application? A. No, sir, I had not; it was some time later on, when they came first. I started in with them to talk about insurance matters. I wanted to save the sisters the premium—what the agent would get. We were very anxious to get that money, and so we didn't care. We would consent to anything at that time." The uncontradicted testimony shows that appellee, for a period of eight years after the mortgage was executed, acquiesced, with full knowledge of all the facts, in the method adopted by appellant in applying the payments each month, in strict accordance with the written contract. This being true, we are of opinion that the court should not make a different rule for the application of such payments simply because appellee, at the time of the contract and loan, thought a different application should be made. It is unnecessary to further review the testimony. A careful examination of it shows that there are no questions involved in it which distinguishes it in any manner from the principles announced by this court in the *Pacific States Savings, Loan & Bldg. Co. v. Green*, 123 Fed. 43, 59 C. C. A. 167, and followed in the *United States Savings & Loan Co. v. Parker*, 123 Fed. 1007, 59 C. C. A. 683, upon substantially similar facts. In the *Green Case* this court said:

"The general rule is, we think, well settled that a court of equity is not authorized to set aside and annul a contract made by parties with full knowledge of all the terms and conditions of the same, without it is clearly and satisfactorily shown that there was fraud, oppression, or undue advantage taken with reference to its execution. \* \* \* We understand the law to be that payments of premiums on the stock are not premiums made upon the loan, but are to be applied solely to the credit of the shares."

Numerous authorities were there cited in support of the views therein expressed. The contract, if enforceable at all, is to be enforced as the parties made it, and its terms and provisions must govern their rights.

2. Conceding, for the purpose of this opinion, that the appellee was not authorized to become a shareholder in the stock of appellant for the purpose of securing a loan of money to enable it to build a convent on the land mortgaged, it does not necessarily follow that the court should set aside and annul the contract on that ground. The mortgage in this case was given under and in pursuance of the contract made between the parties. It was an executed contract. Appellant paid \$7,000 to appellee, and did everything which it agreed to do. Appellee has received the fruits and benefits of the contract, but has not paid all the money agreed to be paid thereon by the terms of the written contract. Can it now successfully defeat the contract by the plea of *ultra vires*? It must be remembered that we are called upon to deal directly with the rule as applied to private corporations, where the contract has been fully executed by the party against whom the plea of *ultra vires* is invoked, as distinguished from the rule which is applied to cases of executory contracts or contracts made by public or quasi public corporations, which owe important duties to the public. The general rule applicable to the case in hand is expressed in 5 *Thompson on Corporations*, § 6016, as follows:

"The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

And numerous authorities are there cited in support of this text.

In *Blue Rapids Opera House Co. v. Mercantile Building & Loan Ass'n* (Kan. Sup.) 53 Pac. 761, the opera house company had taken stock in the building and loan association, and obtained a loan to finish the construction of the opera house. It got the money, and gave its bond and mortgage. It will thus be seen that the case is directly in point. The court said:

"The opera house company contends that its officers were without power to make the loan by taking stock in the building and loan association. Whatever may have been the powers of the officers of the opera house company in this respect, the defense of ultra vires is not available to the company. The contract has been in good faith fully performed by the other party, the money has been paid, and the opera house company has had the full benefit of the payment and the performance of the contract. The law now interposes an estoppel, and will not permit the validity of the loan contract to be questioned. *Railroad Co. v. Johnson*, 58 Kan. 175, 183, 48 Pac. 847."

In *Bowman v. Foster & Logan Hardware Co.* (C. C.) 94 Fed. 592, 596, the court based its decision upon other grounds, but announced the rule upon the point here under discussion as follows:

"Whether it be true that an ordinary corporation, authorized by its charter to do a general merchandise business, can become a shareholder in a building and loan association, in order to borrow money to carry on its business, in the opinion of the court is not decisive of this case; indeed, the question is not necessary to its decision. If it be admitted that it cannot, still, underlying this question is another, about which there cannot be much doubt in the light and trend of modern decisions. The *Foster & Logan Hardware Company* complied with the rules and regulations required by the plaintiff building and loan association in order to become a borrower, and executed the note and mortgage sued on, and accepted the stock. It used the money so borrowed in constructing its business house. So far as the plaintiff building and loan association was concerned, the contract was an executed contract. All the plaintiff building and loan association could do was done. Can the *Foster & Logan Hardware Company*, after having received and used the plaintiff's money under this executed contract, be heard to say that it had no power to become a member of the association, and that its act was therefore ultra vires? I think not. \* \* \* The court is of opinion that the *Foster & Logan Hardware Company*, if in existence, and a defendant, could not avail itself of the plea of ultra vires."

See, also, *Kadish v. The Garden City Eq. L. & B. A.*, 151 Ill. 531, 538, 38 N. E. 236, 42 Am. St. Rep. 256; *The Sherman Center Town Co. v. Morris*, 43 Kan. 282, 284, 23 Pac. 569, 19 Am. St. Rep. 134; *Booth Bros. v. Baird* (Sup.) 82 N. Y. Supp. 432, 435; *Schrimplin v. Farmers' Life Ass'n* (Iowa) 98 N. W. 613, 616; *Hunt v. Hauser Malt-ing Co.* (Minn.) 96 N. W. 85, 87, and authorities there cited.

Appellee relies principally upon *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765, but that case is wholly unlike the case at bar in this, that there the suit was brought by a stockholder of the corporation to declare a certain transaction invalid on the ground that the corporation had no power or authority in the premises. No such question as is here presented was



there raised or discussed. It is simply a case that upholds the general proposition which we have conceded.

The decisions in the state of Washington, wherever the question has been raised, are to the effect that, where a corporation has accepted the benefits of a contract, it is estopped from denying the validity of the instruments by which those benefits came to it. In *Tootle v. First National Bank*, 6 Wash. 181, 33 Pac. 345, the court held that, where a banking corporation has received and retained the benefits of a transaction, it cannot set up the plea that the contract was ultra vires; and cited, in support of this principle, 2 *Morse on Banks and Banking* (3d Ed.) § 740; 2 *Beach, Priv. Corp.* § 425; 2 *Morawetz, Priv. Corp.* (2d Ed.) § 688; *Green's Brice's Ultra Vires*, 729, note a; *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; and further stated that: "This rule is so well established that it is the work of supererogation to quote authorities to sustain it."

In *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 309, 43 Pac. 55, 56, the court said:

"The second contention, viz., the want of authority in the officers to make the note in suit, will not serve the defendant when it appears, as it does from the pleadings in this case, that it had the benefit of the money which it received by reason of the execution of the note. This court has often decided that corporations cannot escape their honest obligations by pleading want of authority to execute a contract, where, as a result of the contract, the corporation had received the benefit of the money obtained."

The same doctrine was followed in *City of Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 180, 60 Pac. 141, 143. The court, after citing *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, said:

"It seems that the rule stated in *Parish v. Wheeler*, 22 N. Y. 494, has been applied by this court, and where a corporation has received benefits under a contract it is estopped from saying it has no power to make it."

See, also, *Dexter, Horton & Co. v. Long*, 2 Wash. St. 437, 440, 27 Pac. 271, 26 Am. St. Rep. 867; *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 633, 45 Pac. 316.

The decisions in the state of Washington are in line with the decisions herein cited from other states. If, under the facts of this case, appellee is estopped from pleading that the contract was ultra vires, then it follows that, if the contract was valid, it can be enforced. A different contract cannot be made between the parties simply because of the plea of ultra vires, unless the plea can be held good. The authorities in the state of Washington did not change any of the terms of the original contract or agreement. The parties were held estopped from asserting the plea of ultra vires solely because they had received money or property on the faith of the contract or transaction, and could not, under circumstances similar to the case at bar, in equity and good conscience deny their contract, because they were estopped by their own acts and conduct from doing so.

The decree of the Circuit Court is reversed, and cause remanded, with directions to the Circuit Court to enter a decree of foreclosure in favor of appellant herein for the amount found to be due under the contract, consistent with the views expressed in this opinion.

GILBERT, Circuit Judge (dissenting). The appellee was a benevolent corporation, formed for the establishment and maintenance of a hospital for the care and treatment of the sick and injured, and the maintenance of a school for educational purposes, with the powers necessary to carry out those purposes. It is not disputed that under the laws of the state of Washington a corporation is not permitted to subscribe for or hold stock in another corporation. This was first held in *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130. In *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765, it was held that such power did not exist under the statutes of that state, even where assumed in the articles of incorporation under a general law providing for the formation of private corporations and permitting them to enumerate in their articles the powers to be exercised by them.

The appellant relies on cases such as *Bowman & Foster v. Hardware Co.* (C. C.) 94 Fed. 592, in which it is held that where a contract made by a corporation in excess of its granted powers has been executed, and the corporation has received the benefit thereof, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. And such may be said to be the doctrine of perhaps the majority of the state decisions. But in the Supreme Court of the United States it is not so held. In *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 59, 60, 11 Sup. Ct. 478, 488, 35 L. Ed. 55, the court said:

"A contract of a corporation which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The doctrine of this case is affirmed in *McCormick v. National Bank*, 165 U. S. 550, 17 Sup. Ct. 433, 41 L. Ed. 817, and *California National Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. Nor does the Supreme Court, in so holding, distinguish between cases of quasi public corporations and private corporations. In *De la Vergne v. German Savings Inst.*, 175 U. S. 58, 20 Sup. Ct. 25, 44 L. Ed. 62, the court said:

"Whatever doubts might have been once entertained as to the powers of corporations to set up the defense of ultra vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that, where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received."

In *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093, the court applied the doctrine to a contract made by a private corporation, the Western Investment Loan & Trust Company of Kansas, and said:

**"The rule in this court is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced or rendered enforceable by the application of the principle of estoppel."**

The extent to which the Supreme Court has applied equitable relief in cases of ultra vires contracts made by corporations has been to require the specific return of property or money parted with on the faith thereof (*Salt Lake City v. Hollister*, 118 U. S. 263, 6 Sup. Ct. 1055, 30 L. Ed. 176), or to compel compensation for property not returned (*Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman Palace Car Co. v. Transportation Co.*, 171 U. S. 156, 18 Sup. Ct. 808, 43 L. Ed. 108).

This established rule of the Supreme Court must control the decision in the present case, unless the Supreme Court of the state of Washington had, prior to the time when the contract in the present case was entered into, announced a different rule as to contracts ultra vires made by corporations of that state. In *Dexter, Horton & Co. v. Long*, 2 Wash. St. 435, 440, 27 Pac. 271, the court held that where money was obtained by a corporation upon its securities, which was ultra vires, but the money was applied for the benefit of the company with the knowledge and acquiescence of the shareholders, the company and the shareholders are estopped to deny the liability of the company to repay it. In *Tootle v. First National Bank*, 6 Wash. 181, 33 Pac. 345, the bank had received property of the value of more than \$7,000, transferred to it by a bill of sale which it claimed was in payment of a debt due it of \$2,000. The court found that the bill of sale was intended as a mortgage to secure the payment of \$2,000, and, in answer to the plea of the bank that the transaction was beyond its powers, the court said:

"It is not necessary to determine whether the contract was ultra vires, for it was not immoral. It was fully performed by the other party, and the bank received and retained the benefits, and in such a case the plea of ultra vires is unavailing. \* \* \* The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

The consideration of the Washington decisions might properly end here, for the foregoing are all the decisions of the Supreme Court of that state on that subject prior to the execution of the contract in controversy. This court is not bound by the decisions of that court, after rights accrued under the contract, where such decisions conflict with the rule of the Supreme Court of the United States. *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517. But it is not perceived that in any of such later decisions, when viewed in the light of the facts presented in each case, the doctrine of the decisions above noted has been departed from. In *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55, the corporation had, for value received, executed its negotiable promissory note for \$8,000, and the note had been indorsed to the plaintiff. The bank, when sued upon the note, made the defense of want of authority. The court said:

"The want of authority in the officers to make the note in suit will not serve the defendant when it appears, as it does from the pleadings in this

case, that it had the benefit of the money which it received by reason of the execution of the note. This court has often decided that corporations cannot escape their honest obligations by pleading want of authority to execute a contract, where, as a result of the contract, the corporation had received the benefit of the money obtained."

In *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141, the suit was brought by a stockholder to set aside a conveyance by which the corporation had transferred all its property to another corporation, and the latter had borrowed from the respondent \$300,000. The contention was that one corporation could not sell all of its property to another; that such a transaction was *ultra vires*. The court in that case approved the doctrine that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. It is true that in that case the court made use of these words:

"It seems that the rule stated in *Parish v. Wheeler*, 22 N. Y. 494, has been applied by this court, and, where a corporation has received benefits under a contract, it is estopped from saying it has no power to make it."

What the court meant by this utterance is shown by its own prior decisions cited in support of it, and by the case of *Parish v. Wheeler*, the doctrine of which it so expressly adopted. That was a case in which it was held that a corporation cannot defend itself against a claim for money paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*. The court in that case said that the plea of *ultra vires* was not to be entertained, especially so long as the corporation "retains, and insists upon retaining, all the benefits of the contract"; and later in the opinion the court added:

"The executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require."

Again, in *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 377, 68 Pac. 879, 881, the court said:

"A corporation has sometimes been permitted to disavow an unexecuted contract which it has attempted to enter into, because beyond the scope of its charter powers. But the doctrine of *ultra vires*, so far as we are aware, has never been invoked successfully when the purpose was to recover money paid by it for the purchase of goods which it had received and appropriated to its own use."

In each of these cases the plea of *ultra vires* was invoked to enable the corporation to retain the money of another without repaying it, or the property of another without paying for it. The controlling consideration in holding it estopped so to do was the gross wrong and injustice of permitting it thus to escape its assumed liability. Such is not the present case. The appellee does not retain from the appellant money which, *ex æquo et bono*, it ought to repay. It borrowed from the appellant \$7,000, and mortgaged its property to secure payment thereof. It entered into the contract of loan on the representation of the appellant's agent, fortified by the printed matter contained in a pamphlet which it published and circulated, and which, while it did not specifically

so promise, stated that it might safely be estimated that payment of 90 installments of the amount specified would be sufficient to extinguish all liabilities of the borrower, and illustrating the expected result by figures showing that 90 installments would amount in the aggregate to only a trifling sum in excess of the principal of the loan and simple interest thereon at the rate of 7 per cent. per annum. That the appellant's expectations were not realized is owing to no act or default of the appellee, but solely to the appellant's misfortunes or to mismanagement of its corporate business, a business in which the appellee, although nominally a stockholder, had no voice or part. The appellee, instead of paying 90, has paid 96 of such monthly payments, amounting in all to \$11,263. These payments, applied on the loan, repay the principal thereof and \$4,263 interest. The amount so paid in gross would be tantamount to a repayment of the \$7,000 principal, and 7.61 per cent. per annum thereon, if the principal had been repaid at the end of the 96 months. But when we come to consider that in fact the loan and interest were repaid in installments of \$119.35 per month, covering the entire period of 96 months, which installments included monthly payments of principal as well as of interest, it will be seen that the rate of interest actually received was much greater than 7.61 per cent. per annum, and amounted to more than 15 per cent. per annum. The inquiry then suggests itself, what has the appellee received out of this extortionate contract which in equity it ought to restore to the appellant? It retains none of the money of the appellant, and none of its stock. The money has been paid back with a very high rate of interest, and the stock was assigned to the appellant at the time when the contract was made. In *Thompson on Corporations*, § 5999, it is said:

"Where, as in the case of strictly private corporations, such as mining, manufacturing, insurance, and commercial companies, no question of public policy is involved, but the question is merely one concerning the rights of stockholders and creditors not to have the corporate funds dissipated by ultra vires engagements, then there will be no right of rescission after a part performance by one of the parties; but that, in the case of any species of corporation, whether public or private in its nature and objects, where a principle of public policy is involved, and where a continued execution of the contract involves a continued violation of the law, then there will always be a right of rescission by either party to the contract, upon a restoration of what he has obtained under it."

The contract in this instance being legal in part and in part illegal, the installments of money paid by the appellee are properly to be deemed payments only of its legal obligation. This leaves the whole of the appellant's demand as it now stands—the demand for the further sum of \$3,375—to rest upon the illegal promise of the appellee to pay assessments on the stock. On what principle can it be said that the appellee is now estopped to deny that obligation? An estoppel in pais is defined to be a preclusion of a person to deny a fact which he has by his act induced another to believe and act upon to his prejudice. But wherein has the appellant acted upon the contract in the present case to its prejudice?

It parted with a sum of money, but it has received it back with interest at 15 per cent. per annum? It has received more out of the transaction that it expected to receive, according to its own representations made at the time of making the loan. If there be an estoppel here, it must rest not on the ground that the appellee retains benefits from the contract, but on the ground that it received and repaid with excessive interest the appellant's money. The appellee, concerning its power to subscribe stock, made no representations on which the appellant relied. Its want of authority to subscribe stock did not consist in any restriction contained in its articles, unknown to the appellant, nor in the failure of its directors to authorize its act. It consisted in the law and public policy of the state under which the appellee had its existence. Of that law both parties were equally bound to take notice. I find nothing in the decisions of the Supreme Court of the state of Washington which requires the denial of the relief which the appellee prayed for—the cancellation of its mortgage upon the records—and nothing to sustain the decision of the majority of this court that in equity the appellee should be subjected to the further burden of paying the \$3,375.40 which the appellant demands in satisfaction of its mortgage.

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### DODGE v. NORLIN.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1904.)

No. 2,091.

#### 1. APPELLATE JURISDICTION—CONTROVERSIES ARISING IN BANKRUPTCY.

Section 24a of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], vests in the Circuit Courts of Appeals appellate jurisdiction over all controversies arising in bankruptcy proceedings over which those courts would have had jurisdiction if those controversies had arisen in the federal courts in other cases outside of proceedings in bankruptcy.

#### 2. SAME—REVOCATION.

This appellate jurisdiction is not excluded or revoked by the provision of section 25a which grants jurisdiction over three specified classes of cases, and limits the time for invoking it to 10 days, nor by section 24b (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), which vests the power of supervision and revision in matter of law in the Court of Appeals. A litigant has the option, in a proper case, to review a decision by appeal or by a petition for revision as matter of law.

#### 3. SAME—JUDGMENT AVOIDING CHATTEL MORTGAGE—RIGHT OF APPEAL.

A judgment of a court of bankruptcy that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, that it entitles the mortgagee to no lien upon the property and to no preference in payment out of its proceeds, is a final decision of a controversy arising in bankruptcy proceedings, of which the Circuit Court of Appeals would have had appellate jurisdiction if it had arisen in any other case in a federal court, and the decision may be reviewed by appeal.

#### 4. BANKRUPTCY—APPEAL—PRACTICE—BILL OF EXCEPTIONS.

A bill of exceptions has no function and accomplishes no purpose in proceedings in bankruptcy.

A proceeding in bankruptcy is a proceeding in equity.

An appeal makes the entire record available to the appellant, and imposes the duty upon him and upon the clerk of the lower court to place the material parts of it in the transcript sent to the appellate court. *Teller v. U. S.*, 111 Fed. 119, 49 C. C. A. 263.

**5. CHATTEL MORTGAGE—GOVERNED BY LAW OF STATE WHERE MADE.**

The validity of a chattel mortgage is determined in the national courts by the decisions of the highest judicial tribunal of the state in which it was made.

**6. SAME—VOIDABLE BY CREDITORS IN COLORADO WHERE MORTGAGEE CONSENTS TO SALES.**

A chattel mortgage is voidable by creditors, according to the decisions of the courts of Colorado, if it covers merchandise and other property, and the mortgagee consents to the sale of the merchandise in the usual course of business, without requiring the application of the proceeds to the payment of the debt; and where such a mortgage is voidable as to part of the mortgaged property it is voidable as to all of it.

**7. APPEAL—REVIEW—FINDING OF TRIAL COURT PRESUMPTIVELY CORRECT.**

Where the court below has considered a question and made a finding on conflicting evidence, its conclusion is presumptively correct, and it should not be disturbed by an appellate court unless it appears that a serious mistake has been made in the consideration of the facts, or that an obvious error has intervened in the application of the law.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the District of Colorado.

The Modern Machine Works Company, a corporation, was adjudged a bankrupt on December 21, 1903. It was a manufacturing corporation, and on April 24, 1903, it had given a chattel mortgage upon its machinery, materials, and merchandise to the appellant, David C. Dodge, to secure the payment to him of a debt of \$4,000, which it had incurred for the purchase of a part of this property. Three thousand five hundred dollars of this debt remained unpaid when the adjudication in bankruptcy was made. The trustee took possession of the mortgaged property, and the mortgagee filed a claim wherein he set forth his mortgage, the specific property covered by it, and the amount of the debt secured by it. The referee adjudged that the chattel mortgage was void, and that it constituted no security for Dodge, because it described a stock of goods, wares, and merchandise, and permitted the mortgagor to remain in possession and to use and enjoy them until the maturity of the debt without applying the proceeds of the sales of them to its payment. Upon a petition for a review of this decision, the District Court rendered a judgment of affirmance, and within 10 days after its rendition the mortgagor appealed from that judgment to this court.

Joel F. Vaile (Edward O. Wolcott, Charles W. Waterman, and W. W. Field, on the brief), for appellant.

Daniel B. Ellis (Henry T. Rogers, Lucius M. Cuthbert, Lewis B. Johnson, and Pierpont Fuller, on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant is met at the threshold of his case by a motion to dismiss his appeal upon the ground that the judgment which has determined that his mortgage lien upon the property and the proceeds of the property covered by it is void in the face of the

attack of the trustee of the bankrupt, is not subject to review by appeal.

The provisions of the Bankruptcy law which relate to the question presented by this motion are:

"The Circuit Courts of Appeals of the United States \* \* \* are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." Section 24a.

"The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction." Section 24b.

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States \* \* \* in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered." Section 25a.

3 U. S. Comp. St. 1901, pp. 3431, 3432, 30 Stat. 553, c. 541.

Under the judiciary act of March 3, 1891, the Circuit Courts of Appeals had "jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." 1 U. S. Comp. St. 1901, p. 549, section 6, c. 517, 26 Stat. 828.

The case here under consideration was not provided for in the preceding section of the act or in any other way than in section 6. The decision of the District Court that the lien by mortgage claimed by the appellant could not be enforced against the trustee who had seized the property which constituted the security for his debt was a final decision. It rendered the question of the mortgagee's right to his security *res adjudicata*. It finally determined a separate collateral controversy distinct from the general subject of litigation in the proceeding in bankruptcy. *Withenbury v. U. S.*, 5 Wall. 819, 18 L. Ed. 613; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Standley v. Roberts*, 8 C. C. A. 305, 308, 59 Fed. 836, 839; *Salmon v. Mills*, 68 Fed. 180, 15 C. C. A. 356; *Central Trust Co. v. Marietta, etc., Ry. Co.*, 48 Fed. 850, 1 C. C. A. 116; *Grant v. Railroad Co.*, 50 Fed. 795, 1 C. C. A. 681. If this controversy had arisen in a federal court when it was not sitting in bankruptcy, the final decision of it would have been reviewable in this court by writ of error or appeal. Section 25a vests the Courts of Appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings of which they have jurisdiction in other cases. As this court has appellate jurisdiction of this controversy in other cases in which it might be presented in a federal court, it has such jurisdiction when it arises in proceedings in bankruptcy.

The jurisdiction of the court of bankruptcy to render its judgment in this case was derived from section 2 (7) of the bankruptcy act of 1898, which empowers that court to "cause the estates of



bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto." It was these controversies, among others, over which section 24a vested appellate jurisdiction in the Circuit Courts of Appeals. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 691, 48 L. Ed. 986; *Steele v. Buel*, 104 Fed. 968, 969, 44 C. C. A. 287, 288; *Cunningham v. German Ins. Bank*, 103 Fed. 933, 935, 43 C. C. A. 377, 380; *In re Columbia Real Estate Co.*, 112 Fed. 643, 645, 50 C. C. A. 406, 408.

Counsel for the appellee have persuasively argued in opposition to this conclusion that this appeal ought not to be maintained (1) because the allowance of appeals by section 25a from the decisions of courts of bankruptcy within ten days after their rendition in the three classes of cases there specified excludes appellate jurisdiction in those courts in all other cases, and the case at bar does not belong to either of these three classes (*In re Whitener*, 105 Fed. 180, 186, 44 C. C. A. 434, 440; *In re Columbia Real Estate Co.*, 112 Fed. 643, 50 C. C. A. 406; *Fisher v. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *Hutchinson v. Le Roy*, 113 Fed. 202, 51 C. C. A. 159); and (2) because, as they contend, no appeal may be maintained from any decision which may be superintended and revised in matter of law under section 24b, and the judgment in this case is susceptible of such superintendence and revision (*In re Worcester County*, 102 Fed. 808, 813, 42 C. C. A. 637; *Hutchinson v. Le Roy*, 113 Fed. 202, 51 C. C. A. 159; *In re Good*, 99 Fed. 389, 39 C. C. A. 581). They have called attention to some of the cases which have been cited, and some of these cases tend to sustain the premises upon which this argument is based. Nevertheless these premises have never appeared to this court to be sound. The provision for appeals within 10 days from the renditions of the decisions in the three classes of cases treated in section 25a has never seemed to us to repeal, revoke, or exclude the plenary appellate power vested in the Courts of Appeals by section 24a to review the decisions of separable controversies in reference to the title, possession, or distribution of the estates of bankrupts which the courts of bankruptcy may render in the course of their proceedings. *Steele v. Buel*, 104 Fed. 968, 969, 44 C. C. A. 287, 288.

The purpose of Congress in the enactment of the judiciary act of 1891, and the effect accomplished by that law, were to provide an opportunity for a review either in the Supreme Court or in the Circuit Court of Appeals of the final decisions by the Circuit Courts and by the District Courts of all the controversies which they might determine. It was not, in our opinion, the purpose of Congress to strike down any portion of this grant or to impair in any way the appellate jurisdiction thus given by the enactment of the bankruptcy law. On the other hand, the provisions of the bankrupt act clearly show that it intended thereby to preserve this jurisdiction over the controversies to which it had already attached in other cases, and to supplement it with the grant of authority to review the decisions of controversies which had not theretofore been within that jurisdiction. Before the passage of the bankrupt act the Courts of Appeals had appellate jurisdiction of controver-

sies arising in the federal courts over the title to and liens upon the property of insolvents who might become bankrupts. Congress provided by section 24a that the Courts of Appeals should still have jurisdiction over those controversies when they arose in bankruptcy proceedings. By section 25a it granted to the Courts of Appeals additional jurisdiction which before the enactment of the bankrupt law they could not exercise, and provided a different time within which this jurisdiction might be invoked, to the end that the proceedings in bankruptcy might not be unduly delayed. But there is nothing in the provisions of section 25a which excludes, revokes, or diminishes the general appellate jurisdiction granted by the previous section over controversies within the jurisdiction of the Courts of Appeals before the bankruptcy law was passed. The extent of its effect is to grant some additional jurisdiction, and to restrict to 10 days the time within which the jurisdiction of the Court of Appeals may be invoked in the three classes of cases there specified.

Nor is there anything in the grant by section 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked.

Any other construction of the bankruptcy law would deprive litigants in the courts of bankruptcy of a review of the decisions of the most important controversies determined by those courts, of controversies between the trustee and third parties over the title to, and the liens upon the alleged property of the estate. A revision as a matter of law is not equivalent to nor is it adequate to take the place of an appeal. Many controversies of the nature of that here under consideration arise which involve large interests in which there is little doubt of the law, but in which the correctness of the finding of facts is both crucial and doubtful. The act plainly declares that the final decisions of such controversies may be reviewed by appeals, and no persuasive reasons convince that this declaration should not have its full effect.

The late decision of the Supreme Court in *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 691, 48 L. Ed. 986, as we understand it, is an adjudication of this question in accord with these views. In this case the Berlin Works had sold and delivered to the bankrupt certain machines under a contract that the title to them should remain in the corporation until the vendee had performed his agreement to pay the purchase price. The trustee had taken possession of the machines. Thereupon the vendor filed a petition for the possession of the property or for a preference in

the payment of the debt of the bankrupt secured by them out of their proceeds. The referee decided that the machines were the property of the bankrupt, and that the vendor must come in as an unsecured creditor. The district court reversed that decision and adjudged that the machines should be delivered to the vendor or that the trustee should pay to it their value. An appeal from this decision was taken to the Circuit Court of Appeals, and that court affirmed the judgment of the court below. The decision of the District Court in that case was reviewable in the Circuit Court of Appeals by a petition for superintendence and revision as matter of law under section 24b. *In re Rochford*, 124 Fed. 182, 187, 59 C. C. A. 388. That judgment did not fall within either of the three classes of cases specified in section 25a. Nevertheless the Supreme Court held that the claim of the Berlin Works to the machines or to the preference in the payment of its claim out of their proceeds raised a distinct and separable issue, which constituted one of those "controversies arising in bankruptcy proceedings" over which the Circuit Court of Appeals had appellate jurisdiction in other cases, and it sustained the appeal.

The claim of the appellant in the case at bar is of the same nature, and it was presented in substantially the same way. It was brought to the attention of the court of bankruptcy by a verified statement of the mortgagee which set forth his mortgage, the claim it secured, and the specific property upon which he claimed a lien under it. The issue it presented was whether or not the mortgage, which was valid between the parties, was voidable by the trustee. That issue was separate and distinct from the general subject-matter of the proceedings in bankruptcy, and it presented a controversy of which the Circuit Court of Appeals would have had jurisdiction if it had arisen in any other case in a federal court. The conclusion is that the Circuit Courts of Appeals have jurisdiction to review the final decisions by the courts of bankruptcy of controversies arising between the trustees in bankruptcy and third parties over the title to, or over liens upon the alleged property of the bankrupt or its proceeds under section 24a; that this jurisdiction is not excluded or revoked by the grant of appellate jurisdiction over the three classes of cases specified in section 25a; but the effect of that section is to limit the time within which appeals may be taken in the cases there treated, and to increase to some extent the appellate jurisdiction of the Courts of Appeals; that the general appellate jurisdiction vested by section 24a is not impaired or affected by the grant of the power of revision and supervision in matter of law contained in section 24b; and that the motion to dismiss this appeal must be denied.

When we turn to a consideration of the merits of the case we find ourselves embarrassed by the state of the record. The evidence and many of the proceedings before the referee and in the court below appear before us only by means of a bill of exceptions which the record contains. This is a proceeding in bankruptcy, and a proceeding in bankruptcy is a proceeding in equity. *Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed.

1175; *Siegel v. Swartz*, 54 C. C. A. 399, 402, 117 Fed. 13, 16; *In re Rochford*, 59 C. C. A. 388, 393, 124 Fed. 182, 187. A bill of exceptions has no function and serves no purpose in a suit in equity or in bankruptcy. An appeal makes the entire record available to counsel for the appellant, and imposes upon him and upon the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the hearing of the questions to be presented there. *Teller v. U. S.*, 111 Fed. 119, 49 C. C. A. 263. The bill of exceptions must therefore be disregarded.

It appears, however, that this bill of exceptions was presented by the appellant to the court below, that it bears the written approval of counsel for the appellee, and that it was filed in the case by the order of the District Court. In view of these facts, we have concluded, with some hesitation, that the paper called a "Bill of Exceptions" may be deemed a written stipulation of the parties to the effect that it correctly portrays the evidence and the proceedings below, and upon this basis we proceed to consider the case it presents.

The mortgage provided that until default the mortgagor might retain possession of the goods and chattels and use and enjoy them, but that in case of default, or if the mortgagor should attempt to sell or remove the mortgaged property without the written permission of the mortgagee, the latter might take possession of and sell the property to pay the debt. The chief business of the mortgagor was the manufacture of machines upon the orders of its customers, but it was also engaged in repairing machinery, in manufacturing water registers for sale, and in the purchase and sale of the materials used in its manufacturing business, and of dry batteries and electrical fixtures and supplies which were not used in its business of manufacturing. It did not hold itself out as a dealer in any of these materials, but it sold them in the usual course of business to any one who came and inquired for them. During the existence of the mortgage the Modern Machine Works Company sold about 3,000 or 4,000 pounds of steel, which was worth about \$175, and various small amounts of materials and of electrical supplies. The mortgagee testified that he never gave his consent to the sale of any of this property with the exception of one machine; that he consented to that sale on condition that the proceeds should be applied to the payment of the mortgage debt; that he did not know that the mortgagee had sold any of the property covered by the mortgage until litigation began; that he visited the mortgagor's place of business two or three times after the mortgage was given; that he did not notice the business particularly; that he was there for the purpose of having his automobile repaired; and that he did not know that he knew that the mortgagor was buying and selling merchandise. The mortgage covered machinery used in the manufacturing business of the mortgagor, electrical fixtures and supplies and materials used in the manufacturing business.

It is assigned as error that in this state of the case the court below held the mortgage voidable at the option of the trustee upon

the ground that the mortgaged property might have been levied upon and sold under judicial process against the bankrupt. 30 Stat. 565, c. 541, § 70a (5); 3 U. S. Comp. St. 1901, p. 3451. The decisions of the highest judicial tribunal of the state in which a chattel mortgage is made determine its validity in the national courts. *Etheridge v. Sperry*, 139 U. S. 266, 271, 11 Sup. Ct. 565, 35 L. Ed. 171. The Supreme Court of Colorado has decided that a chattel mortgage of a stock of merchandise is voidable, at the option of creditors of the mortgagor, if there is an agreement between the mortgagor and the mortgagee, or a consent of the mortgagee, that the merchandise may be sold in the ordinary course of business, without applying the proceeds of the sales to the payment of the mortgage debt; that this agreement or consent may be evidenced by the fact that the mortgage, as in the case at bar, provides that the mortgagor may retain, use, and enjoy the stock of goods, but that if he sells them the mortgagee may take possession of them, and by the fact that while the mortgage is in existence the goods are in fact sold by the mortgagor in the ordinary course of business without applying the proceeds to the payment of the mortgage debt. That court has also repeatedly decided that, if any part of the mortgaged property consists of goods thus sold with the consent of the mortgagee, the entire mortgage is void in the face of an attack of creditors. *Wilson v. Voight*, 9 Colo. 614, 619, 13 Pac. 726; *Estes v. First Nat. Bank*, 15 Colo. App. 526, 537, 63 Pac. 788; *Harbison v. Tufts*, 1 Colo. App. 140, 143, 27 Pac. 1014; *Brasher v. Christophe*, 10 Colo. 284, 295, 296, 15 Pac. 403. Under these rules of law, the only question open for consideration in reference to the validity of this mortgage is whether or not the mortgagee consented to the sale by the mortgagor of the electrical fixtures and supplies, the rolled steel, and the other small amounts of merchandise which it sold in the ordinary course of business, without applying the proceeds to the payment of the mortgage debt. The referee and the district court found that such consent was given, that it was in the contemplation of both of the parties to the mortgage when it was made that the electrical supplies should be sold to customers in the usual course of trade, that the raw materials should be consumed in the manufacture of machines or sold to purchasing customers as opportunities presented themselves, and that there was no other way in which the mortgagor could use and enjoy these goods. If this question were presented here for the first time there might be room for the contention that the evidence does not conclusively show that the mortgagee contemplated or consented to this course of action. But in view of the testimony that the electrical supplies and fixtures were not necessary to, or useful in, the business of manufacturing, but were kept and sold as merchandise; that raw materials were so sold whenever a customer sought to buy them; that the mortgagee lived in the city where this property was situated, and occasionally visited the store from which these sales were made; and that he took no steps for many months nor until litigation was commenced to seize the property on account of the sales—this record does not

so clearly show that the referee and the court were mistaken in their finding that an appellate court should reverse it. Where the court below has considered a question and made a finding on conflicting evidence, its conclusion is presumptively correct, and it should not be disturbed unless it is reasonably clear that a serious mistake has been made in the consideration of the facts or an obvious error has intervened in the application of the law. *Stearns-Roger Mfg. Co. v. Brown*, 52 C. C. A. 559, 563, 114 Fed. 939, 943.

The argument of counsel for the appellant that the rule of law adopted by the Supreme Court of Colorado is inapplicable to this case because the mortgagor was a manufacturer, and not a merchant, has not been overlooked in reaching this conclusion. This argument has not prevailed, because, while the chief business of the mortgagor was that of manufacturing machinery, there is testimony that it was also engaged in the business of buying and selling finished goods, and because the courts of Colorado hold that if a mortgage is voidable as to any part of the property which it describes it is voidable as to all of it. If a mortgage of a soda fountain and certain goods and merchandise is voidable because there was a consent to the sale of the goods and merchandise, as in *Wilson v. Voight*, it is not perceived why a mortgage of machinery and of electrical supplies is not made voidable by a consent to the sale of the electrical supplies from day to day in the ordinary course of business.

The judgment below must be affirmed, and it is so ordered.

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COX et al. v. TERRE HAUTE & I. R. CO.

CENTRAL TRUST CO. OF NEW YORK v. TERRE HAUTE & I. R. CO.'S RECEIVER.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1904.)

No. 1,048.

1. RAILROAD—LEASE IN VIOLATION OF PUBLIC POLICY—RECOVERY OF RENTAL.

A lease of a railroad which is void as contrary to public policy cannot be the foundation of any recovery of rentals.

2. SAME—INSOLVENCY OF LESSEE—EQUITABLE LIEN FOR PRIOR RENTAL.

Where the lessee of a railroad operated the same without paying the rental therefor for a time prior to its being placed in the hands of a receiver in a suit to which the lessor was not a party, a claim for such rental cannot be established as an equitable lien upon a fund arising from the earnings of the road during the receivership, no part of the rental withheld by the lessee having come into the hands of the receiver.

3. SAME—RIGHTS OF MORTGAGEE—RECOVERY OF RENTAL FROM RECEIVER OF LESSEE.

Where the mortgagee of a railroad, entitled to possession by the terms of the mortgage on default, commenced a foreclosure suit after the road had passed into possession of a receiver appointed for a lessee which had possession of the road under a void lease, but made no application in its own suit for a receiver, nor demand for possession, but permitted the road to be operated by the lessee's receiver until its sale, receiving monthly reports which showed that it was operated at a loss, it

cannot assert an equitable claim for the rental value of the road during such time against a fund in the hands of the receiver arising from the operation of another line owned by the lessee.

Appeal from the Circuit Court of the United States for the District of Indiana.

On June 4, 1889, the Terre Haute & Indianapolis Railroad Company (hereinafter called the Terre Haute Company), which then owned and operated a line of railway from Indianapolis, Ind., westerly to the state line, and also, under leases, operated the lines of certain other railway companies, entered into a contract of lease with the Indiana & Lake Michigan Railway Company (hereinafter called the Lake Michigan Company), a consolidated corporation of Indiana and Michigan organized in 1889, to construct and operate a railroad between South Bend, Ind., and St. Joseph, Mich., a distance of about 40 miles. Contemporaneous therewith, and as part of the transaction, the Terre Haute Company acquired all of the stock of the Michigan Company, and the officers and directors of the latter were also officers and directors of the former company. The contract provided that the Lake Michigan Company should execute a mortgage upon its railway to secure \$480,000 of bonds, and with the proceeds of the sale of the bonds construct the road—the bonds to be guaranteed by the Terre Haute Company—and that upon completion the road should be turned over to the Terre Haute Company to be operated by it for the period of 99 years, the latter company to retain 75 per cent. of the gross receipts for its own use, and to appropriate the remaining 25 per cent. to the payment of taxes and the interest upon the bonded indebtedness stated, the surplus, if any, to be paid to the Lake Michigan Company. In the event of the insufficiency for the purposes stated of this 25 per cent. of the gross receipts, the Terre Haute Company agreed to advance the deficiency to the Lake Michigan Company by way of loan. In conformity with the agreement the Lake Michigan Company on September 2, 1889, executed its trust deed or mortgage to the Central Trust Company of New York, and to Josephus Collett, since deceased, as trustees, to secure \$480,000 of its bonds, and with the proceeds of these bonds constructed the road, and in 1890 delivered possession to the Terre Haute Company under the contract. The latter company operated the road continuously from that time until the appointment of a receiver in this cause, November 13, 1896. The Terre Haute Company complied with the terms of the contract until September 1, 1896, when it defaulted in the payment of the semiannual interest due at that date upon the bonds of the Lake Michigan Company. It has paid nothing by way of rental for the use of the road since March 1, 1896. The gross income of the road received by the Terre Haute Company from March 1, 1896, to November 13, 1896, was \$48,596.72, one-fourth of which amounts to \$12,149.18. The interest of the Lake Michigan Company's bonds for the same period is \$16,866.67. The operating expenses of that road paid by the Terre Haute Company during the same period were \$52,875.62, thus exceeding the gross income by \$4,278.90.

On October 1, 1892, the Terre Haute Company executed a somewhat similar lease with the Terre Haute & Peoria Railroad Company (hereinafter called the Peoria Company), which in 1893 was validated by an act of the Legislature of the state of Indiana. On October 30, 1896, Mark T. Cox and others, in behalf of the bondholders of the Peoria Company, filed their original bill in this cause, charging default by the Terre Haute Company under the lease with the Peoria Company; that for upwards of a year it had received and retained 30 per cent. of the gross earnings of that road, which, it was claimed, under the lease, belonged to the Peoria Company, and had mingled the moneys with its own funds. An injunction was sought from further misappropriation of the lease percentage of the Peoria earnings, and for specific performance of the contract, and that a receiver be appointed if that company should prove to be insolvent. The Terre Haute Company answered, admitting its insolvency; prayed for a receiver of its own road and of its leased lines. Thereupon, upon amendment of the bill, charging insolvency, a receiver was appointed, and in a similar proceeding in the federal court for the

Southern District of Illinois, a similar appointment was made for the Illinois property. No bill was filed or receiver appointed in any court of the state of Michigan with respect to that part of the Lake Michigan Road situated in that state. The order appointing the receiver directed the operation of all the lines of railway owned or leased by the Terre Haute Company; that the receiver keep separate accounts showing separately the gross earnings of each line of railway, whether owned or leased; that he set apart from the gross earnings of each leased line the percentage provided in the respective contracts of lease, to be rendered each lessor; that he deposit the amount in separate bank accounts; that no part of such percentage so set apart should be paid out or applied except on special order of the court; that, if the balance of the gross earnings of either of the leased lines should prove insufficient to meet operating expenses, the receiver should advance the deficiency out of the gross earnings of the main line owned by the Terre Haute Company, and, if they were insufficient therefor, he should apply to the court for instructions. In compliance with this order, on November 13, 1896, the Terre Haute Company surrendered to the receiver possession of all railways owned or leased by it. The Lake Michigan Road was thereafter operated by the receiver as part of the Terre Haute system until February 28, 1899. Neither the Lake Michigan Company nor the Central Trust Company were parties to that bill during the receiver's operation of the road.

On November 27, 1896, the appellant trustee filed its bill in the court below against the Lake Michigan Company and the Terre Haute Company for a foreclosure of its mortgage, and for enforcement of the guaranty by the Terre Haute Company of the bonded indebtedness. A similar proceeding was commenced in the United States Circuit Court for the Western District of Michigan. These bills pray for the appointment of a receiver, but no application therefor was made, and none was appointed. The Terre Haute Company answered, denying liability upon the ground that the contract of lease and the guaranty were ultra vires and void. On June 16, 1898, a final decree was rendered in the Indiana suit, and a few days later in the Michigan suit, foreclosing the mortgage and ordering a sale of the road, but also holding the guaranty of the bonds by the Terre Haute Company to be invalid. An appeal was taken by the Central Trust Company of New York from so much of the decree as exonerated the Terre Haute Company from its liability by reason of the guaranty. That decree was in all things affirmed by this court on January 2, 1900. 39 C. C. A. 220, 98 Fed. 666. The mortgaged property was sold December 8, 1898, for \$100,000, to a committee of the bondholders, leaving a deficiency of over \$450,000; and on January 13, 1899, the sale was confirmed, the amount of the deficiency decreed to be paid to the Central Trust Company, and deed directed to be executed and delivered.

On the same day an order was made in this suit directing the receiver to deliver possession of the road to the purchasers or their assigns, by which order it was provided "that neither this order, nor the surrender of possession by said receiver to said purchasers or their assigns, shall be construed to affect in any manner the fund now in the hands of the receiver, known as the 'Lake Michigan Fund,' and consisting of twenty-five per cent. of the gross earnings of said Indiana & Lake Michigan Railway while in the receiver's hands; but the court expressly reserves to itself the right to make further orders concerning said fund, and the said Central Trust Company of New York is now granted leave to file an intervening petition in this cause touching the disposition of said Lake Michigan fund now in the receiver's hands."

On February 28, 1899, pursuant to the order, the receiver surrendered possession of the Lake Michigan Railroad to the St. Joseph, South Bend & Southern Railroad Company, a corporation organized by the purchasing bondholders. On January 31, 1899, pursuant to the leave reserved, the appellant filed its intervening petition in this cause, praying to be paid by the receiver all of the Lake Michigan funds in his hands, being 25 per cent. of the gross earnings of the road throughout the receiver's possession; also the sum of \$12,149.18 for the use of the Lake Michigan Road by the Terre Haute Company from March 1, 1896, to November 13, 1896. This, it claimed, should be paid to it as trustee for the holders of the Lake Michigan Company bonds, and applied pro tanto to the unpaid portion of the bonds.



The gross earnings of the Lake Michigan Company's road during its possession by the receiver were \$153,753.43. He expended in operating the property \$160,101.10. The 25 per cent. of the gross earnings deposited by him, under the order, to the credit of the Lake Michigan fund, amounts to \$38,438.37, less paid, under order of court, for taxes on the property, \$4,424.56; leaving a balance in that fund of \$34,013.81. From March 1, 1896, to November 13, 1896, the gross income of the road, received by the Terre Haute Company, was \$48,596.72, and the operating expenses paid by that company were \$52,875.62. The main line owned by the Terre Haute Company was operated by the receiver at a profit, and he has in possession more than sufficient to pay the amount claimed for the use of the Lake Michigan Railway from March 1, 1896, to November 13, 1896. The deficiency in the earnings of the road was paid by the receiver out of the earnings of the line of road owned by the Terre Haute Company.

During the receiver's possession of the Lake Michigan Road, statements of the gross earnings, the operating expenses, and the amount of the Lake Michigan fund were furnished monthly to the chairman of the bondholders' committee of the Lake Michigan Road.

On May 23, 1903, upon final hearing, the intervening petition was dismissed for want of equity (C. C. 123 Fed. 439), from which decree this appeal is taken.

John S. Miller, for appellant.

John G. Williams, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge (after stating the facts as above). The agreement or lease was ultra vires the Terre Haute Company, was contrary to the public policy of the state of Indiana, and was void. *Central Trust Company v. Indiana & Lake Michigan Railroad Company*, 39 C. C. A. 220, 98 Fed. 666; *Central Transportation Company v. Pullman's Palace Car Company*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. Therefore no court should lend its assistance in any way to carry out the terms of this illegal contract, or to enforce any claimed rights directly springing therefrom. *Pullman's Palace Car Company v. Central Transportation Company*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. So far, therefore, as any claim here asserted is dependent upon this illegal and void contract, it cannot be approved. *East St. Louis Connecting Railway Company v. Jarvis*, 34 C. C. A. 639, 92 Fed. 735. One may recover property or money parted with on the faith of such a contract. *Pullman's Palace Car Company v. Central Transportation Company*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Gilbert v. American Surety Company*, 57 C. C. A. 619, 121 Fed. 499, 61 L. R. A. 253. But that question is not presented here, the property having been returned.

The petition here seeks to obtain a fund arising from setting apart the 25 per cent. of the gross earnings. This fund was tentatively set aside by the court and maintained intact to await the determination of the question of right. The appellant's claim thereto arises either under and because of the illegal contract, or because it may rightfully claim compensation out of the fund for the value of the use of the road during its possession by the Terre Haute Company or by its receiver. In the former case the claim cannot be sustained. "Ex turpi causa non

oritur actio." The claim in the latter case is to be looked at in two aspects: First, as a claim for the value of the use of the road from March 1, 1896, to November 13, 1896, during the time of its possession by the Terre Haute Company; second, for the value of the use of the road from November 13, 1896, when the receiver took possession, until February 28, 1899, when, under order of the court the receiver redelivered possession. With respect to the first: Assuming that the appellant, as trustee, may assert a claim for the value of this use, either by virtue of its mortgage, or of the decree adjudging payment to it of the deficiency upon the sale, there is one conclusive answer to the claim, namely, that the fund in court arose, not from the earnings of the road during that period, but represents gross earnings accruing subsequently to the latter date, and during its operation by the receiver. The appellant can have no equitable lien upon this fund for the misappropriation of moneys by the Terre Haute Company, no part of which has come to the receiver.

With respect to the second claim: By the mortgage the rents, issues, and profits of the railway were pledged to the appellant trustee as security for the payment of the bonds. This was coupled with a provision that, until default in payment of the interest and principal of the bonds, the Lake Michigan Company should remain in undisturbed possession and management of the road. The trustee is not entitled to the rents and profits of the mortgaged premises under such a provision until he takes actual possession, or until possession is taken in his behalf by a receiver, or until, in proper form, he demands and is refused possession. *Hook v. Bosworth*, 12 C. C. A. 208, 64 Fed. 443, and authorities cited. No step was taken by the Central Trust Company which would entitle it to the income of the road under this provision. There was default in the payment of interest by the Terre Haute Company on the 1st of September, 1896, and continuously thereafter. The Central Trust Company commenced foreclosure on November 27, 1896, praying, among other things, for a receiver, but at no time made application for one. On the 13th of November the railway passed into the possession of the receiver in this suit under the bill against the Terre Haute Company. From that time until February 28, 1899, when possession was surrendered by the court to the purchasing bondholders upon foreclosure of the trust deed to the Central Trust Company, no demand was made for the possession of the road, or any claim asserted for rentals. During all this period these bondholders received monthly statements from the receiver of the gross earnings and operating expenses of the road, which showed that during that period the operating expenses exceeded the income. Under these circumstances, knowing that this road was operated at a loss, it must be assumed that the Central Trust Company was content not to assume the burden of the operation of the road, but was content to allow that burden to rest upon the receiver of the Terre Haute Company. The court below would doubtless have directed delivery of possession, had it been demanded, because the Central Trust Company was entitled thereto. It cannot, therefore, now rightfully claim this fund for the use and occupation of the road upon the basis of its rental value, when the fund does not represent net

earnings from the operation of the road. *United States Trust Company v. Wabash Western Railway Company*, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085.

Nor can the Central Trust Company claim this fund as a trust fund appropriated to the payment of the interest upon the bonds, because such claim can only be spelled out through and under the provisions of an illegal contract. The fund was set apart from the gross earnings, that it might be kept intact to render to the parties entitled upon the determination of the validity of the agreement or lease. The railway having been operated at a loss, this fund does not represent profits, but in fact represents so much money received from the operation of the line owned by the *Terre Haute Company*. There is therefore no equity in appropriating this fund in execution of an illegal and forbidden agreement.

The decree is affirmed.

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**PLATTNER IMPLEMENT CO. v. INTERNATIONAL HARVESTER CO. OF AMERICA.**

(Circuit Court of Appeals, Eighth Circuit. November 11, 1904.)

No. 2,097.

**1. FACTOR'S LIEN IMPLIED BY LAW.**

A lien is implied by law, without any agreement between the parties, upon all the goods in the hands of a consignee, who is given the power to sell them, for the advances he makes for his consignor in conducting the business of his agency.

**2. PRACTICE—JUDGES OF CO-ORDINATE JURISDICTION SHOULD NOT OVERRULE EACH OTHER'S DECISIONS.**

The various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property and practice, except for the most cogent reasons.

**3. SAME—RULE INAPPLICABLE TO APPELLATE COURT.**

The foregoing rule is inapplicable to the appellate courts, whose duty it is to decide every question according to the law and the facts.

Nor does it deprive the aggrieved party of the right to review and reverse a ruling which follows an erroneous decision of another judge, but it leaves the case in the same situation in which it would have been if the judge who rendered the first decision had made the rulings which followed it.

**4. TRIAL—EVIDENCE—ERRONEOUS REJECTION—PRESENTATION OF ALL EVIDENCE NOT REQUISITE.**

The rejection of competent evidence to sustain a cause of action or defense, on the sole ground that no evidence in support of it is admissible is not less erroneous because all the evidence requisite to sustain the cause of action or demand was not presented.

**5. SAME—LITIGANT PROCURING RULING THAT NO EVIDENCE ADMISSIBLE MAY NOT SUSTAIN BECAUSE EVIDENCE INSUFFICIENT.**

One who has induced a court to exclude competent evidence of his opponent upon the sole ground that no evidence in support of the latter's claim is admissible may not sustain that ruling on the inconsistent ground that his opponent did not go through the useless form of offering to prove all the facts requisite to sustain his claim.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

R. D. Thompson (John M. Waldron, on the brief), for plaintiff in error.

Fred R. Wright (Charles D. Hayt, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. The facts material to the determination of this case are few and simple. The International Harvester Company, a corporation, brought an action of replevin against the Plattner Implement Company to recover the possession of certain agricultural implements and parts of implements. It alleged that it was the owner of this personal property, that it had demanded possession of it, and that the defendant retained it. By its answer the Plattner Company presented, among others, these three defenses: (1) That one of the mowers was sold and delivered by the harvester company, then its owner, to Nels Nelson, in October, 1902, and that the defendant had the possession of it for Nelson, and not for the plaintiff. (2) That the plaintiff obtained its title to all the property from the Plano Manufacturing Company, a corporation, in October, 1902; that the Plattner Company had received this property from the Plano Company as its commission sales agent; that at the request of the Plano Company it had advanced and paid on account of freight on goods thus delivered to it, while it was sole agent authorized to receive and to sell the property, \$5,306.54, and that it had a factor's lien upon the implements in its possession for this amount. (3) That the plaintiff was indebted to the Plattner Company in the sum of \$200 for storage of the goods, and that it had a lien upon them for this sum. A general demurrer was interposed to this answer, which was sustained by the resident district judge. In deciding the questions presented by the demurrer the judge expressed the opinion that, as there was no agreement between the parties to the effect that the defendant should have liens for the amounts it expended for freight and storage, none could be implied. After the order which sustained the demurrer was filed, the defendant made an amended answer, in which it pleaded its three defenses again. The plaintiff filed a reply to this answer. There was a trial before a jury and the district judge of another district, who was temporarily holding the court, and the latter judge instructed the jury to return a verdict for the defendant for the mower owned by Nelson, and for the plaintiff for the remainder of the property.

In the course of the trial one of the counsel for the defendant, for the purpose of proving its lien, inquired of a witness how much freight the defendant paid upon Plano machines in the years 1900 and 1901. An objection was made to this question upon the ground that the resident judge had decided on the hearing upon the demurrer that the defendant could acquire no lien for his advances for freight without an express agreement to that effect, and this

objection was sustained. Counsel for the defendant offered to prove the facts which they had pleaded regarding the alleged liens for freight and storage, but like objections to this evidence were interposed and sustained. These rulings are assigned as error.

The order which sustained the demurrer was erroneous (1) because the facts that Nelson's mower had been sold by the Harvester Company, its former owner, to him, and that it was held by the implement company for him, was a complete defense to the plaintiff's action to recover that machine, and (2) because a lien in favor of a factor is implied by law, without an express agreement between the parties, upon all the goods in the hands of a consignee who is given the power to sell them for the advances which he makes for his consignor in conducting the business of his agency. *Nagle v. McFeeters*, 97 N. Y. 196, 202; *Williams v. Tilt*, 36 N. Y. 319; *Kruger v. Wilcox*, 1 Ambler, 252, 254; *Green v. Farmer*, 4 Burr, 2214, 2218; *Lickbarrow v. Mason*, 6 East, 21, 28; 1 *Jones on Liens*, § 418.

The order sustaining the demurrer, however, has not been assigned as error for the obvious reason that the defendant waived its right to review the ruling it embodied by filing an amended answer, which again pleaded the three defenses which the decision sustaining the demurrer held to be unavailing. It is now contended that the ruling of the trial judge was right, because he was bound by the prior erroneous opinion of the resident judge upon the legal question whether or not a factor's lien may arise, without an agreement of the parties, on account of the rule announced in *Shreve v. Cheesman*, 69 Fed. 785, 791, 16 C. C. A. 413, 418. That rule is "that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice, except for the most cogent reasons." It is not unworthy of notice that the judge who tried the case below did not treat this rule as so imperative that he thought it necessary to follow it in the disposition of the defense relative to the Nelson mower, but he directed a judgment for the defendant upon that defense, although the resident judge had previously sustained a demurrer to it as decisively as to the defenses founded upon the alleged liens. On the other hand, he followed the rule in *Shreve v. Cheesman* in the trial of the latter defenses, and refused to receive any evidence in support of them. This course of proceeding is undoubtedly explained by the fact that no objection was made to the evidence in support of the former defense, while objections were persistently urged to testimony which tended to sustain the latter. The rule in *Shreve v. Cheesman* is a rule of comity and of necessity. For obvious reasons it applies with especial force to decisions which constitute rules of property and of practice, and by its terms it permits the "most cogent reasons," such as a certainty that a previous ruling was erroneous, that no conflict would arise and no injustice would result from disregarding it, to present exceptions to it. But the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respecta-

ble administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed. The reasons for it and the authorities in its support were stated at some length in the opinion in *Shreve v. Cheesman*, and the judge who tried this case did not render himself obnoxious to any just criticism because he followed and applied it.

The rule, however, prevails only among judges of co-ordinate jurisdiction. It has no application in an appellate court, whose duty it is to review the decisions of the questions of law which were rendered by the inferior courts, and to decide them according to the law and the facts. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 490, 20 Sup. Ct. 708, 44 L. Ed. 856. Nor does this rule deprive the party aggrieved of his right to review a wrong ruling because it is a repetition by a judge of co-ordinate jurisdiction of a previous erroneous decision of another judge in the same case. The effect of the rule in such a case is to leave the litigants in exactly the same situation in which they would have been if the judge who rendered the first decision had also made the rulings which followed it. In the case at bar its effect is to leave the plaintiff in error the same right to review and reverse the rulings of the judge who tried the case that it would have had if the action had been tried, and if those rulings had been made by the judge who sustained the demurrer to the answer. The ruling which excluded the evidence of the liens claimed by the Plattner Company was erroneous and prejudicial. It was subject to objection, exception, and review, and it necessitates another trial of this case.

The contention of counsel for the Harvester Company that the ruling of the trial judge which has been discussed is not available to reverse the judgment, because there was evidence on the part of the plaintiff that the defendant made no claim of the liens, and that it therefore waived them when the International Company demanded the goods and the Plattner Company offered no proof to the contrary is not tenable. The testimony which the defendant offered to sustain its liens was competent and material for that purpose. The plaintiff objected to it on the ground, not that the Plattner Company did not prove or offer to prove that it had not waived its liens, but that no evidence whatever in support of its claims for the liens was admissible, and the court sustained that objection. It is no answer to a challenge of the rejection of competent evidence to sustain a cause of action or defense upon the ground that no evidence is admissible in support of it that all the evidence requisite to establish it was not presented or rejected. *Peck v.*

Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; *Shepherd v. Baltimore, etc., Railroad Co.*, 130 U. S. 426, 434, 9 Sup. Ct. 598, 32 L. Ed. 970. Moreover, the ruling of the court below that no evidence in support of the alleged liens was admissible was procured by the plaintiff, and that ruling prevented the defendant from proving, and probably induced it to omit to offer to prove, that it had not waived its liens. A litigant may not defeat his opponent because the latter has omitted to do that which the former has made it impossible or futile for him to perform.

The judgment below must be reversed, and a new trial granted, and it is so ordered.

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UNITED STATES v. ROSSI et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,039.

1. PUBLIC MINERAL LANDS—RIGHT TO CUT TIMBER—EVIDENCE OF MINERAL CHARACTER.

In an action by the United States to recover for timber cut from public lands, where the defense was that the cutting was justified under Act June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], permitting the cutting of timber from mineral lands for certain purposes, evidence was properly admitted to show the mineral character of other lands in the same vicinity, as well as of those from which the timber was taken, as tending to show the extent of the mineral district.

2. APPEAL—REVIEW OF INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.

A general exception to the charge given by the court to the jury, which does not conform to rule 10 of the Circuit Court of Appeals (90 Fed. cxlv, 31 C. C. A. cxlv), cannot be considered on appeal if any part of the charge states the law correctly.

3. PUBLIC MINERAL LANDS—RIGHT TO CUT TIMBER—DEPARTMENT REGULATIONS.

Under Act June 3, 1878, c. 150, § 1, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], which authorizes all citizens and other persons bona fide residents of certain states and territories and all other mineral districts to cut and remove timber from mineral lands for building, agricultural, mining, or other domestic purposes, the fact that timber so cut is manufactured into lumber and sold as an article of merchandise, to be used in the state where it is cut, does not render such cutting unlawful, nor can it be made so by a regulation of the Secretary of the Interior, promulgated under the power given him by the act to prescribe rules and regulations "for the protection of the timber and of the undergrowth growing upon said lands and for other purposes," such rules and regulations being intended merely to furnish detailed instructions as to the manner of taking the timber to prevent waste and unnecessary destruction.

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

This was an action brought by the United States in the United States Circuit Court for the District of Idaho to recover the sum of \$155,760, the alleged value of 7,778,000 feet of lumber claimed by the United States to have been unlawfully cut from the public domain by the defendants in error in the years 1899, 1900, 1901, 1902, and 1903, manufactured by them into lumber, and converted to their own use. Judgment is also asked for the sum of \$136, expended in the investigation of the trespass. The defendants in error admitted that they were carrying on business in the vicinity of Boise, Idaho, as

manufacturers and dealers in lumber, during the years mentioned, and that they did enter upon the lands described in the complaint, belonging to the United States, and cut timber therefrom. But they alleged, in justification of their action, that the land from which the timber was cut and taken was mineral land, not subject to entry for other purposes under the laws of the United States; that the lumber manufactured therefrom was sold for domestic, agricultural, mining, and building uses in the vicinity of Boise City, and within the general district and state wherein the timber was cut; that no portion thereof was exported from the state; that in the cutting and removing of the timber in question full compliance had been made with the rules and regulations of the Secretary of the Interior then in force; that because of the above-mentioned facts the defendants in error were licensed and privileged to cut and remove the timber in question by the act of Congress of June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], entitled "An act entitling the citizens of Colorado, Nevada, and the territories to fell and remove timber on the public lands for mining and domestic purposes." A verdict was rendered for the defendants in error, and judgment entered thereon. The United States brings the case to this court upon writ of error.

Marsden C. Burch and R. V. Cozier, U. S. Attys.

Fremont Wood and W. E. Borah, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). The assignments of error relate to the action of the trial court in three particulars, mainly: (1) In admitting certain evidence as to the character of the land in question; (2) error in instructing the jury; and (3) in refusing to give certain instructions requested by the United States Attorney. The evidence objected to consisted of the testimony of one W. C. Tatro to the effect that between the years 1870 and 1882 he furnished supplies to miners along Fifer creek, one of the locations mentioned in the complaint from which timber was cut; also certified copies of mining locations on another of the creeks specified in the complaint, filed in 1899, 1900, 1901, and 1903, and assay certificates of rock taken from land a mile and a half distant from the land upon which the timber in question was cut. It is argued that this testimony concerned land too far distant from the land in suit to be material. The court admitted it as showing the extent of the mineral district, and permitted a full examination as to the value of the mineral deposit in that region, how long mining had continued, etc., giving an opportunity to thoroughly inform the jury as to the relative value of the land for mineral or timber. We find nothing prejudicial in the admission of this testimony.

The next objection is to the instruction of the court as to what constituted mineral land and what constituted nonmineral land under the act of Congress of June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528]. The instructions covered a number of legal propositions involved in these questions. The instructions were as follows:

"Shortly after the passage of the law (Act June 3, 1878), when the circumstances under which it was enacted and when the objects which Congress had in view were better understood than now, Secretary of the Interior Teller, who was familiar with the entire subject, in 1882, in his instructions, said: 'Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but when there are extensive



valleys, plains, or mountain ranges and no known mineral exists the land may be considered and treated as nonmineral.' The views of the present secretary, as I understand from his rules issued July 18, 1900, are that the use of timber must be limited to that ground only which can be entered as mining ground under the existing mining laws; that is, to such as is located, or can be, as mining claims. I therefore instruct you that the law includes as mineral lands not only those tracts in which mineral has actually been discovered, and which has been or can be legally located as mining locations, but also all other lands lying in reasonably close proximity to, or in the general neighborhood of, such tracts, and all such neighboring lands as have the general characteristics of mining lands, even if mineral has not been actually discovered therein. In this connection you must bear in mind that, as a rule, the land in a mineral district and in the neighborhood of mines is of such hilly, broken character that it is utterly useless for agricultural or other purposes than mining and for the timber growing upon it, and, as Congress is presumed to have known this fact, it is presumable that it intended to include all such lands under the designation of mineral lands, and with a view of granting the use of the timber thereon, as stated.

"Much has been said as to the quantity of mineral that must be found in ground to constitute it mineral land. The laws themselves fix no limits. They do not even say that it must be more valuable for mineral than for other purposes. It is therefore a subject for conjecture; one upon which opinions may and do differ. But I feel justified in saying to you that ground containing only a trace of mineral—a color—or containing it in such small quantities that a miner would not expect it ever to prove profitable, cannot be held mineral land; but when it contains sufficient to encourage the miner to claim and locate it in good faith as mining ground, and to work and develop it in the reasonable expectation of finding paying quantities, even if it never proves valuable, it is, within the law, mineral land. The question may arise, how are we to know the miners' opinions on these questions? My answer is, by his actions; by what he does, whether or not he located the ground and continues to occupy it and develop it. I may add in this connection that an occasional location here and there over a country, which is not developed and not worked, is not such evidence as constitutes the entire country a mineral district; but the mining operations carried on must be such as to indicate that those who do locate claims and who carry on the work have faith in the country. I mean by that that you cannot make the mere appearance of mineral in a country the excuse for claiming the whole country to be mineral. There must be something substantial back of it in order to justify the claim that a country is mineral. Now, in this particular case you must judge of the country by what has been produced there, by what has been done, and from all that conclude whether or not the men who are engaged in mining in good faith look upon that as a mineral country. I do not know any better rule or test than the judgment of men who are engaged in mining. If that class of men deem a country a mineral country, and show it by their acts and works, it justifies us in concluding that it is a mineral country; and in this case you must reach your own conclusions from the testimony placed before you, showing how the country has been considered, how it has been operated, and by what has been done in it."

The objection to these instructions is based upon the following exception:

"To each and all of these instructions given by the court to the jury the counsel for the plaintiff fully excepted, which exceptions were by the court allowed."

Rule 10 of this court (90 Fed. cxlv, 31 C. C. A. cxlv) provides that:

"The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

We think the general exception taken by counsel for the plaintiff to the charge of the court in this case cannot be considered if any part of the charge states the law correctly. The exception should have pointed out to the court the precise part of the charge that was objected to. The charge, as a whole, is substantially in accord with the views of this court as expressed in the case of the *United States v. Basic Co.*, 121 Fed. 504, 57 C. C. A. 624.

The remaining assignments of error relate to the refusal of the court to instruct the jury that the defendants in error acted unlawfully in cutting and removing the timber and manufacturing the same into lumber for the purpose of sale and traffic out of the district where cut, in that such acts were in violation of the rules and regulations of the Secretary of the Interior. The act of June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], provides, in section 1 thereof, that:

"All citizens of the United States and other persons bona fide residents of the state of Colorado or Nevada or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other domestic purposes any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry in either of said states, territories, or other districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon said lands and for other purposes: provided, that the provisions of this act are not to extend to railway corporations."

This act was passed, according to the views of Secretary Teller, of the Interior Department, expressed in 1 L. D. 607, to establish by positive enactment a right claimed and exercised by lumbermen for a period of about 30 years without interference on the part of the government—the right to appropriate the timber on government lands, manufacture it into lumber, and furnish it to the millmen, the miners, the farmers, and other inhabitants of the district who could not or did not wish to do the actual cutting and manufacturing for themselves individually. He further said:

"The great object of the governmental supervision of the cutting of timber in those states and territories ought not to be to compel payment for timber so cut, but to prevent unnecessary waste, the cutting of the small trees under the size prescribed by the department, and to prevent waste by fires and other means."

The rules and regulations of the Secretary of the Interior in force until February 15, 1900, were in accord with these views, permitting owners of sawmills to cut the timber and manufacture it into lumber for sale, under the requirement that it be sold to citizens of the state or territory wherein it was growing, and for "building, agricultural, mining, and other domestic purposes." The intention of Congress in enacting this law was to enable settlers in the regions where timber is scarce to utilize it for domestic and mining purposes, and especially to develop the mineral resources of the rough, mountainous districts, where agricultural pursuits could not be profitably followed. Whether or not this policy should be continued to permit the carrying on of an extensive business in the manufacture and sale of lumber, not only to

the miners, but for all the uses of the cities which may grow up by reason of the mining industry, and without compensation to the government for the timber required for such purposes, may reasonably be questioned. But until Congress closes the door which was so widely opened by the passage of this act, or limits its benefits to some specified amount or degree, the courts must continue to give effect to its provisions.

It is true that the rules and regulations of the Secretary of the Interior now in force, and which have been in operation since February 15, 1900, declare, in rule 5, that:

"No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations."

Section 4 reads:

"The uses for which timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'"

And it is contended by the plaintiff in error that rule 5 is made an integral part of the act by the wording of section 1 thereof, and that the defendants in error have acted unlawfully in removing timber for purposes of sale and manufacturing it into lumber as an article of merchandise, in direct violation of this rule. To uphold this contention would, in effect, permit a modification and alteration of an act of Congress by a department charged merely with the execution of the law in question. The rules and regulations provided by the act to be prescribed by the Secretary of the Interior were intended merely to furnish detailed instructions as to the manner of taking the timber, to prevent waste and unnecessary destruction. The land from which the timber might be taken, the objects for which it might be used, and the persons entitled to take it, were designated by Congress in the act itself. If the working out of this law has not conferred the public benefits intended, but resulted inimicably to the government, the remedy lies with the legislative branch of the government, the power that made the law originally, and not with the executive branch, or the judicial.

We find no error in the action of the court below. The judgment is affirmed.

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HAROLD v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1904.)

No. 1,327.

**1. TRIAL—DIRECTION OF VERDICT—INSUFFICIENCY OF PETITION.**

A court is not warranted in directing a verdict on motion of defendant, after answer filed joining issue on the facts, on the ground of the insufficiency of the petition, unless it is so absolutely defective that no judgment could properly be entered on a verdict for plaintiff.

**2. SAME.**

A petition alleged that plaintiff was a passenger on an excursion train on defendant's railroad; that in the train was a combination car, one-half of which was a baggage room without seats, having a door at the end,

but no platform; that on the return trip such car was placed in the train, with the baggage room toward the rear next the second car; that it was after dark, and plaintiff, who was in such car, on account of its being crowded and warm went to the rear door, which was open, and, while standing there, was caused by the motion of the car to step forward through the door, and fell between the cars, receiving serious injuries; that owing to the darkness plaintiff could not see that there was no platform. Negligence was alleged in the use of such car, in the manner in which the train was made up, and in not using some means to protect passengers from the danger. *Held*, that such petition presented issues for the jury, and that it was error for the court at the trial to direct a verdict for defendant on motion, on the ground of its insufficiency, after defendant had answered, but before the taking of testimony.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Musser & Kohler and Young & Wanamaker, for plaintiff in error.

Arrel, McVey & Taylor and Allen, Waters & Andress, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in error was the plaintiff below. He brought the suit to recover damages sustained by him while riding as a passenger on an excursion train of the defendant, on the return trip of the train, which had left Akron, Ohio, on the morning of August 16, 1902, and run to Sandusky, where the passengers left the train and went by boat to Cedar Point, where, during the day, they had a picnic.

The plaintiff purchased a round-trip ticket at Akron before starting. There were a large number of passengers on the train, which ran in two sections of eight cars each, much crowded. Late in the afternoon the passengers, the plaintiff among them, returned to Sandusky, and took the train on its starting to return to Akron. The first section of the train had already gone when the plaintiff came to the station, and the second section was about to go. The car which the plaintiff took was a combination car, having in one end a smoking room with seats, and in the other end a baggage room which had no seats. This car had a platform at the end containing the smoking room; at the other end it had none, but there was a door in it. In the morning, on the outgoing trip, the end without a platform was next the engine; on the return its position was reversed, the end having the platform being next the engine, and the end having none being connected with a passenger car next in the train. The plaintiff went aboard this combination car by the platform at the end of the smoking room, which he found already full of passengers, some standing up. After standing for a while, he went into the baggage room where were a large number of passengers, and where he sat down for a time on a basket. The room became hot and close, and the plaintiff went to the rear door for air. The door was standing open. There was no light between this car and the next, and the one in the baggage room was so dim and poor that the plaintiff could not see the condition of things where he was. It had become nighttime before

the train reached Chicago Junction, a station on the route. As they were nearing that place the car in which the plaintiff was made a sudden lurch, which caused the plaintiff to step forward beyond the end of the car. There being no platform there, he went down through the open space between the cars, and sustained injuries which resulted in the loss of one of his legs and the two first fingers of one hand.

In his petition the plaintiff charges the defendant with negligence "in using said baggage compartment for the carriage of passengers, and in not furnishing plaintiff with a suitable, proper, and safe place in which to ride; and also in using said car with the baggage end at the rear next to the following coach, so that an open space was left between said cars, as aforesaid, through which passengers on said train were liable to fall and be injured; and also in not furnishing and providing some suitable and proper device or means to prevent persons not knowing of said open space from falling between said cars onto the track of said railroad and thereby suffering injury"; and he says he was without any fault whatever contributing to his injury. Before the commencement of the trial the plaintiff was allowed to amend his declaration, and it then stated the facts to be substantially as above narrated. The answer admitted the plaintiff had been injured, but denied all other material allegations of the petition, and set up the defense of contributory negligence on the part of the plaintiff.

The case proceeded to trial. The plaintiff's counsel made an opening statement of the facts he expected to prove, which were, in substance, those stated in the petition, except that he said that the car "swayed slightly," instead of making a "sudden lurch," as alleged in the petition. Before taking evidence the defendant's counsel moved the court to direct the jury to find a verdict for the defendant upon the case as stated in the pleading and by counsel, stating the purpose of the motion to be to "raise now the question of law as to whether there is any case stated in this amended petition against the defendant company that entitles the plaintiff to a verdict." Upon argument, the bill of exceptions states, "It being admitted to the court by counsel for the plaintiff that the 'sudden lurch' of said car, mentioned in the third paragraph of plaintiff's amended petition as causing the plaintiff to step forward and to fall between the cars through said open space, was not a negligent act on the part of said defendant, and that no claim was made by plaintiff that such act was negligence or negligently caused by defendant," the court sustained the motion. The plaintiff moved to amend his petition so as to state that the plaintiff, supposing there was a platform there, and because the room was hot and close, stepped through the door, which stood open, instead of alleging that he was thrown forward by a "sudden lurch" of the car. This motion was refused. The court directed the jury to find a verdict for defendant, which was done. The record does not very clearly advise us of the particular ground of the court's ruling. But the fair inference is that the court thought that upon the allegation of the petition the "sudden lurch" was the proximate

cause of the plaintiff's injury, and, as that was admitted not to have been negligently caused, the ground of action had fallen out, and there was nothing further for the jury to consider.

We think the court was in error. The petition did not allege the lurching of the car was caused by any negligence of the defendant, and amounts to nothing more than the statement of what is frequently experienced by those traveling on railways. It was a mere incident of the means by which the plaintiff was brought into the place of danger where he suffered the injury. The ultimate causation was in the negligent organization of the train, supposing it to have been negligent, to which all the other factors in the situation led up. We are not to be understood as expressing any opinion as to whether there was negligence on the part of the defendant in the use of this car in the connection in which it was placed or in any other respect. That is a question for a jury. The proper way to raise the question of the sufficiency of a petition is by a demurrer, and while the course pursued here might be permissible in a case where it is perfectly clear that the petition is so defective that no judgment could properly be entered upon a verdict for the plaintiff, and so the trial would be a waste of time, we do not think this petition so absolutely defective as to warrant that practice. By answering the petition the defendant had lost its right to interpose a demurrer, and it would be anomalous if it could, after issue joined, revert to its former position. Said Judge Campbell, in *Jackson v. Collins*, 39 Mich. 557, 560: "When issue is joined on the facts, the declaration cannot be held fatally defective, unless inconsistent with any reasonable ground of action."

Having regard to the duty of the carrier to provide a proper place for its passengers, the crowded and uncomfortable conditions to which the plaintiff was subjected, and the leaving open the door at the rear end of the car without a light there, we think the question whether the plaintiff was guilty of contributory negligence was also one for the jury. For these reasons, we are constrained to think the court erred in sustaining the motion of the defendant and directing a verdict and judgment against the plaintiff.

The judgment will be reversed, with costs. A new trial should be awarded, and the court below is authorized to permit the plaintiff to amend his petition if he is so advised.

## In re ALLEN B. WRISLEY CO.\*

(Circuit Court of Appeals, Seventh Circuit. October 5, 1904.)

No. 1,056.

**1. BANKRUPTCY—COMPOSITION—PETITION TO SET ASIDE.**

Leave to file a petition to set aside the confirmation of a composition in bankruptcy should be refused only when the petition on its face shows that, upon the facts stated, the petitioner cannot under any circumstances be entitled to relief.

**2. SAME—PARTIES IN INTEREST—ASSIGNMENT OF CLAIM.**

A creditor of a bankrupt, who has assigned his claim, receiving a consideration therefor, is no longer a "party in interest" who can maintain a petition to set aside the confirmation of a composition subsequently entered, although the assignment was obtained through the fraud and misrepresentation of the trustee and bankrupt, whatever may be his right to proceed against them.

**3. SAME—MISCONDUCT OF TRUSTEE.**

A trustee in bankruptcy holds a fiduciary relation to creditors, and should not be interested in any scheme of composition. His joining with the bankrupt to effect a composition to the detriment of creditors by means of false representations as to the assets is ground for his removal, and for setting aside the composition.

Grosscup, Circuit Judge, dissenting.

In Bankruptcy. Petition to Review an Order of the District Court of the United States for the Northern District of Illinois, Sitting in Bankruptcy.

Subsequently to the adjudication in bankruptcy, and the appointment of the Chicago Title & Trust Company as receiver, and thereafter as trustee, on September 21, 1903, a composition with creditors accepted by a majority in number holding allowed claims, including the Central Commercial Company, the appellant, was confirmed by the court. On December 30, 1903, the appellant applied for leave to file its petition to vacate the order confirming the composition, to remove the trustee, and for further proceedings in the administration of the estate of the bankrupt. Leave to file this petition was denied, and thereupon a review of such order is sought in this court.

The petition to vacate the confirmation of the composition sets forth that the trustee and the bankrupt, with a view to defraud the latter's creditors, corruptly agreed that the trustee should furnish the money to settle with creditors; that the trustee, pursuant to that arrangement, purchased a large number of the claims of the creditors; that one Stone, the authorized agent of the trustee and of the bankrupt, offered the petitioner 40 per cent. of its claim if it would accept and consent to a composition at that rate, representing that the trustee was not furnishing the money for the settlement; that the assets upon sale in the bankruptcy proceedings would not net the creditors 40 per cent. of their claims; that no creditors had received more than that percentage, and would be paid no more; that, relying upon such representations, the petitioner accepted the composition, "and at the request of said Stone, on the representation that it was necessary in order to carry through said composition on the basis of forty per cent., your petitioner executed an assignment in blank of its claim, and an acceptance of said forty per cent. composition, and a waiver of any checks due it in any other manner by reason of the confirming of said composition"; that all such representations were false; that the trustee advanced large sums of money to effect the composition and to purchase claims; that unsecured creditors, three of whom are specified, have received more than 40 per cent. of their unsecured claims, and

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\*Rehearing denied November 22, 1904.

that, if the assets had been sold, the creditors of the bankrupt would have received more than 40 per cent. of their claims; that such assets, as shown by the report of the receiver, filed subsequently to the confirmation of the composition, amount to nearly \$274,000, and the liabilities do not exceed \$234,000; that the assets exceed in value the total indebtedness; that upon confirmation of the composition the bankrupt transferred to the trustee all of its property, and the trustee now conducts the business, employing the president of the bankrupt company as manager; and that the falsity of the representations came to the knowledge of the petitioner subsequently to the confirmation of the composition.

Lewis W. Parker, for petitioner.

S. O. Levinson, for respondent.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. Whether the order under review is correct depends upon the question whether the petition presents a case availing to vacate the confirmation of the composition. *Dumont v. Des Moines Valley Railroad Company*, 131 U. S. clx., 25 L. Ed. 520. It does not, however, follow that filing of the petition should have been refused, if it be essential that all creditors assenting to the composition should be made parties and cited to answer, upon the ground that, upon the vacation of the order confirming the composition, such creditors must repay the money they had received, and incur the risk of obtaining a less sum from the trustee, under the ruling in *Marshall Field & Company v. Wolfe Dry Goods Company*, 57 C. C. A. 326, 120 Fed. 816—a question upon which we express no opinion. Failure to make such creditors parties might be ground for special demurrer; but the petition in that respect is amendable, and all proper parties could have been brought in. It is only, we take it, when the petition upon its face shows that, upon the facts asserted, the petitioner cannot under any circumstances be entitled to relief, that filing should be refused.

We are constrained to the conclusion that it is shown by the petition that the petitioner is not entitled to the relief sought. The confirmation of the composition can only be set aside "upon the application of parties in interest." Act July 1, 1898, 30 Stat. 550, c. 541, § 13 [U. S. Comp. St. 1901, p. 3427]. The petition shows that the petitioner assigned his claim, receiving therefor 40 per cent. of the amount. It is true that it is alleged that this was done upon the representation that it was necessary in order to carry through the composition. The law does not so provide. The petitioner was bound to know the law, and had no right to rely upon such representation. By the assignment, and so long as it stands effective, the petitioner was divested of all interest in the claim and in the estate of the bankrupt. The consideration was paid to and received by the petitioner at the date of the assignment. If the confirmation of the composition had failed, and creditors had received less than the amount offered, the petitioner would not be obliged to refund the excess received over the amount the estate should realize. The risk of loss was borne by the purchaser of the claim. We do not say that the petitioner may not have a right of action against the trustee for the damages sustained by reason of asserted false representation, but we hold that, having parted with all title to his claim, the petitioner is not in a position to assail the composition.



While we are thus constrained to hold, we cannot permit that silence with respect to the alleged doings of the trustee should be construed as in any sense condonation of the conduct complained of. A trustee in bankruptcy is an officer of the court, chosen by vote of the creditors. He stands to creditors in a fiduciary relation. He holds the estate in trust primarily for creditors; secondarily, if there be a surplus, for the benefit of the bankrupt. He should have no interest to serve except to conserve the estate. He should not be interested in any scheme of composition. In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed from the trust to which he has been false. If the facts stated in this petition be true—but for the fact that the petitioner had disposed of all interest in his claim—we should not hesitate to annul the composition.

GROSSCUP, Circuit Judge (dissenting). To my mind, in a case such as presented by this petition, the court should have allowed the petition to have been filed; and, the facts being established by the proofs, have entered an order, without prejudice to the composition, so far as it affected creditors not joining in the petition, and without prejudice to the creditors joining in the petition, so far as the composition was an executed matter, requiring the bankrupt and the trustee, the wrong doers, to account for any advantage obtained by them through the wrong perpetrated. Had the purchaser of the bankrupt's assets been an innocent third party, the petition might be unavailing. But the composition money came, not from an innocent third person, but from the trustee. A trustee cannot be allowed thus either to help himself or his cestui que trust; and as to him there cannot be applied the considerations that in the case of an innocent purchaser, would preclude the opening up of the matter. I think that the majority opinion, while recognizing clearly the fraud on the bankruptcy law that the facts averred disclose, fails to recognize the power in the possession of a court of equity to circumvent such fraud by requiring the wrong doer to surrender up the advantages of the fraud.

The order is affirmed.

## CHEUNG HIM NIN v. UNITED STATES.

CHIN CHEW FONG v. SAME.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,020.

## 1. CHINESE EXCLUSION—PERSON ENTERING ON MERCHANT'S CERTIFICATE—CHANGE OF OCCUPATION.

A Chinese person entering the United States on a merchant's certificate obtained in accordance with section 6 of Act May 6, 1882, c. 126, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307], is subject to deportation, as being unlawfully in this country, where it is shown that, after being in business as a merchant for 15 months after his arrival, he became a laborer, and has remained such ever since—a space of several years.

Appeal from the District Court of the United States for the Northern District of California.

See 129 Fed. 585.

Henry C. Dibble & Dibble, for appellant.

Duncan E. McKinlay, Asst. U. S. Atty., and Marshall B. Woodworth, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was arrested upon a warrant issued by Commissioner E. H. Heacock upon a complaint charging the appellant with being a Chinese manual laborer within the limits of the Northern District of California, without the certificate of residence required by the act of Congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and the act amendatory thereof approved November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], and the act of Congress approved April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1903, p. 188].

The following proceedings took place before the Commissioner upon the hearing:

"Cheung Him Nin, the defendant, sworn. The Commissioner: Q. Where were you born? A. In China. Q. When did you first come to the United States? A. In the twenty-third year of Kwong Sue. Q. You brought a Section Six merchant's certificate? A. Yes, sir. Q. What have you been doing in the United States since you arrived? A. I did business for fifteen months. Q. Here? A. On Dupont street—Quong Wah Lee. Q. What number on Dupont street? A. I don't remember the number. Q. Do you remember that firm? A. Yes, sir. Q. Did you have an interest in it? A. My uncle had an interest there. Q. Did you have an interest in the firm? A. My uncle gave me money to enter there. Q. How much money did he give you to enter there? A. One thousand. Q. Did you have a thousand dollars interest in that firm? The Commissioner: Mr. interpreter, caution him to tell me the truth. If he tells me a lie, he may be prosecuted for perjury. A. I am not telling any lies. Q. Did your name appear on the partnership list of that firm? A. I don't know whether there is any in the customs or not. Q. Did your name

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.

appear on the partnership list of the books of the firm in the store? A. My uncle's name is on the books, but he gave that to me to do. Q. Is your name on the books of the firm? That is what I am asking you. Answer my question. A. They put my uncle's name down, and then my uncle transferred it to me. The Interpreter: I said, 'Is your name down?' and he says, 'Yes.' The Commissioner: Q. Your name is on the partnership list, is it? A. Yes, sir. Q. When did you enter that firm—how soon after you arrived in the United States? A. In the twelfth month. Q. Of what year? A. In the twenty-third year. Q. And you continued for fifteen months? A. Yes, sir. Q. Then what did you do? A. I went to farming. Q. And you have been a laborer ever since? A. Yes, sir. Q. Why did you quit the firm? A. My uncle went back to China, and then I did not do anything any more. Q. Your uncle took the capital with him, did he? A. Yes, sir. Q. Were you examined on the 25th day of September by the officers of the Chinese bureau? Mr. Stidger: We admit he was, and made those statements. The Commissioner: It is admitted that he made those statements contained in the paper. I will order the defendant deported; he being a laborer, and not entitled to remain in the United States."

The case was thereupon appealed to the District Court, when the following proceedings were had:

"This case, on appeal from the judgment of deportation by United States Commissioner Heacock, this day came on regularly for hearing, and by agreement of Benjamin L. McKinley, assistant United States attorney, and Oliver Dibble, attorney for the defendant, was submitted to the court upon the record, and without argument, for decision. After due consideration had thereon, it is by the court ordered that the said judgment of deportation be, and the same is, hereby affirmed."

The assignment of errors raises the same question as that in the preceding case of Chin Chew Fong; the only difference being that in the present case the appellant testifies that he did business for 15 months, and then went to farming. We think the commissioner was justified in his conclusion that the appellant was a laborer, within the meaning of the exclusion act, and that he was unlawfully in the United States.

The judgment of the District Court is affirmed

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### CHEUNG PANG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1904.)

No. 1,059.

#### 1. CHINESE EXCLUSION—MERCHANT'S CERTIFICATE—SUFFICIENCY.

A merchant's certificate issued to a Chinese person under section 6 of Act May 6, 1882, c. 126, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307], but which does not conform to the requirements of said section by stating the estimated value of his business carried on in China, nor fully establish his status as a merchant, does not entitle him to enter the United States, nor to remain after his entry has been permitted.

Appeal from the District Court of the United States for the Northern District of California.

¶ 1. Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. Same*, 35 C. C. A. 332.

Henry C. Dibble & Dibble, for appellant.

Marshall B. Woodworth, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was arrested upon a warrant issued by Commissioner E. H. Heacock, upon a complaint charging the appellant with being a Chinese manual laborer within the limits of the Northern District of California, without the certificate of residence required by the act of Congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]), and the act amendatory thereof approved November 3, 1893 (28 Stat. 7, c. 14 [U. S. Comp. St. 1901, p. 1319]), and the act of Congress approved April 29, 1902 (32 Stat. 176, c. 641 [U. S. Comp. St. Supp. 1903, p. 188]).

It appears from the evidence that the appellant came to the United States in 1898, and was permitted to enter this country as a merchant, under the provisions of the treaty between the United States and China, upon the production of a certificate issued in pursuance of the provisions of said treaty and the acts of Congress relating thereto. Upon examination of this certificate, the commissioner found that it was not in conformity with such acts of Congress, in that it did not state the estimated value of the business carried on by the appellant in China prior to and at the time of his application, and that his status as a merchant was not fully established, he being designated in the certificate as "Assistant Accountant in Kwong Yu Wing Shop, No. 47 Bonham Strand, Hong Kong"; that the appellant was therefore unlawfully in this country, and should be deported. An appeal from this decision was taken to the District Court of the United States, and the judgment of the commissioner was there affirmed.

We are of the opinion that the said certificate did not entitle the appellant to enter the United States as a merchant, nor to remain in the United States after having been permitted to land. *United States v. Pin Kwan*, 100 Fed. 609, 40 C. C. A. 618.

The judgment of the District Court is affirmed.

## WRIGHT et al. v. FITZ BROS. CO.

(Circuit Court of Appeals, First Circuit. November 18, 1904.)

No. 517.

## 1. PATENTS—INFRINGEMENT—LASTS.

A shoe last made in accordance with the Fitz patent, No. 632,994, *held* not an infringement of the Clark patent, No. 388,830, so as to be within a license granted under the Clark patent, nor its manufacture by the licensee a violation of the license contract on the ground that it embodies patentable parts of the Clark invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Edward S. Beach (George H. Maxwell, on the brief), for appellants.

Elgin C. Verrill (Clifford, Verrill & Clifford, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. The defendant, as successor of the Amos G. Fitz and Ira W. Fitz copartnership, holds a license from the Clark Relasting & Shoe-Treeing Company, which gives it the right to make lasts in accordance with what is known as the "Clark invention," described in letters patent No. 388,830, under which it is bound to pay a royalty on all lasts made in accordance with the patent and the license thereunder; and the complainants have succeeded to the rights of the licensor in respect to protection and an accounting. It was stipulated below, in effect, that the accounts stated in the defendant's answer include all lasts made by the defendant covered by the Clark patent and the license referred to, unless lasts like the Amos G. Fitz last, so called, are within the license, and should rightfully be included in the account. We therefore have only to deal, first, with the question whether the Fitz last infringes the Clark patent, and, secondly, whether it violates the contract or the rights of the complainants under the license.

It is apparent that the two lasts have the same general purpose—that of stretching and shaping the shoe under pressure—but our conclusion is that the means of accomplishing that purpose are substantially different in the two devices. It is not necessary for us to consider which is the better means, or which is the most successful device. Clark's leading idea was to have a last in two parts, so arranged that the shoe in the process of shaping should be suitably stretched or spread, and this result was to be accomplished, and he intended that this result should be accomplished, through a last divided into two pieces by a vertical cut across the shank, so that he should have a heel portion and a fore part without any physical connection, each to have a hole to receive a pin or tool "adapted to spread or separate the said parts one from the

other by any suitable spreading device." It is clear that the idea of complete separation of the parts was in the mind of the patentee, for he points out in his specification that the heel portion may be removed at any time desired, and the fore part remain in the boot or shoe, thereby rendering the heel portion superfluous at certain stages of the manufacture, and that the fore part may be inserted independently of the other part of the last.

In practical operation, after the Clark last, consisting of two parts, is placed in the shoe, each part thereof having a hole designed to receive a pin or tool attached to a suitable spreading device, it is placed upon the machine, the hole in each part thereof receiving the intended pin connected with a suitable spreading device, and by hand or by mechanical means the two pieces are separated and forced apart, thus stretching and shaping the shoe, and accomplishing a result answering the general purpose of the invention.

The Fitz last in question, which is constructed in substantial compliance with the Fitz patent, of course has the same general purpose—that of stretching the leather and shaping the shoe—but the means of doing it, as already observed, are substantially different. It wholly discards the idea of separate pieces or spreading devices independent of the last itself. The Fitz last is constructed with physical connections pivotally secured, and when the two pieces are forced into the shoe under pressure they assume what is termed their "lengthened relation," thus stretching and shaping the shoe, and the union between the heel part and the fore part becomes fixed and rigid, and the two parts are automatically locked upon its pivoted connecting bar or bars. The conceptions and the means are so different in the two devices that the doctrine of equivalents in no way applies. The difference is very clearly stated by the appellee in its brief in the following words:

"The Clark last was professedly designed to be separable in the shoe to fill, fit, and stretch the shoe while being treed. This was all that he added to the prior art. The 'Amos G. Fitz Last' was professedly designed to be rigidly locked in the shoe, and to be inseparable while the shoe was being treed thereon, being, when in the shoe, practically a solid last."

The conclusion is that the Amos G. Fitz last does not infringe the Clark patent.

Now, as to the rights of the parties under the license. The complainants contend that, even if the Clark patent be not infringed, yet the license is violated, since the license refers to parts of the invention. This contention may, we think, be disposed of aside from the many expressions in the license which would require it to be confined to the Clark invention, and preclude the argument that it was intended to cover parts of the Clark last which did not in themselves embody the invention. The substantial feature of the Clark novelty is in the idea which has been explained; and, while the parts of the last are separable, the invention is unitary, and incapable of being divided into patentable parts; and therefore the use of the heel part or of the fore part cannot be said to be a use of a part of the Clark invention within the reasonable meaning of the license.

As has been said, the Clark last is of two separable parts, each having a vertical hole for the reception of a tool, and when the last as a whole is inserted in the shoe the holes receive two separate pins, which, first, hold and support the last at two points, and, second, through the instrumentality of a suitable spreading device serve to separate the two parts, elongate the last, and stretch the shoe. This use of the two vertical holes for spreading purposes, whereby, through the separation of the two parts, the last is lengthened and the shoe stretched lengthwise, is the substance of the invention and the only patentable feature. As the appellee's brief says:

"At the date of the Clark invention it was not new broadly to provide a last with two vertical tool-receiving holes extending into it from the top to receive the pins of a treeing machine to hold the last upon the tree and to prevent it from twisting thereon. Such a last is shown in defendant's exhibit 'Packard and Arnold Patent.'"

The specification of the Packard and Arnold patent contains the following expression:

"While the extended upper surface of the metallic standard admits of its being provided with two or more holes or sockets for the reception of a corresponding number of supporting pins in the jack, thereby enabling it to be steadied and prevented from turning around independently of the jack, as is liable to occur where a single supporting pin only is employed."

In view of this earlier patent, the substantial novelty of the two vertical holes in the Clark last is not in the holding function, but in the function of spreading and lengthening. It results, therefore, that the Amos G. Fitz last does not violate the rights of the complainants under the license.

The decree of the Circuit Court is affirmed, with costs to the appellee.

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WESTINGHOUSE ELECTRIC & MFG. CO. v. ELECTRIC APPLIANCE CO.

(Circuit Court, N. D. Illinois, N. D. March 26, 1904.)

No. 27,066.

1. PATENTS—VALIDITY AND INFRINGEMENT—ELECTRIC MOTORS.

The Tesla patents, Nos. 511,559 and 511,560, the former for a method and the latter for a means of operating electric motors, *held valid* on a motion for a preliminary injunction, as against the defense of anticipation by the Ferraris publication in Milan April 22, 1888, and also infringed.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560, for electrical transmission of power and an electric motor, granted to Nikola Tesla December 26, 1893. On motion for preliminary injunction.

Rector & Hibben, for complainant.

Charles A. Brown, for defendant.

KOHLSAAT, District Judge. This cause comes now on to be heard upon complainant's motion for an injunction pendente lite restraining

defendant from infringing letters patent Nos. 511,559 and 511,560. The inventions relate to the operation of rotating field motors upon a single alternating current circuit, under what is known as the Tesla split-phase system, applied in the present case to the operation of electric motors. The former patent covers the method of operating the motors, while the latter covers the means for so doing. The inventions may be said to consist in splitting the current, at the motor, into two or more branches, constituting the independent circuits of the motor, and producing by artificial means the difference of phase necessary to operate the motor. The drawings of the patents seem to call for an armature in the form of a cylinder.

The defendant's armature consists of a disc. The specification and claims, however, of the patents in suit, are not limited to details of form, but call broadly for "an armature within the influence" of the energizing circuits. I am of the opinion that defendant's device is fairly embraced within the terms of the patents in suit. Both are operated under the principles of Tesla's patent of May 1, 1888, the invention of which was the production, by means of a series of stationary magnet poles, energized by alternating currents of different phase, of an effect upon an armature, mounted within the influence of such poles, similar to that which would be produced upon the same armature by rotating around it bodily the pole or poles of a physical magnet. The equivalency of the two is shown in Guttman patent, No. 614,225, under which defendant's device is manufactured. The difference in the location and application of the magnetic influence is equalized and compensated by a corresponding difference in the angles of the slots in the cylinder or disc. The principle of the rotary impulse and progression is the same. The question is satisfactorily settled for the purposes of this motion by the respective decisions in the suits brought by complainant herein against Roberts, decided by Judge Archbald, of the Eastern District of Pennsylvania, September 10, 1903 (125 Fed. 6), and same against Mutual Life Ins. Co. et al., decided by Judge Hazel, of the Western District of New York, February 4, 1904 (129 Fed. 213). I deem the question of infringement duly established. From the record it appears that the validity of the patents in suit is assailed principally upon the Bailey and Ferraris publications, set out. The former was practically eliminated from this case by the decision of Judge Townsend, of the Second Circuit, in the original suit upon Tesla's fundamental patents, Nos. 381,968, 382,279, and 382,280, entitled Westinghouse Electric & Mfg. Co. v. New England Granite Co., 103 Fed. 951, which ruling was affirmed on appeal (110 Fed. 753, 49 C. C. A. 151), and again by Judge Archbald in the Roberts Case, *supra*. In the case of this complainant against The Catskill Illuminating & Power Co., 121 Fed. 831, 58 C. C. A. 167, the Court of Appeals for the Second Circuit reversed the decision of Judge Lacombe (110 Fed. 377), largely upon the ground that it did not appear from the record that Tesla's said inventions were not anticipated or described in the paper read by Prof. Ferraris before the Royal Academy of Sciences of Turin, Italy, on March 18, 1888, and published, in part, in an electrical journal issued at



Milan on April 22, 1888. This ruling was followed by Judge Colt, of the First Circuit, in the case of complainants herein against Stanley Instrument Co., 129 Fed. 140. In the Cases of Roberts and Mutual Life Insurance Co. of New York, *supra*, as herein, this difficulty was overcome. The records in those cases, together with certain original proofs herein, corroborative thereof, are now before the court, from which I am satisfied that Tesla's inventions in suit antedated the Ferraris article, and were original with him, and that the said patents are valid. It therefore becomes unnecessary to pass upon the other questions raised by complainant.

The patents being found valid for the purposes of this motion, and also infringed, it follows that the preliminary injunction should be granted. Complainant's counsel may prepare an order in compliance herewith.

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COOPER v. BURNS et al.

(Circuit Court, D. Nebraska. November 11, 1904.)

No. 111.

1. GUARDIAN AND WARD—VALIDITY OF SALE OF LANDS—PURCHASE FOR GUARDIAN.

Under Comp. St. Neb. 1903, c. 23, § 85, which prohibits an executor, administrator, or guardian from becoming the purchaser of any real estate sold by him for the estate in his charge, and provides that any sale made contrary to its provisions shall be void, but that it shall not prevent any such purchase by a guardian for the benefit of his ward, a sale of land by a guardian to one who purchases for the guardian and at once conveys to him for the same consideration is absolutely void as against all persons who do not come under the designation of innocent purchasers. The fact that the proceeds of the sale are used for the support of the wards does not make the purchase one for their benefit within the meaning of the statute.

2. SAME—INVALID SALE—INNOCENT PURCHASER.

A guardian sold land of his wards under an order of court, and on confirmation executed a deed to the purchaser, who on the same day conveyed the land to the guardian, the two deeds reciting the same consideration and being recorded at the same time. The purchase was in fact made for the benefit of the guardian, and was void under the statute. *Held*, that the record disclosed such facts as to put a subsequent purchaser on inquiry, and that a mortgagee from the guardian was not protected as an innocent purchaser.

3. SAME—ATTACKING VALIDITY OF SALE—ESTOPPEL.

The fact that the proceeds of a guardian's sale of lands were applied to the maintenance of the minor wards does not estop them from asserting title to the land on the ground of the invalidity of the sale.

4. MARRIED WOMEN—CONVEYANCE OF SEPARATE ESTATE—COVENANT OF WARRANTY.

Under Comp. St. Neb. 1903, c. 53, § 2, which provides that a married woman may sell and convey her real estate and personal property and enter into any contract with reference to the same in the same manner and with like effect as a married man may in relation to his real and personal property, where a married woman joined with her husband in a mortgage of land in which she had a vested estate for life, she is estopped by general covenants of warranty therein from asserting that an after-acquired title to the fee did not inure to the benefit of the mortgagee.

In Equity. Suit for foreclosure of mortgage.

Flansburg & Williams, for complainant.

George H. Thomas and A. M. Post, for respondents.

MUNGER, District Judge. The material facts necessary to a proper consideration of this case are as follows:

In July, 1877, one Daniel Foley died intestate, seised in fee of real estate in Platte county, Neb., occupied by himself and family as a homestead, described as the northwest quarter (N. W.  $\frac{1}{4}$ ) of section thirteen (13), township ten (10) west, of the sixth P. M., excepting the east quarter (E.  $\frac{1}{4}$ ) of the northwest quarter (N. W.  $\frac{1}{4}$ ) of said section, containing 150 acres, more or less, according to government survey. Said Foley left surviving him as his sole heirs at law his widow, Mary Foley, and two minor children, named Jeremiah Foley and Mary Foley. Subsequently, and in the year 1883, said widow intermarried with the respondent, Martin Burns, and on August 27, 1883, said Martin Burns applied to the county court for appointment as guardian of said minor children, to wit, Jeremiah Foley, then aged seven years, and Mary Foley, then aged six years, and such proceedings were had in the county court that said Martin Burns was appointed such guardian in October, 1883, and he duly qualified as such in January, 1884. In February, 1884, Martin Burns, as such guardian, petitioned the district court of Platte county for a license to sell the interest of said minors in said real estate; license was granted; and said guardian afterwards reported to said district court that he had on June 12, 1884, sold the interest of his wards, said minors, in said real estate for the sum of eleven hundred dollars (\$1,100) to one James Cooney; and on June 20, 1884, said sale was by the court confirmed, and the said guardian directed to execute a deed to said James Cooney. On June 23, 1884, Martin Burns, as guardian, made his deed to James Cooney, and on the same day said James Cooney by deed reconveyed the said premises for the same stated consideration to said Martin Burns. Both of said deeds were filed for record on the 3d day of July, at the same hour. No consideration passed between Martin Burns and James Cooney for said deeds, but said estate was purchased by James Cooney at said guardian sale pursuant to an agreement entered into between him and said Martin Burns that he, James Cooney, should purchase the same for and on behalf of said Burns. March 4, 1889, Martin Burns and wife executed and delivered to the Globe Investment Company, for a consideration of eighteen hundred dollars (\$1,800) paid to Martin Burns, a note, with interest coupons, secured by a mortgage upon the real estate before mentioned, which mortgage contained, among other things, the following statements and covenants:

"This indenture made on the 4th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, between Martin Burns and Mary Burns, his wife, of the County of Platte, and State of Nebraska, parties of the first part, and the Globe Investment Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal place of business in Boston in the County of Suffolk and said Commonwealth, party of the second part.

"Witnesseth: That said party of the first part in consideration of Eighteen Hundred Dollars, paid by said party of the second part, the receipt whereof

is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part and its successors and assigns forever, all the following described tract, piece or parcel of land situate in the County of Platte, and State of Nebraska, to-wit:

\* \* \* \* \*

"To Have and to Hold the same with all and singular the emblements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, unto the said party of the second part, and its successors and assigns forever, and the said parties of the first part do hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above described, and are seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances; and that they will warrant and defend the same in the quiet and peaceable possession of said party of the second part and its successors and assigns against the lawful claims of all persons whomsoever."

—And at the same time executed a second mortgage to said Globe Investment Company upon the same real estate to secure the sum of one hundred and eighty dollars (\$180), which second mortgage recited that it was subject to said first mortgage of eighteen hundred dollars (\$1,800). At the time the Globe Investment Company made said loan and took said mortgage, it had actual knowledge of the proceedings had in both the county and district courts relative to the before-mentioned proceedings, and the record of said deeds from Martin Burns, guardian to James Cooney, and from James Cooney to said Martin Burns, but did not have actual knowledge of the agreement between Martin Burns and James Cooney that such purchase by James Cooney was for the benefit of said Martin Burns, or that said conveyances were without consideration. March, 1889, said Globe Investment Company transferred said note and mortgage for eighteen hundred dollars (\$1,800) to one Percival Burney, and indorsed said second note and mortgage for one hundred and eighty dollars (\$180) in blank. In March, 1892, said Martin Burns filed in the county court of Platte county an account and report of his acts and doings as such guardian, in which report he charged himself with eleven hundred dollars (\$1,100) as the proceeds of the sale of the interest of his wards in said real estate, and credited himself with the sum of two hundred and sixty-five dollars and forty-five cents (\$265.45), prior incumbrance on said land paid off, and seventy-five dollars (\$75) attorney fees, and for the keeping, clothing, and maintenance of said minors a sum exceeding the remainder of said eleven hundred dollars (\$1,100) and interest thereon, which report was examined and approved by the county judge. In June, 1892, one J. Lowell Moore, as trustee, brought an action in the district court of said Platte county to foreclose said second mortgage of one hundred and eighty dollars (\$180). Martin Burns, Mary Burns, the Globe Investment Company, and other subsequent lien holders were made parties defendants. The Globe Investment Company filed its answer therein, setting up said first mortgage of eighteen hundred dollars (\$1,800), claiming it to be a first lien on said premises, but that it was not desirous to have said first mortgage foreclosed, and that any decree to be entered directing a sale should be subject to the lien of said first mortgage. Such proceedings were had in said action that a decree of foreclosure and order of sale was entered in the usual form, but finding that said mortgage of eighteen hundred dollars (\$1,800) was a first lien on said premises, and that a sale under said decree should be

subject thereto. An order of sale was issued, and the sheriff advertised said premises to be sold under said decree, but before sale said minors, Jeremiah Foley and Mary Foley, by their next friend, W. R. Ellis, brought an action in the district court of Platte county against all the parties to the said foreclosing action, joining with them the sheriff, praying that the guardian sale from Martin Burns to James Cooney be set aside, the license issued to said Martin Burns as guardian be revoked, that the two several mortgages to the Globe Investment Company be canceled and decreed no lien upon the premises, that the title be quieted in said minors as against all the defendants, and for a perpetual injunction forever restraining the enforcement of said decree against said real estate. Defendants J. Lowell Moore and the Globe Investment Company appeared to said action and filed their joint answer therein. Upon the final hearing of said action it was decreed that the guardian sale of the interest of said minors in said real estate was fraudulent and conveyed no title; that the mortgage was only a lien upon the life estate of Mary Burns; and enjoined the sale under said decree of any greater interest in said premises than the life estate of said Mary Burns. At the time of the institution of said foreclosure suit, as well as the injunction suit on behalf of said minors, the eighteen hundred dollar (\$1,800) note and mortgage was owned and held by Percival Burney, who purchased the same in March, 1889, and held the same until May 30, 1894, and was not a party to either of said actions. In May, 1894, Burney exchanged said eighteen hundred dollar (\$1,800) note and mortgage with the Globe Investment Company for certain of its debenture bonds, and assigned said note and mortgage to one John Herbert, trustee, as security for such debenture bonds, with others of the same series. May 5, 1896, Mary Foley, having attained her majority, executed a quitclaim deed to said real estate to one Jeremiah Grady, and on the 27th of March, 1897, said Grady conveyed the same by quitclaim deed to said heir Jeremiah Foley. On October 24, 1899, said Jeremiah Foley died intestate, leaving no issue or children, his mother, Mary Burns, and his sister, Mary Foley, being his sole heirs. November 2, 1900, Mary Burns conveyed all her interest in said real estate to Mary Foley. October 27, 1902, said Mary Foley, then by reason of her marriage named Mary Dill, conveyed said real estate to the respondent, Blake Maher. Said Blake Maher in February, 1903, executed a declaration of trust to the effect that he held the same in trust for said Mary Burns, upon the payment by her of the sum of nineteen hundred dollars (\$1,900). Complainant holds said eighteen hundred dollar (\$1,800) note and mortgage as trustee successor to the trust first held by John Herbert, and has brought this action to foreclose said mortgage, claiming the right to have the same enforced as a lien, not only against the life estate of Mary Burns, but the entire fee of said land.

The foregoing are the facts which I regard as essential to a proper determination of the rights and equities of the respective parties.

The legal and equitable questions presented for determination are: First. What title or estate, if any, did Martin Burns acquire in the premises by virtue of the guardian sale to James Cooney, and the conveyance by James Cooney back to said Burns? Second. The proceeds

of such guardian sale having been used for the benefit of the minors, and the guardian's account in that respect having been reported to and approved by the county court during the wards' minority, are the minors estopped to impeach such guardian sale? Third. Is complainant an innocent purchaser or mortgagee, or is he chargeable with notice of the invalidity of such guardian sale? Fourth. Did the fact that Mary Burns had a present vested life estate in said lands at the time she executed complainant's mortgage, and that said mortgage contained the before mentioned covenants as to title, extend the lien of complainant's mortgage to her after-acquired title to the remainder? Fifth. Mary Burns, at the time of the execution of complainant's mortgage, having an existing vested life estate in the mortgaged premises, is she now estopped by virtue of the covenants in the mortgage from asserting that such mortgage is not a lien upon the entire fee estate?

Section 85, c. 23, Comp. St. Neb. 1903, which was in force at the time said guardian sale was made, is as follows:

"The executor or administrator making the sale and the guardian of any minor heir of the deceased shall not directly or indirectly purchase or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void; but this section shall not prohibit any such purchase by a guardian for the benefit of his ward."

Whether the term "void" as used in the statute shall be held to mean voidable only, I regard in this case immaterial. Before said minors became of age, an appropriate proceeding in equity was brought in their behalf to declare the sale void and of no effect, and the court so decreed. It is true that Burney, the then owner of the note and mortgage sought to be foreclosed in this action, was not a party to that proceeding and not bound by the judgment therein, but it was an act of disaffirmance on behalf of the minors, and their conveyances upon reaching the age of majority were a disaffirmance of the sale on their part. I think, however, the proper construction of the statute, when applied to the facts in this case, is that such sale should be absolutely void as against all persons who do not come under the designation of innocent purchasers. Such I think the general rule (*Frazier v. Jeakins* (Kan. Sup.) 68 Pac. 24, 57 L. R. A. 575; *Winter v. Truax*, 87 Mich. 324-349, 49 N. W. 604, 24 Am. St. Rep. 160), and such I think the effect of the holding of the Supreme Court of this state in *Veeder v. Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982.

It is strenuously argued on the part of the complainant that the section of the statute above quoted permits the purchase of real estate at guardian sale by the guardian for the benefit of the ward; that, as the proceeds of the sale were to be used in the discharge of existing liens and for the maintenance of the wards, such purchase was for their benefit. I do not so construe the section of the statute. There is a vast difference between a sale and a purchase for the benefit of the wards. It is probable that in this instance the sale was for the benefit of the wards, but I am unable to see how the purchase by the guardian under the circumstances was for the ward's benefit. On the contrary, I think the whole transaction shows that the purchase was for the sole benefit of the guardian. There may be, and doubtless are, instances

when it would be for the benefit of a minor to have the estate purchased by the guardian for their use. In such a case the title would be held by the guardian as trustee for the ward, and the trustee would not be authorized to convey or mortgage the property without permission of the court, and in no event for his own personal benefit, and, if the complainant supposed that the property was so purchased by the guardian, he was bound to ascertain the authority to execute the mortgage in question.

Complainant and all persons dealing with the mortgage in question were chargeable with whatever notice the records relating to the title to the land imparted, and the Globe Investment Company had actual knowledge thereof. The records at least were sufficient to put a person upon inquiry as to the dealing between the guardian and Cooney, and, had such inquiry been made, the fraudulent character of the transaction would have been disclosed. But it is said on behalf of the complainant that Martin and Mary Burns by their covenants stated they were the owners of the estate in fee, and Cooney had died, so no further inquiry would have disclosed the real facts. The representations in the covenants were not representations as to the real transaction between Burns and Cooney, they were not representations as to whether the purchase by Cooney was in pursuance of an agreement with the guardian that such purchase should be made by Cooney for the benefit of Burns; they were only representations of the legal effect of such transaction. I think the records disclosed such a state of dealing between the guardian and Cooney as deprives complainant of any benefit as an innocent purchaser. *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70; *Veeder v. Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982; *Frazier v. Jeakins* (Kan. Sup.) 68 Pac. 24, 57 L. R. A. 575; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160; *McKay v. Williams* (Mich.) 35 N. W. 159, 11 Am. St. Rep. 597; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641. The fact that the proceeds of the guardian sale were applied for the maintenance and support of the minors does not estop them from asserting title to the land on account of the invalidity of the guardian sale (*Rowe v. Griffiths*, 57 Neb. 488, 78 N. W. 20; *Bachelor v. Korb*, supra) the general rule being that parties under disability are not estopped unless their conduct has been intentional and fraudulent, and in this case there was no act on the part of the minors which had a tendency to mislead any one.

By the married woman's act (section 2, c. 53, Comp. St. Neb. 1903) it is provided:

"A married woman, while the marriage relation subsists, may bargain, sell and convey her real estate and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

There can be no doubt under this statute that a married woman may in a conveyance of her own separate estate bind herself by covenants of warranty as to the title to as full an extent as though she were single, even though her husband should join with her in such conveyance. But a married woman is not bound on the covenants contained in a

deed which she executes with her husband in conveying his estate for the purpose of releasing her inchoate right of dower. Though such deed on its face does not show whether the estate conveyed is that of her husband or her separate estate, this may be established by other evidence, and the purpose of her execution of the deed shown, upon the principle that a court of equity will look beyond the mere form and into the substance of the transaction, and give effect to the contracts of parties according to the true meaning and intent which the parties themselves understood and attached to them at the time they were made. At common law a married woman was not bound upon her contracts, and such is the law in this state except in so far as it has been modified by statute. The statute only renders her contracts valid, and she liable thereon when made with reference to her separate estate; and in states where married women have power to convey by statute, but no power to enter into contracts or covenants, covenants do not create an estoppel. *Wilson v. King*, 23 N. J. Eq. 150.

In the case at bar Mary Burns had a present vested estate at the time of executing the mortgage in question, and under the Nebraska statute she was *sui juris* as to her own separate estate, and could contract with reference thereto the same as though she were single. So, in this state, when a married woman enters into a contract of conveyance of real estate in which she has a present vested interest, I think she is liable upon such contract the same as if she were sole, all disability as to her right to contract with reference thereto being removed. In this case I think the respondent, Mary Burns, estopped from asserting that her after-acquired title to the fee did not inure to the benefit of the mortgagee, whether such estoppel be placed upon the ground of her liability upon the covenants contained in the mortgage, or upon the equitable principle that good faith and fair dealing require that a party making a conveyance should forever thereafter be precluded from gainsaying that he did not have the estate affirmed in the conveyance to be held by him, and which must have influenced the grantee in making the purchase. *Real v. Hollister*, 17 Neb. 661, 666, 24 N. W. 333; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102; *King v. Rea*, 56 Ind. 1; *Yerkes v. Hadley et al.* (Dak.) 40 N. W. 340, 2 L. R. A. 363; *Knight v. Thayer*, 125 Mass. 25; *Sandwich Mfg. Co. v. Zellmar*, 48 Minn. 408, 51 N. W. 379; *St. Louis & S. F. R. Co. v. Foltz* (C. C.) 52 Fed. 627. The after-acquired interest of Mary Burns to one-half of the estate in remainder was, however, obtained subject to a mortgage of \$1,900, and the amount due thereon must be held to be a superior lien to complainant's mortgage.

Decree of foreclosure will be entered for complainant, finding his mortgage a first lien upon the life estate of Mary Burns to the land in question, and upon the undivided one-half of the estate in remainder, and a second lien upon the remaining undivided one-half of the estate in remainder, subject only to said mortgage of \$1,900. In computing the amount due, complainant will be entitled to include the amount paid to redeem from tax sales. Counsel for complainant will prepare the proper decree, and submit the same to counsel for respondents before presenting the same to the court for signature.

## THE LOTTIE E. HOPKINS.

(District Court, D. Maine. November 28, 1904.)

No. 158.

## 1. SALVAGE—PRINCIPLES AND BASIS OF AWARD.

A salvage award is not to be based on the mere arbitrary judgment of the court, but must be governed by the principles of the law of salvage, which require the amount allowed to be sufficiently generous to encourage others to render like service under like conditions; and the court, in applying these principles, cannot follow any unvarying rule as to proportion with reference to values.

## 2. SAME—SALVAGE SERVICE—TOWING DISABLED VESSEL AT SEA.

The taking in tow of a disabled vessel on the open sea by a tug is always a salvage service.

## 3. SAME—AMOUNT OF AWARD.

A fishing schooner of 47 tons, net, valued at from \$600 to \$1,000, and having fish on board to the value of \$60, having lost one anchor and her rudder, and being blown toward the shore, anchored at night near a ledge on the south shore of an island off the Maine coast; sending word by a passing schooner for a tug. The next morning the tug Carita, valued at \$5,000, went to her assistance from a port 10 miles northwest. The wind was blowing heavily from the southwest, and the sea was very rough. One of the tug's coal bunkers was washed away, and it was necessary to board over the bunkers to keep her from filling. After a difficult trip the schooner was reached and taken in tow, and, by careful management, was brought safely to port. The weather indications were stormy, and the schooner was in considerable peril, being held by a single anchor on a rocky bottom. *Held*, that the towage was a salvage service, for which the tug and her crew were entitled to an award of \$200.

In Admiralty. Suit to recover for salvage services.

Benjamin Thompson, for libelants.

Clarence E. Sawyer, for claimants.

HALE, District Judge. This case comes before the court upon a libel in rem for salvage brought by Cyrus R. Tupper in behalf of himself and the other owners and the crew of the steam tug Carita. The schooner Lottie E. Hopkins is a fishing vessel of about 47 tons, net tonnage, and at the time in question was owned by William A. Trufant, of Harpswell. Her value is estimated to be from \$600 to \$1,000. At the time the salvage service was rendered, she had on board fish of the value of \$60. On September 23, 1904, she was engaged in the business of fishing, and was under the command of Capt. Gilbert Doughty. On that day, while prosecuting her business of fishing, she was at anchor on the Great Ledge, about 20 miles off shore, and about 10 miles outside of Damariscove Island. About 8 o'clock in the evening, during a heavy breeze, it was discovered that her hawser had chafed off about 10 fathoms from the bottom, losing one of her anchors. The crew immediately made sail, intending to go to the southward of Seguin, in order to reach Harpswell; but, upon attempting to luff their vessel, it was

¶ 2. See Salvage, vol. 43, Cent. Dig. §§ 23-25.

¶ 3. Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.



found that there was some trouble with the rudder, and, upon taking off the wheel box, it was found that the rudder was gone. The schooner was blown in toward the land until about 10 o'clock that night, when she had reached a point near Bantam Ledge, off the southerly end of Damariscove. She then jibed, and, as she was liable to go onto the ledge, the other anchor was let go. At the time of anchoring it was blowing harder than it had previously blown during the day, and was still breezing on. A little later a schooner was observed going in toward the land. Capt. Doughty hailed the schooner, and asked to have a steam tug sent out. At the time of anchoring, the Lottie E. Hopkins was lying about northwest from Bantam Rock, and about a quarter of a mile distant from it, in about 35 fathoms of water. The place of anchorage was a rocky bottom. Capt. Doughty, of the schooner, testifies that he was intending to rig up a temporary steering gear the next morning, with the use of the hawser.

The steam tug Carita is a vessel of the value of about \$5,000, as the testimony tends to show, and is the largest steam tug engaged in towing in Boothbay Harbor and vicinity. Bath is about 15 miles distant from Boothbay Harbor, and is the nearest point at which larger steam tugs could have been obtained.

Between 5 and 6 o'clock on the morning of Saturday, the 24th day of September, 1904, the master and crew of the steam tug were informed that a schooner was lying off the Bantam Rock, in the vicinity of Damariscove, with loss of rudder and anchor, and in need of a steam tug. Upon receiving this information, the tug immediately started to go to Damariscove, which is about 10 miles southeast of Boothbay Harbor, and directly to seaward. At the time of her departure from Boothbay the wind was about south-southwest, blowing heavily, with a strong sea running. The testimony tends to show that the master of the tug, on account of the heavy sea, had grave apprehensions as to the advisability of continuing in that direction. Soon after leaving Boothbay Harbor one of the coal bunkers was washed away, and it was found necessary to nail boards over her bunkers in order to prevent her from filling. It was also necessary to slow her engine down, and keep her head to the sea as much as possible. The steam tug found the schooner at anchor off the Bantam Rock, in a strong wind and heavy sea. The crew of the steam tug testify that the sea was increasing, while the crew of the schooner testify that it had moderated since the previous night. All, however, agree that the weather looked bad, and that at about 1 o'clock that day the storm began to increase, that it blew very hard, and that there was a rough sea. The schooner had made no preparations to get under way, although her crew testify that they intended to rig up a temporary rudder and try to sail her in if assistance had not been obtained. All agree that there was no vessel in the vicinity of the schooner on that day, and that assistance could not have been obtained except by sending to Bath; there being no other steamer at Boothbay Harbor suitable to go to the relief of the schooner. The witnesses do not agree as to the effect of an attempt to get the

schooner under way at the time without assistance, or as to the result if she had chafed off her hawser or dragged during the night of the 23d. The witnesses in behalf of the schooner say that, if they could have managed her, they would have made to the northward of Damariscove, while the witnesses in behalf of the tug testify that, if the schooner had dragged or parted, she would have gone onto the Bantam or the Motions, off Damariscove. There is also testimony that at that time it was breaking heavily on the Bantam and on the Motions, and that the weather indications looked stormy and heavy; that those in control of the tug could not bring her very close to the schooner at the time, on account of having to keep her head to the sea, as they did not like to have her lose her headway and fall off. Capt. Doughty, of the schooner, with two men in his crew, came on board the steamer in a dory, but no agreement was made respecting salvage. A hawser was run from the tug to the schooner, and as soon as it was made fast the steamer held the schooner up until the anchor was up, when she steamed ahead slowly. By allowing the hawser to drag in the water, and by sheering in the opposite direction when the schooner sheered, the tug towed the schooner into Boothbay Harbor; reaching there between 9 and 10 o'clock in the forenoon of the same day.

What amount should be allowed to the libelants for their salvage service? In the case of *The Lyman M. Law* (D. C.) 122 Fed. 816, this court had before it a salvage case in which we fully discussed the law of salvage, and the principles which should be applied in making an award. We then quoted from *The Sandringham* (D. C.) 10 Fed. 556, in which Judge Hughes reviews the principles upon which cases of this kind should be decided. We quoted in that case the familiar definition of salvage, namely:

"Salvage is a reward or bounty, exceeding the full value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods has been saved from shipwreck or other dangers of the sea."

We quoted also the statement of the rules which courts are accustomed to follow in determining a salvage award.

In *The Blackwell*, 10 Wall. 1, 19 L. Ed. 870, Mr. Justice Clifford also announced the main ingredients in determining the amount of the reward for a salvage service, and gave those ingredients substantially the same as, although entirely independent from, the case of *The Sandringham*, supra. These rules have often been applied to the case of tugs rendering a salvage service. In this district, in *Baker v. Hemenway*, 2 Low. 501, Fed. Cas. No. 770, Judge Lowell said:

"As well as I can estimate the intent of the courts, it has been to give to tugs what will be a handsome gratuity—enough to induce prompt and even eager assistance: and this would be enhanced slightly by a great value at risk, though in no important or definite proportion to value."

As we have already said in *The Lyman M. Law*, a court is not at liberty to render a mere arbitrary judgment upon individual discretion, but must be governed by the principles of the law of salvage; but under this general rule there is often serious question as to what award should be made to meet the facts in any given

case, always having in mind that a court has not to decide merely with regard to the question of what services are worth, but to give a fairly generous award, such as to encourage salvors to render like services under like conditions. In making such award the court cannot follow any unvarying rule as to proportion in reference to values.

There can be no question but that the service rendered in this case was a salvage service. In the case of *The Great Northern* (D. C.) 72 Fed. 678, the court said:

"Towing a disabled vessel on the high seas is always a salvage service, owing to the latent dangers from the multiform accidents to which ships are constantly liable. \* \* \* Courts, judges, and lawyers of the interior are apt to assimilate this service to towing on inland canals and rivers of the country, and are apt not to realize the full nature of towing at sea. \* \* \* After getting under way and commencing the towing service, there is constant danger on the open sea when the disabled ship has no power of self-control. \* \* \* It is the latent danger from the multiform accidents to which ships are constantly liable that makes a towage service on the open seas, rendered to a disabled ship, always a salvage service."

This fishing schooner was lying near the Bantam Rock, in a dangerous locality. The wind was blowing hard, and the sea was rough. The testimony is somewhat contradictory; but the court must find that the schooner was in great hazard, that she was disabled, and that, if she had dragged, she would have been in great danger of going onto the rocks. While the learned counsel for the claimant insists that other assistance might have been obtained, it is undoubtedly true that no other assistance presented itself, and the only means of safety that was extended to the schooner came from the tug. It is undoubtedly true, also, that the steamer took some risk in doing the salvage service. She started promptly at the call of the disabled vessel. The sea, when the tug got outside, was rough. It was even thought by the captain at one time that it was too rough to keep on. She had to be kept head to the sea, and slowed about, her bunkers nailed down. There was some fear that the vessel would fill. When the tug arrived at the schooner, it is not probable that the damaged vessel could have remained long in her dangerous position.

When a tug, under circumstances like these, renders prompt and efficient salvage service, she should be rewarded liberally. The part of the Maine coast where the damaged schooner was lying is a perilous place in bad weather. Fishing vessels should be made to feel that the courts will hold out to salvors all proper inducements to give aid to vessels in distress in such places. Tugboats, in the regular conduct of their business, have sometimes been too apt to refuse salvage service in places of danger. They should be encouraged in the manner pointed out by Judge Lowell in *Baker v. Hemenway*, supra. The court is of the opinion that the sum of \$200, which was suggested by the owner of the tug, was not too great a reward, under the circumstances of the case.

Let a decree be entered for the libellant for the sum of \$200, which shall be in full for all interests represented by the libel, with costs.

## EVANSTON ELEVATOR &amp; COAL CO. v. CASTNER et al.

(Circuit Court, N. D. Illinois, N. D.)

No. 26,779.

## 1. SALES — CONTRACT TO DELIVER COAL F. O. B. CARS — DUTY TO PROVIDE CARS.

A contract by which a coal company sold a quantity of coal, to be delivered during a series of months "F. O. B. cars at the mines," did not cast upon it an obligation to provide cars, but only to be ready to load the same when supplied; nor was such obligation imposed upon it by a further provision by which it guaranteed a maximum freight rate from the mines to the city to which the shipments were to be made during the time of delivery.

On Demurrer to Plea.

Arthur W. Underwood, for plaintiff.

Runnells & Burry, for defendants.

KOHLSAAT, District Judge. On March 18, 1902, plaintiff and defendants entered into an agreement whereby defendants were to sell and deliver to plaintiff 6,000 tons of Pocahontas coal, at \$1.10 per ton free on board cars at defendants' mines, to be shipped in about equal monthly proportions between April 1, 1902, and April 1, 1903. Defendants guaranteed that the freight rates of the railroad for shipping the coal to Chicago should not exceed \$1.90 per ton up to March 31, 1903. It was further agreed that defendants should not be held for failures to deliver coal caused by strikes or combinations, accidents at the mines, or interruption of transportation or navigation, or by any cause or any occurrence. It was further provided that:

"In such case the obligation to deliver coal under this contract is cancelled to an extent corresponding to the duration of such cause, occurrence or interruption, and no liability shall be incurred by the sellers for damages resulting therefrom;" also: "This contract price is based on the present freight rate, but if this rate should be advanced during the term of this contract, then the purchaser has the option of taking any undelivered portion of the tonnage at a corresponding advance in price or of cancelling this contract by giving immediate notice in writing of his desire to do so."

Defendants failed to deliver the tonnage called for, whereupon plaintiff brought this suit. Defendants filed several pleas.

The matter comes on to be heard upon plaintiff's demurrer to defendants' fourth amended plea. This plea refers to the contract, and alleges that defendants did deliver some of the coal, but were unable to deliver the full amount, because of the failure of the plaintiff to furnish cars for that purpose. It is the contention of the plaintiff that the contract requires the defendants to supply the cars. The only language in the contract bearing upon the matter is as follows, viz.:

"6000 tons of 2000 lbs of C. C. B. Pocahontas at \$1.10 for run of mine grade per ton of 2000 lbs 'F. O. B.' cars at the mines." Also: "The railroad freight rate on the tonnage covered in this contract is guaranteed not to exceed One & <sup>99</sup>/<sub>100</sub> dollars per net ton from Pocahontas district to Chicago, Illinois, from April 1st, 1902 to March 31st, 1903."

Thus it will be seen that practically the only question before the court is as to the meaning of the term "F. O. B. cars at the mines," with reference to the furnishing of cars. Bouvier defines the phrase as denoting that the seller has agreed to deliver on cars or vessels, "without cost to the buyer for packing, portage, cartage, and the like," and adds (citing *Dwight v. Eckert*, 117 Pa. 508, 12 Atl. 36), "In such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made."

In *Neimeyer Lumber Co. v. Burlington R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534, the court holds that these letters imply that the buyer shall be free from all the expenses and risks attending the delivery of the property at the point named in the contract. Again, it is held in *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672, and *Capehart v. Furman Farm Implement Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60, that the letters have a well-defined meaning, of which the court will take judicial notice, giving the definition as above.

The case of *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836, was brought by the Hocking Coal Company to recover from defendants for breach of contract to purchase coal F. O. B. cars at tipple—the reverse of the case at bar. The court says:

"The appellee undertook to sell and deliver at the tipple the coal at the designated price, and the appellants covenanted to receive it there and pay for it. If so, they were bound to furnish the cars for it."

See, also, *Kunkle v. Mitchell*, 56 Pa. 100.

The Court of Appeals for this Circuit, in the case of *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207, involving a contract of sale which provided for delivery in the words "loaded on cars," held that defendant did not thereby agree to furnish the cars, and that, under that language, it was the duty of the plaintiff to see that cars were furnished.

In the case of *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126, it appears that suit was brought to recover from the coal company for its failure to accept and pay for coal contracted for by it to be delivered all F. O. B. cars at said mine. The court says:

"The fact that appellees were required by the contract to deliver the coal free on board the cars at the mine can have no bearing on the question in regard to whose duty it was to furnish cars. \* \* \* Until the cars were furnished, appellees were required to do nothing except to have the coal ready."

The court then squarely holds that it was the duty of the appellant to furnish cars. The court also holds that in this case the parties had themselves construed the contract so as to cast the burden of providing cars upon the vendee.

In the case of *Tradewater Coal Co. v. Lee et al.* (Ky.) 68 S. W. 400, the same clause was involved, but the court decided the case upon other grounds; incidentally sustaining an instruction which directs the jury to find for the defendants on their set-off in case they believe from the evidence that sufficient cars were furnished by the railroad company for the purpose of the contract. This case

is cited by the plaintiff, but does not, in my judgment, hold contrary to the other cases above cited.

I am of the opinion, for the purposes of this hearing, that under the phrase "F. O. B." no obligation was cast upon the coal company to provide cars, but only to be ready to load the same when supplied. Nor do I think this position in any way affected by the other clause as to the maximum freight rate. That clause merely protected plaintiff to that extent, but entirely fails to modify the question of furnishing cars.

The demurrer is overruled and the plea sustained. Plaintiff may reply to the pleas within 10 days.

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IN re DAVIDSON S. S. CO.

(District Court, E. D. Wisconsin. November 22, 1904.)

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—PLEADING.

In a proceeding for limitation of liability the petition and answer on the one hand and the individual claims for damages on the other present distinct issues, which are to be separately adjudicated in the order named.

2. SAME.

A petition for limitation of liability must allege the facts necessary to entitle the petitioner, under the statute, to the relief sought, and a damage claimant contesting the right must take issue by answer, which must be full and explicit and distinct to each separate article and separate allegation, as required by admiralty rule 27. The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved under rule 55, the right to contest which is reserved to the petitioner by rule 56, which issue should be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit.

In Admiralty.

On (1) exceptions to the answer of the Ohio Transportation Co. to the petition, and (2) exceptions to the claim filed on behalf of that company as owner of the Steamer Gladstone, and of the representatives of her cargo.

C. E. Kremer, for petitioner.

Goulder, Holding & Masten, for respondents.

SEAMAN, District Judge. While the exceptions are independent in classification, both involve a primary question of the rule of pleading applicable to the issues respectively. In that view they are considered together, and the inquiry thereupon is not free from difficulty, owing to the want of clear precedents. My conclusions are, however, that the petition and answer on the one hand and the claims of damages on the other present distinct issues, which are to be separately adjudicated in the order named, as indicated by the opinion of Judge Brown in *La*

¶ 1. Limitation of liability of vessel owners, see note to *The Longfellow*, 45 C. C. A. 387.

**Bourgogne (D. C.) 106 Fed. 232, 233.** Whatever the form of pleading to that end, I am of opinion that each of such issues must be presented independently of the other, and in conformity with the general requirements applicable to pleadings in the admiralty.

This proceeding is commenced by the petitioner to limit liability, and the issuable allegations thereupon are the facts prescribed by statute as the grounds for limitation. It is unquestionable that the petitioner must allege and prove the state of facts thus required to obtain the relief sought. Nevertheless, a claimant contesting the right to limit liability must take issue by answer to the petition (rule 56), and I am of opinion that such answer must "be full and explicit and distinct to each separate article and separate allegation," as required by rule 27 for answer to libels. Thereupon "the cause must stand for hearing on proof like any other cause at issue." *Bened. Adm. Pr. (3d Ed.) § 580.* The doctrine which is to govern admiralty pleadings is now settled, though uncertain prior to 1844, when the rules were promulgated by the Supreme Court as authorized by act of Congress. Thus, in an early case (*Clarke v. The Dodge Healy*, 4 Wash. C. C. 651, 656, Fed. Cas. No. 2,849) it was said, "If the answer does not acknowledge the truth of the allegations of the libel, it must be proved by those who assert it;" while Judge Lacombe, in *Virginia Home Ins. Co. v. Sunberg* (C. C.) 54 Fed. 389, 390, construes the rule and practice in admiralty to entitle the libellant "to an admission or denial of each distinct and separate averment in its libel, separately and distinctly." The last-mentioned view plainly conforms to the intent of rule 27, and is deemed equally applicable to the pleadings upon the issue as to limited liability. The proof required in support of the petition that any liability incurred was "without the privity or knowledge of" the petitioner, does not reach the subsequent issue of liability, as it relates only to the personal negligence or conduct of the owners. *Benedict's Adm. Pr. (3d Ed.) § 565.*

Upon the further issue of liability for damages arising out of the collision the petitioner brings the case within rule 56, which reserves its right to contest such liability. "No presumption arises from the happening of a collision against either vessel" (*Henry's Admr. Jur. & Proc. § 82*) without fault on the part of one shown or confessed, and it is unquestionable that the general rules and practice in admiralty intend that all issues be well defined by pleadings in some form, with simple and explicit allegations of fact. I am satisfied, therefore, that the claim under which proof of liability is to be presented (rule 55) must be treated as a pleading in the nature of libel, and must set out "the various allegations of facts upon which the claimant relies in support of his suit," in accord with rule 23. While this requirement is not expressed in rule 55, and neither of the rules states the method of framing such issue, nor mentions an answer to the claim, the hearing cannot proceed as contemplated by rule 55, for the purposes of a contest, without an issue presented in some form. The claimant, though called into court by the monition to prove any claim it may have, must prove that the damage was caused by fault of petitioner's steamer, or fail of recovery. The petitioner is relieved from confession of liability by the allegations to that end in a petition; but those allegations are

incidental only, and do not enter into the consideration of the primary and independent issue tendered by the petition to limit liability. Nor **can** they serve to relieve the claimant of the need to state and prove a **cause** of action when the issue of liability is reached without violating **well-settled** general rules governing such issues; and these rules, under **the** limited liability act, do not impress me as intending such reversal of the established order of pleading and proving liability. The statutory provisions which are applicable are quite general in terms. Section 4284, Rev. St. [U. S. Comp. St. 1901, p. 2943], provides that one and the other parties "may take the appropriate proceedings in any court" for apportioning any liability. It goes without saying that the fact of liability must be ascertained primarily. What is the "appropriate proceeding" to that end? In the chapter on "Limitation of Liability" incorporated in the third edition of Benedict's Admiralty Practice the statute and rules are discussed, and the practice generally is exemplified with satisfactory clearness; but the present inquiry is not discussed, and no light is furnished in that excellent treatise for its solution. With no precedents interpreting the rules as to the practice upon such issue, I am of opinion that they intend the appropriate judicial hearing of the controversy over liability, with the issues presented upon distinct allegations of fact for and against the claim; that claimant must state, as the fundamental requisite of apportionment and recovery for damages arising out of the collision, a prima facie case of liability on the part of the petitioner's vessel, such liability being expressly reserved for contest; and that the petitioner becomes respondent in respect of such issue, and may either answer the claimant's allegations by counter statement of facts, consistent with the petition, or have the averments of the petition thereupon adopted for the purpose of the issue. Unless the rules intend that the fact of collision, followed by the petition to limit liability, creates a presumption of liability which the petitioner must overcome, the contention is untenable that the claimant may rest its claim upon specification of damages sustained and averment that the injuries occurred without fault on its part. Such departure from the general doctrine cannot be upheld under my understanding of the letter or spirit of the rules.

In conformity with the views thus stated as to the status of answer and claim respectively as pleadings, my conclusions upon the exceptions may be briefly stated.

1. Exceptions to the Answer. The first, second, and third exceptions are sustained, as the answer is insufficient in each of the particulars noted therein. The denial in each instance assumes knowledge or information on the part of the respondent that the facts and circumstances were not as alleged in the petition in certain of the essentials imposed by statute, but withholds disclosure of such information. Thus the denial to which the first exception is taken is the sole answer to the jurisdictional allegations that the Sacramento was, at the time of the collision, "stout, staunch, strong, and seaworthy, well and properly manned and equipped, and had on board a full and competent complement of officers and crew," etc. The answer must be "full, explicit, and distinct" (rule 27), and this requirement is not met by denial alone. Commander in Chief, 1 Wall. 43, 17 L. Ed. 609. If the party answer-



ing is uninformed in the premises, he may so state, and thus raise the issue without admitting or denying; but a denial must be founded on information, and, possessing that, the pleader must state the facts accordingly upon information and belief. The fourth exception is confessed, and met by amendment. The fifth is overruled, as the allegation referred to relates only to the right to contest the petition, and not to the merits of the claim, which is a separate issue, so that reference to the claim filed is deemed sufficient.

2. Exceptions to the Claim of Liability. The three exceptions state a single objection in different forms, namely, that the facts upon which liability is asserted are not stated. The objection is well taken to the claim treated as a pleading, and the exceptions are sustained accordingly.

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In re COLE.

(District Court, D. Maine. November 26, 1904.)

No. 74.

1. **BANKRUPTCY—REFEREES—COMPELLING ATTENDANCE OF WITNESSES OUT STATE.**

Under the proviso to Bankr. Act July 1, 1898, c. 541, § 41a, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437], that "no person shall be required to attend as a witness before a referee at a place outside of the state of his residence and more than one hundred miles from such place of residence," a person cannot be compelled to leave the state wherein he resides to be a witness before a referee in bankruptcy, the proviso being a restriction upon, and not an enlargement of, the power given the federal courts to require the attendance of witnesses, by Rev. St. § 876 [U. S. Comp. St. 1901, p. 667].

In Bankruptcy. On certificate of referee.

Haley & Haley, for bankrupt.

Cleaves, Waterhouse & Emery, for petitioning creditors.

HALE, District Judge. From the certificate of the referee it appears that one William H. Cole, of Wakefield, in the commonwealth of Massachusetts, the husband of the bankrupt, was served with a subpoena directing him to appear on the 16th day of November, 1904, at Biddeford, Me., before said referee in these proceedings. The witness failed to appear. His counsel stated that he had advised him not to obey the summons. It is admitted that the witness Cole was residing at a place less than 100 miles from the place where the hearing was being had and in another judicial district. It is also admitted that he received his travel and legal fees for attendance. The referee held the witness to be in contempt, and certified the facts to this court.

Section 41 of the bankrupt act provides:

"A person shall not, in proceedings before a referee, \* \* \* (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: provided, that no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and

more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him." Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437].

The general law in force when the bankrupt act went into effect, with respect to the power of compelling the attendance of witnesses, is in section 876 of the Revised Statutes [U. S. Comp. St. 1901, p. 667], which provides that "subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." This provision of the general statutes has been held to have been enacted for the protection of witnesses, and not to have been changed by the bankrupt law, so far as it applies to matters before the Circuit or District Court.

With reference to the provision which we have quoted from section 41 of the bankrupt act, in *In re Hemstreet* (D. C.) 117 Fed. 568, Judge Shiras, of the District Court of Iowa, has said:

"It was the clear intent of Congress to enact that referees should have the right to require the attendance before them as witnesses of all persons residing within the state wherein the referee is acting, and that a witness cannot lawfully refuse obedience to a subpoena calling him to appear before a referee unless he is a nonresident of the state, and resides more than one hundred miles from the place of hearing. \* \* \* The proviso found in section 41 of the act has reference only to hearings before referees, and does not change or enlarge the power of the District or Circuit Courts to compel the attendance of witnesses, as defined in section 876 of the Revised Statutes [U. S. Comp. St. 1901, p. 667]. The phraseology used in the proviso clearly indicates that it was intended as a limitation upon, and not as an enlargement of, pre-existing rights. Under the provisions of section 21 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), the court, upon due application, can require the attendance of witnesses before the referee, and under General Order No. 3 (89 Fed. iv) the clerk will furnish the referee with the necessary subpoenas; but the subpoenas thus issued would be subject to the limitations found in section 876, Rev. St. [U. S. Comp. St. 1901, p. 667]. If the proviso found in section 41 of the bankrupt act had not been enacted, then subpoenas issued under section 21 would have been effectual to compel the attendance of witnesses living within the district, and also of witnesses living outside of the district, but within a distance of 100 miles. The proviso enacted as part of section 41 is intended, not as an enlargement of the jurisdiction of the referee over witnesses, but as a limitation for the benefit and protection of the witnesses. The proviso does not declare that the referee or the court shall have the right to compel the attendance before the referee of all witnesses living within the state or within a hundred miles of the place of hearing, but the declaration is that no person shall be required to attend as a witness before the referee at a place outside of the state of his residence and more than a hundred miles from the place of hearing. The meaning of the proviso is that no one shall be compelled to attend as a witness at a distance of more than one hundred miles, and he shall not be compelled to leave the state wherein he resides. If the witness lives at a greater distance from the place of hearing before the referee than a hundred miles, or in another state, ample provision is made in the provisions of section 21 for taking his testimony orally or by deposition, and thus protection is afforded to all without imposing a burden upon witnesses."

The court is of the opinion that the case from which we have quoted fully and correctly decides the question; it gives the proper construction to section 41 of the bankrupt act, when considered in

relation to the general provisions of law found in Rev. St. § 876 [U. S. Comp. St. 1901, p. 667]. This construction is in accordance with the decision with reference to the jurisdiction of this court made by Judge Fox of this district under a former bankrupt act, in *Paine v. Caldwell*, Fed. Cas. No. 10,674. It appears that the witness William H. Cole lived in the commonwealth and district of Massachusetts. Under the proper construction of section 41 of the bankrupt law, he cannot be compelled to leave the state wherein he resides in order that he may be a witness in a hearing before a referee in bankruptcy.

The decision of the referee in adjudging the witness guilty of contempt is overruled.

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C. L. KING & CO. v. INLANDER.

(Circuit Court, N. D. Illinois. January 11, 1902.)

No. 25,997.

**1. EQUITY PLEADING—MULTIFARIOUSNESS—MISJOINDER OF CAUSES OF ACTION.**

A complainant in a federal court cannot join with a cause of action for infringement of a patent one for unfair competition in trade, although both relate to the same subject-matter, where there is no allegation of diverse citizenship to give the court jurisdiction of the second cause.

In Equity. On motion for preliminary injunction and demurrer to bill.

Geo. E. Waldo, for complainant.

G. S. Noble, for respondent.

KOHLSAAT, District Judge. The bill herein asks relief against defendant (1) for infringement of complainant's patent, and (2) for unfair competition in trade in the use by defendant of the article alleged to be protected by said patent. No diverse citizenship is shown. The bill sets up two distinct causes of action, though relating to the same subject-matter. The ground of federal jurisdiction is distinct as to each cause of action. While it might be that a federal court could properly, in its discretion, permit the joinder of said causes of action, had it jurisdiction of each, yet it could not obtain jurisdiction of a distinct cause of action by this method. Complainant's citations touching ancillary jurisdiction are not applicable.

The demurrer to the bill is sustained on the ground of multifariousness, and, as the motion for a preliminary injunction is based solely upon the unfair competition phase of the bill, said motion is denied.

**FRANKLIN OPERA HOUSE CO., Limited, v. ARMSTRONG.****GUNBY v. SAME.****(Circuit Court of Appeals, Fifth Circuit. November 21, 1904.)**

Nos. 1,242, 1,301.

**1. FEDERAL COURTS—ANCILLARY JURISDICTION—SUIT BY RECEIVER.**

Where a federal court has obtained jurisdiction over the property and assets of an insolvent building and loan association within its district by the appointment of a receiver in an ancillary suit for winding up the affairs of the association, a bill by the receiver to foreclose a mortgage against a borrowing stockholder on property within the district is ancillary to such suit and within its jurisdiction, without regard to the citizenship of the parties or the amount in controversy.

**2. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY.**

Insolvency, as applied to a building and loan association, does not mean inability to pay its outside debts; but it is insolvent, in such sense as to warrant a suit by a stockholder for the appointment of a receiver and to wind up its affairs, when its financial condition is such that it is unable to carry to completion the purpose of its creation.

**3. RECEIVERS—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK.**

The regularity of the appointment of a receiver by a court which had jurisdiction of the parties and the subject-matter cannot be collaterally attacked.

**4. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—ENFORCING DEMANDS AGAINST BORROWING STOCKHOLDERS.**

Where a building and loan association becomes insolvent, and proceedings are instituted for winding up its affairs, the court as a matter of necessity may require borrowing stockholders to pay forthwith the amounts due from them, although they are not in default and their obligations are not due by their terms.

**5. SAME—CONTRACTS WITH BORROWING STOCKHOLDERS—USURY.**

The charter of a building and loan association, organized under the laws of Louisiana and in conformity to Sess. Acts 1888, p. 177, No. 115, relating to such associations, provided for the issuance of different kinds of stock. Defendant subscribed for series stock, class B, and also became a borrower of a sum equal to the face value of the stock. Under the charter such stock was matured by the payment of 142 monthly installments. It did not share in the general earnings of the association, and the holder was not entitled to vote. The subscription and borrowing contracts, although executed contemporaneously, were separate and distinct. By the former defendant contracted to pay the 142 installments to mature his stock, and by the latter he executed his note for the amount borrowed, due in 142 months and bearing interest at 6 per cent., payable monthly; such rate being lawful under the laws of the state. The note was secured by a mortgage of property and a pledge of the stock, which, when matured, was to be applied in cancellation of the loan. *Held* that, the note being lawful on its face, the transaction was not rendered usurious because of the stock contract, in the absence of proof of a corrupt agreement, or that it was a device or shift to cover usury, within the contemplation of both parties; it appearing that the agreements were entered into by defendant freely and voluntarily, and with full knowledge of their terms and conditions.

**6. SAME—ESTOPPEL.**

One who becomes a subscriber to the stock of a building and loan association, and a borrower therefrom, and makes the payments required

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¶ 1. Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

¶ 3. See Receivers, vol. 42, Cent. Dig. § 103.

by his contracts in accordance with its by-laws, thereby recognizes it as a bona fide building association, with power to issue stock, and cannot thereafter question the validity of his stock, and set up the claim that the installments paid thereon were payments on his loan, contrary to the provisions of his contract.

**7. USURY—LIMITATION OF RIGHT TO RECOVER USURY PAID—LOUISIANA STATUTE.**

Under the statute of Louisiana, which authorizes the recovery back of usurious interest paid if a suit or proceeding therefor is instituted within 12 months after the payment is made, the limitation is a condition of the right itself, and not merely a part of the law of the remedy, and, unless the right is asserted within the time fixed, it ceases to exist, and cannot be claimed or enforced in any form.

**8. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—SETTLEMENT WITH BORROWING STOCKHOLDER.**

In the settlement between the receiver of an insolvent building and loan association and a borrowing stockholder, the equitable rule is to charge the borrower with the amount of the loan, with the interest stipulated in the contract, and credit him with interest paid and with the present value of the stock as determined by the ascertained or estimated dividend to which he will be entitled thereon in the distribution of the assets; but, where he kept up all his payments to the time of the insolvency and receivership, he cannot be charged with an attorney's fee stipulated for in the contract in case of his default.

**9. SAME—RIGHTS OF PURCHASER OF MORTGAGED PROPERTY.**

Where a purchaser of real estate expressly assumed in the conveyance payment of the balance due from the vendor to a building and loan association secured by a mortgage of the property, which secured, not only a note given by the vendor for a loan from the association, but also the payment of installments on stock subscribed for by the vendor and pledged to secure the loan, such purchaser cannot set up as against the association that the stock was invalid and the transaction usurious, when it was valid between the parties, and especially where the vendor is before the court insisting on the validity or fairness of the contract; nor has the purchaser any standing to insist that stock payments made by it after the purchase shall be applied on the loan, and not on the stock, on the ground that it did not become owner of the stock, since the obligation it assumed extended to such stock payments, and their application is therefore immaterial, as between it and the association.

**10. SAME—RIGHTS OF PURCHASER AGAINST VENDOR—SUBROGATION.**

In a suit by the receiver of an insolvent building and loan association against a borrowing stockholder and a subsequent purchaser of the mortgaged property to foreclose the mortgage and the lien on the stock pledged, it appeared that the stockholder sold the property for a stated price, a part of which was paid in cash and a part by the purchaser's assumption of the balance due on the mortgage as computed by the parties. In fact the amount due exceeded such computation, and the purchaser also paid installments on the vendor's stock, of which the purchaser did not become the owner, and which payments, while secured by the mortgage, were not applied upon the mortgage debt assumed. *Held*, that the court in such suit could only give the purchaser relief in respect to such overpayments to the extent of subrogating the purchaser, on its payment of the amount found due the association, to the lien of the association as pledgee of the stock owned by the vendor.

McCormick, Circuit Judge, dissenting.

Appeals from the Circuit Courts of the United States for the Western and Eastern Districts of Louisiana.

*Gunby v. Armstrong* is an appeal from the Western District of Louisiana, and *Franklin Opera House Company v. Armstrong* comes up from the Eastern District of that state. The principal issues are alike in both cases, and hence

they were submitted at the same time. In both suits, Armstrong, as receiver of the New South Building & Loan Association, is a party, and the litigation results from a failure to agree upon terms of settlement after the association passed into the hands of the receiver. A scheme or plan of settlement, as between the insolvent association and its borrowing stockholders, was formulated by Mr. E. B. Kruttschnitt in an elaborate report submitted by him as special master to the court of primary jurisdiction, sitting in the Eastern District of Louisiana, and by an order duly passed by Judge Parlange the plan recommended was adopted. The report of the master and the order of the court will be found textually reported in *Miles v. Association* (C. C.) 111 Fed. 946-972, to which reference is made in connection with this statement of the case. It is admitted by counsel that since the submission of the master's report a large number of the outstanding loans have been collected, pursuant to the order of the court, thus considerably reducing the amount of the indebtedness against borrowing members. The association continued its operations as a going concern in Louisiana, Mississippi, Georgia, and several other states until June 2, 1899, when, owing, it is alleged, to adverse decisions, mainly by the Supreme Court of Mississippi, on the question of usury, Mrs. Felliciana R. Miles, one of its stockholders, filed a bill in the United States Circuit Court for the Eastern District of Louisiana praying the appointment of a receiver. On the following day an order was made by Judge Pardee, and concurred in by Judge Parlange June 5th, appointing the appellee, Armstrong, receiver of the association, pursuant to the prayer of the bill. On October 25, 1899, the receiver presented to the court a petition requesting instructions as to how he should deal with borrowing members of the association, and on October 31st, following, an order was made by Judge Parlange referring the petition to Mr. Kruttschnitt as special master, with directions to ascertain and report "what would be a proper basis for the adjustment, settlement, and collection, at this stage of the cause, of the obligations of the borrowing members of the defendant, the New South Building & Loan Association." On February 16, 1900, the master submitted his report, which was, as above stated, approved and confirmed by the court. As to the parties represented at the hearings before the master, it is said in the report: "The application of the receiver is necessarily one made *ex parte*. The action which the receiver seeks to take is approved of by the complainant, and apparently acquiesced in by the defendant, as it did not appear before the master, although duly notified. Neither the American Trust & Banking Company, which has filed a bill in the United States Circuit Court for the Northern District of Georgia, seeking to control the administration of almost all of the assets belonging to the series stock fund and in the hands of the receiver, nor any other creditor of the defendant association, is a party to these proceedings. Only one stockholder, and that one a borrowing stockholder, voluntarily appeared before me. I state these facts very fully, in order to show the extreme care which should be exercised by the court in the premises, and the great caution to be observed in dealing with a large amount of assets in the hands of the receiver, in which so many persons are interested, none of whom, with the one or two exceptions above named, have been heard." The foregoing statement applies generally to the two appeals. Reference will now be made to such parts of the record as are deemed applicable to each appeal, separately considered.

(1) *A. A. Gunby v. Johnston Armstrong, Receiver.*

The appellant, Gunby, was a borrowing stockholder, having subscribed for 25 shares of series stock, class B, and executed his note, December 26, 1894, to the association for \$2,500, payable November 1, 1906, at its office in New Orleans, La., with interest at the rate of 6 per cent. per annum, payable monthly, from date, until paid. To obtain the loan it was necessary to become a stockholder in the association, a preliminary application being required by the rules before the certificate of stock issued. The appellant duly made his application for stock, and a certificate therefor issued. He also applied for a loan of \$2,500, to secure which an act of sale was executed as herein-after mentioned, and his stock deposited as additional security. The following

statement touching the application for stock and loan, the certificate of stock, and the act of sale, is taken from the brief of appellee's counsel:

"The application starts out by declaring that applicant, by occupation a lawyer, hereby subscribes for twenty-five shares of series stock, class B, and applies for membership in the New South Building & Loan Association of New Orleans, La., and understands and especially agrees to the rules of the association governing said class B series stock, and particularly as to the withdrawal value of the shares and as to the relinquishment of all participation of the shares applied for in the profits or dividends or earnings of the association (except as to so much of the profits as may be necessary to mature the stock after 142 payments). The applicant further declares that this relinquishment is in consideration, among other things, of the right to apply for a loan on terms stated in the application, and of the right to receive the amount of such loan without discount, and to pay on the same interest at the rate of 6 per cent. per annum, payable monthly, and of the right to pay no premium on the loan whatever, unless the applicant wishes to repay the loan before the expiration of 142 months, and that in case of such voluntary repayment applicant agrees to pay a premium on the full amount of the loan at certain rates stated in the application. For instance, if he desired to repay the loan and withdraw the stock in the fifth year of his loan, he agreed to pay a premium of 8 per cent., or \$200. The applicant further specially agreed that all payments should be made to the home office and that agents had no authority to promise loans or to make any other contract binding the association. The certificate of stock is headed, 'Class B, Series No. 55, 25 Shares.' It certifies that A. A. Gunby, of Monroe, state of Louisiana, is a stockholder in the New South Building & Loan Association of New Orleans, La., and is the owner and holder of twenty-five shares of series stock, class B, therein, of \$100 each; that the certificate is issued and accepted by the stockholder subject to all the conditions and limitations contained in the charter and by-laws of the association; and that such conditions and limitations form a part of the certificate. The certificate states the obligation of the stockholder to be to pay 70 cents per month on the first of each month for each share held for a period of 142 months or until the certificate is canceled or withdrawn under the rules of the association; that all moneys due shall be payable at the home office in New Orleans, provided, however, that payment may be made to a local treasurer for transmission to the home office, but in such case the local treasurer shall be deemed the agent of the local stockholder, and not of the association; that 60 cents of each monthly payment, all interest, premiums, fines, and forfeitures, shall go into the series stock loan fund; that when the stock is matured it shall be received by the association in liquidation of the indebtedness of the owner in accordance with his agreement with the association; that the contract between the association and its members is contained in its charter and by-laws, and cannot be changed or altered by any agent or officer of the association; that agents have no power beyond that specially given them in their certificate of authority. The certificate contains an indorsement, signed by appellant, that, in conformity with the rules and regulations of the association, he has transferred the certificate, with all rights thereunder, to the association, in order to further secure the association the advance made him on the shares of stock evidenced by the certificate. The date of the application for stock is November 24, 1894, the date of the certificate is December 24, 1894, and of the indorsement December 26, 1894. Appellant's application for a loan begins with the declaration that Mr. Gunby, the undersigned, hereby applies to the New South Building & Loan Association of New Orleans for a loan of \$2,500 on 25 shares of the association on the terms and conditions, under the rules and regulations of the association, and in accordance therewith. The following paragraph occurs in the application: 'It is thoroughly understood and agreed by me, in making this application: First, that this loan, if made, will be made by the New South Building & Loan Association of New Orleans, Louisiana, and accepted by me, on the terms and conditions and subject to all the regulations contained in the charter and by-laws of said association, and subject to all the rules of the association, and on the terms and conditions to be further stipulated by said association; and I agree to comply with the

same and to accept the loan at the date the same is allowed by the board of directors of the said association.' This application is signed and sworn to by appellant, who states in his affidavit that he fully understands that the loan, if allowed, will be made in reliance on the truth of the statements therein given. According to the usual mode of procedure in building and loan association transactions, the real estate to secure the loan was transferred to the association, and from association back to appellant, in order to secure the loan by a vendor's lien and special mortgage. Among the stipulations contained in the act of sale to appellant are the following: Appellant declared that, as a part of the consideration of the sale, he binds himself to pay monthly, at the office of the corporation, until he takes up and pays his note for \$2,500, the monthly dues or installments on 25 shares of stock taken by him under the above referred to certificate, which amount to 70 cents per share, or \$17.50 per month, and that, in order still further to secure the loan, he does give in pledge to the corporation all installments now paid and to be paid on said 25 shares of the capital stock of the association, and that the certificate therefor he had delivered to the representatives of the association, and that the said pledge was made under all the terms and provisions of the charter and by-laws of the corporation. The act of sale contained, among others, the following clause: 'Said vendor hereby reserves to itself (and the purchaser consents thereto) the right to apply whatever payments are made, either to the interest, dues, fines, taxes, or insurance, as said vendor may elect.' It was further expressly agreed and understood in the act that if the purchaser should pay the interest on his note monthly, and should pay the installments due upon his stock promptly and punctually, then the principal of the note should not become exigible until the value of the 25 shares of stock, with dividends or accumulations thereon, should become equal to the amount of the obligation, with all interest and costs due upon the same, at the happening of which event the stock and the indebtedness should cancel each other; the stock and the indebtedness being alike extinguished. It was also agreed and understood that, in case the purchaser should for the term of two months fail or neglect to pay the installments of interest or dues, or any portion thereof, or any and all costs and fines that might be due by him to the association, such failure or neglect should at once, without demand, without putting in default, and as a penalty, make the promissory note, with all back interest thereon, become immediately due and exigible, and should entitle the association to enforce, by executory process or by ordinary proceedings at law, the collection of the note and all interest due thereon, together with all sums due the association for insurance premiums, taxes, installments on said shares of stock, and attorney's fees, etc. It appears from the record that the monthly installments of \$17.50 on account of the stock and \$12.50 on account of interest were paid by appellant up to and including the installments and interest due for the month of May, 1899. In February, 1899, appellant applied to repay his loan and withdrew his stock. A statement was sent to him, from which it appeared that at that time, considering the book value of the assets of the association, the withdrawal value of his stock was \$765. He was charged 8 per cent. premium, amounting to \$200, for repayment in the fifth year. He denied the right of the association to charge this premium, and brought suit in the Fifth district court for the parish of Ouachita to compel the association to settle with him without demanding the premium. The suit was dismissed on exception to the jurisdiction."

A few days after Mrs. Miles filed her original bill in the Eastern District of Louisiana seeking the appointment of a receiver, as set forth in the general statement of this case, she filed an ancillary bill in the United States Circuit Court for the Western District of that state. The ancillary bill having been submitted to Judge Pardee, he made an order, June 6, 1899, adjudging and decreeing that the court take ancillary jurisdiction of the cause with the United States Circuit Court for the Eastern District of Louisiana, recognizing and confirming Armstrong as receiver, "to the end that all the affairs, concerns, and business of said association may be liquidated, adjusted, and wound up under the supervision of the United States Circuit Court for the Eastern District of Louisiana." Upon application duly made to



the Circuit Court for the Western District of Louisiana, Judge Boorman made an order, December 24, 1900, decreeing that "the report of E. B. Kruttschnitt, special master, and the decree of the United States Circuit Court for the Eastern District of Louisiana affirming said report, be and the same are hereby ratified, adopted, and confirmed."

The appellant and the receiver having failed to agree upon a settlement of the former's indebtedness, the receiver filed in the Circuit Court for the Western District of Louisiana, July 9, 1901, a petition or bill against the appellant, in the ancillary proceeding instituted by Mrs. Miles, in which he sought to recover the indebtedness due by appellant to the association and the foreclosure of the lien upon the real estate given to secure it. The answer of the appellant denies that the association is insolvent and claims that the attempt to compel him to pay his indebtedness before maturity, by forcing the association into liquidation without just cause, is unjust and inequitable. It is further averred that as the owner of series stock, class B, he did not participate in the earnings of the association, and that it agreed to make the loan to him, without discount and without any premium whatever, at the rate of 6 per cent. per annum; that his contract stipulated that the shares subscribed for by him should be fully paid up in 142 months; and that the repayment of the loan could not be demanded by the association as long as the monthly installments were promptly paid. It is further averred as follows: "Defendant avers that this loan was made through a regularly established branch of the New South Building & Loan Association, which was in active operation in the city of Monroe; that said branch organization had its own board of directors, and fully conducted and carried on its own business, and advertised that it would loan money on good mortgage security at 6 per cent. per annum interest. Avers that the whole intention, purpose, and consideration of said contract was to make a straight loan of money, and that the subscription for nonparticipating shares of stock did not make, nor was it intended to make, defendant a mutual member of said association; that it was not of the nature of a building and loan association, but was a simple contract of loan, which made defendant a debtor of said association for the amount of money borrowed, and entitled him to credit for all amounts paid by him on said loan." The answer further avers that from December, 1894, to June, 1899, inclusive, the appellant paid \$30 a month to the association, aggregating \$1,650, which he claims should be credited on the loan at the date each payment was made, leaving a balance of \$1,280 due July 1, 1899; that the appellant has been ready and willing at all times, and is still willing, to carry out his contract, but he denies the right of the association beyond the terms thereof. The answer concludes with the following prayer: "Wherefore defendant prays that complainant, the receiver of the New South Building & Loan Association, be ordered and compelled to file an accounting especially of the stock in series B of said association, and that the demands of complainant against defendant be rejected, and that defendant be permitted to carry out his contract with the New South Building & Loan Association, according to the terms and the true intent thereof; and further humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

Reference having been made to the master, Mr. Thomas T. Taylor, to state the accounts between the parties, and his report having been confirmed by the court, a decree was passed in favor of the receiver for \$3,158, with foreclosure of the lien as prayed for. The sum adjudged against the appellant, \$3,158, is composed of the following items, as taken from the decree: (a) The principal of the promissory note given by said defendant, \$2,500. (b) Interest on said note at 6 per cent. per annum from June 1, 1899, to November 30, 1902, \$525. (c) Attorney's fees, 10 per cent. on amount in suit, \$302.50. The defendant under the decree of the United States Circuit Court is entitled to a credit of 20 per cent. on the value of certificate No. B27 (which was, per tableau, \$847.50), \$169.50. Leaving the amount due the receiver of \$3,158.

From the decree thus rendered the defendant, Gunby, has appealed to this court.

(2) Franklin Opera House Company, Limited, v. Johnston Armstrong, Receiver.

From the record it appears that this suit was originally instituted by appellant as an independent action, August 17, 1900, against Mrs. Lucy De Long and her husband, and Johnston Armstrong as receiver of the New South Building & Loan Association, and was ordered by the court to stand as an intervention in the receivership proceedings. On April 10, 1895, Mrs. De Long applied to the association for 50 shares of stock, class B, and, after compliance by her with the usual preliminaries, the certificate issued, and on the same day the stock was pledged as collateral security for the loan hereinafter mentioned. Mrs. De Long's application for a loan of \$5,000 was granted, and, on May 7, 1895, being thereunto duly authorized by her husband, she executed her note to the building association for the amount named, payable 142 months after date, at the office of the association in New Orleans, La., with interest at the rate of 6 per cent. per annum from date until paid. The real estate upon which the lien is sought to be foreclosed by the appellee was by the usual sale and resale subjected to the vendor's privilege and special mortgage to secure payment of the note and the performance of Mrs. De Long's contract with the association. After Mrs. De Long had paid, less a few days, 18 monthly installments of interest on the loan at \$25 per month, amounting to \$448.35, and a like number of monthly installments on the stock at 70 cents per share per month, amounting to \$630, she conveyed the property involved herein, November 2, 1896, to the appellant, for the sum of \$10,000, of which \$5,630 was paid in cash, and touching the balance the act of sale contains the following clause: "The said purchasing corporation, or its agent, does hereby assume the payment of the balance due by said vendor on the mortgage note dated May 7, 1895, secured by the vendor's lien and special mortgage in favor of the New South Building & Loan Association of New Orleans, Louisiana, bearing upon and affecting the property herein conveyed, which said balance is now computed at four thousand three hundred and seventy dollars (\$4,370.00), and the payment whereof is assumed upon the terms contained in the act of sale from said building and loan association to the said Mrs. De Long, of record," etc. By the act of sale Mrs. De Long did not specifically convey her 50 shares of stock in the association to the appellant; and it may be said that the appellant has neither claimed to be the owner of the stock nor has it been recognized as such by the association. Subsequent to the sale of the property by Mrs. De Long to the appellant, the latter paid to the building association and receiver \$1,995, which was imputed as follows: To the payment of interest on the loan, \$875; to monthly installments on stock, \$1,085; and to fines, \$35. After the appointment of the receiver \$280, included in the above amount of \$1,995, was remitted to him in payment of dues, etc., which brought the account of appellant down to October, 1899; and it thus clearly appears that all stock installments were paid to the date of the receivership and all interest to the date last mentioned, to wit, October, 1899. It is to be noted that the appellant was not a party to the contract between the association and Mrs. De Long, nor was the association a party to the act of sale between Mrs. De Long and the appellant. Indeed, it appears that the association was not informed of the sale by Mrs. De Long to the appellant until long after it had been consummated. A lengthy correspondence took place between the receiver and a representative of the appellant in reference to an adjustment of the indebtedness resting upon the property, but without result, and as a consequence the suit was instituted by the appellant as above stated.

Briefly stated, in the petition of intervention the appellant claimed that the association was in no proper sense a building association, and that Mrs. De Long was not a stockholder, the stock being merely a fiction; that the transaction between the parties was purely a commercial loan, usurious in its nature; and that all monthly payments made by Mrs. De Long and the appellant should be credited upon the principal and interest of the loan. It is further alleged that 53 partial payments of \$60 each had been paid on the original indebtedness, aggregating \$3,180, and that as a penalty for the

usurious and extortionate interest the entire amount should be credited, thus leaving a balance due by the appellant of \$1,820. The petition concluded with the following prayer: "(1) That there be judgment against the said receiver and against the said Lucy Ashton Evans De Long decreeing petitioner to be entitled to full credit of three thousand one hundred and eighty dollars (\$3,180.00) upon the said note of five thousand dollars (\$5,000.00), and in the alternative petitioner prays: (2) That, if the court declares said alleged stock genuine and bona fide and the interest charged not usurious, then that petitioner have credit on said note for all the partial payments of principal, or for the value of said alleged certificate B92, amounting to the full sum of eighteen hundred and fifty-five dollars (\$1,855.00), and petitioner further prays for all general and equitable relief, and for all orders and proceedings necessary in the premises." An answer and cross-complaint were filed by the appellee, the receiver, in which he sought to recover the entire amount of \$5,000, with 6 per cent. interest from October 1, 1899, attorney's fees, and costs of suit. Mrs. De Long made no answer to the cross-complaint filed by the appellee, and a decree pro confesso was taken against her. In her answer to the petition of the appellant she admitted the facts touching the sale of the property to the appellant, but claimed that she was the owner of the 50 shares of stock, and as such was entitled to whatever dividends there might be declared upon the same, and her prayer was consistent with the claim set up. The intervention was referred to Mr. Kruttschnitt, as master, who found in favor of the appellee against the appellant and Mrs. De Long in the sum of \$5,000, with 6 per cent. interest from October 1, 1899, and 10 per cent. attorney's fees, less a credit of \$312, which latter amount was allowed as an anticipatory dividend on the book value of Mrs. De Long's stock.

In reference to the state of account between Mrs. De Long and the appellant, and the adjustment of the state of the rights and equities between them, the master reported as follows: "It is to be borne in mind, however, that whilst the association has, in my opinion, the undoubted right to recover the full sum of \$5,000 and interest and attorney's fees as above stated, still the payment of that amount is secured, not only by mortgage on the opera house company's property, but also by pledge of Mrs. De Long's stock; and it is further to be borne in mind that she sold the property purchased by the opera house company for a price of ten thousand dollars (\$10,000.00), whereof she received in cash \$5,630, and through some erroneous computation between herself and the company computed the balance due upon her mortgage note at only \$4,370, instead of \$5,000. It is further to be borne in mind that the Franklin Opera House Company has paid the sum of \$1,085 in installments on stock, which installments were secured by mortgage on the property sold by Mrs. De Long to the company, and as to which the company did not assume her obligations. It would therefore seem quite clear that under her warranty Mrs. De Long would be bound to the opera house company to the extent of \$630 excess in the amount due on the mortgage note over the amount at which that indebtedness was computed in her act of sale to the opera house company, and for the further sum of \$1,085 amount of installments paid by the Franklin Opera House Company on account of her indebtedness on her stock. Apply these principles to the case at bar, and we find that the opera house company has certainly paid installments due upon the stock of Mrs. De Long to the amount of \$1,085, and that, whenever the decree to be rendered in this cause in favor of the receiver shall have been satisfied, it will also have paid an amount of \$630 in excess of the amount which by its act of purchase it assumed on account of Mrs. De Long's loan from the association. By these payments, which it had an interest in making, and which were necessary in order to save its property from seizure and sale, it became subrogated to all the rights of the association as against Mrs. De Long. As subrogee, it can, of course, not compete with the subrogor, who is entitled to be first paid. Civ. Code, art. 2162. Hence it follows that the association and its receiver may enforce payment of the whole amount due to them by Mrs. De Long by seizure and sale of the property mortgaged, and also by en-

forcing the pledge of the stock, which was given as further security for the rights of the association; and it follows that after the association, or its receiver, shall have been paid, the opera house company will be entitled as subrogee to recover the amounts which it was not personally obligated to disburse, and which it has or may hereafter disburse for account of Mrs. De Long, and the reimbursement of these amounts is secured by pledge of her stock. This is the necessary result from the application of the laws of the state of Louisiana to this case, and it also leads to most equitable conclusions. Third. I further find that from an account and dividend list filed by the receiver it appears that Mrs. De Long is entitled to a dividend of 20 per cent. on the book value of her certificate of stock; that is to say, 20 per cent. of \$1,560, or \$312. As this amount constitutes cash in the hands of the receiver, collected from the stock pledged to him, it should be imputed as a credit on the amount which I have above found as the amount due to the association, and I shall so impute it in the decree which I shall hereinafter draft and recommend to the court for adoption. It is to be further noted that, inasmuch as the receiver would be entitled to collect the fines of \$35 due by Mrs. De Long out of this sum of \$312, if he had not already collected it from the Franklin Opera House Company, by crediting this full sum of \$312 upon the amount now found to be due to the association, the opera house company indirectly obtained a credit for the \$35 of fines which I have above stated should not be debited to it. If, in other words, the receiver should hand back to the opera house company the \$35 of fines erroneously debited to that company, he would reimburse himself for such payment out of this sum of \$312, reducing the credit from \$312 to \$277. The same result, with less circumlocution, is brought about by crediting the whole sum of \$312 to the net indebtedness of Mrs. De Long as above set forth."

The master included in his report a form of decree in accordance with his findings, and the report was approved and confirmed by the court. The decree provided for the sale of the property to satisfy the indebtedness due the receiver as above set forth; and on the question of subrogation, as affecting the issue between the appellant and Mrs. De Long, it provided as follows: "It is further ordered, adjudged, and decreed that after the claims of said New South Building & Loan Association, for which a decree is herein rendered in favor of said receiver, shall have been paid in full, the Franklin Opera House Company, Limited, be, and it is hereby, subrogated to the claims of said New South Building & Loan Association, and of said receiver, as pledgees of 50 shares of stock of the New South Building & Loan Association represented by certificate No. B92, for fifty shares of the stock of said association, and that as such subrogee said Franklin Opera House Company, Limited, be, and it is hereby, decreed to be entitled to recover from said Mrs. Lucy Ashton Evans, wife of H. L. De Long, the sum of one thousand seven hundred and fifteen dollars (\$1,715), with interest thereon at the rate of five per cent. per annum upon the amounts and from the dates following, to wit: On six hundred and thirty dollars (\$630) from the date when the decree in favor of said receiver shall have been paid in full; on thirty-five dollars (\$35) from January 4, 1897, until paid; on a like amount from each of the dates following until paid, to wit: January 30, 1897; March 6, 1897; April 3, 1897; April 30, 1897; June 1, 1897; July 1, 1897; August 2, 1897; September 2, 1897; October 2, 1897; October 20, 1897; December 1, 1897; January 3, 1898; February 11, 1898; March 3, 1898; June 8, 1898; and on four hundred and twenty dollars (\$420) from December 28, 1898, until paid; and on one hundred and five dollars (\$105) from October 14, 1899, until paid; and said sum so decreed being subject to a credit of two hundred and seventy-seven dollars (\$277) as of date February 22, 1902, and to be imputed according to law as a payment of said date. It is further ordered and adjudged that the said fifty shares of stock represented by certificate B92 be, in the event of such subrogation, sold without appraisal for cash by ———, Esq., who is hereby appointed special master for the purpose, and that out of the proceeds of said sale said special master do pay the expenses of said sale, and then unto the said Franklin Opera House Company, Limited, the sum hereinabove found to be due, and secured by pledge as afore-

said, and deposit any balance in the registry of the court to the credit of this cause."

From the decree thus rendered the opera house company only has appealed.

E. T. Lamkin and A. A. Gunby, for appellant Gunby.

Philip H. Mentz and R. L. Tullis, for appellant Franklin Opera House Co.

George Denegre and Joseph Paxton Blair, for appellees.

Before McCORMICK, Circuit Judge, and MAXEY and JONES, District Judges.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The records before us embrace two distinct appeals, and each one will be considered in its order.

(1) Gunby v. Armstrong, Receiver.

The appellant objects to the jurisdiction of the Circuit Court upon the ground that both he and the appellee, Armstrong, receiver, are citizens of the state of Louisiana. His objection was not much insisted upon in the oral argument, and slight consideration is given it in the briefs. Regarding the facts, it may be stated that the Circuit Court for the Eastern District of Louisiana is the court of primary jurisdiction. Soon after Mrs. Miles, who was a citizen of the state of Texas, filed her bill in the Circuit Court for the Eastern District which culminated in the appointment of the appellee as receiver of the New South Building & Loan Association, a corporation organized under the laws of the state of Louisiana, she filed an ancillary bill in the Western District of that state, and Judge Pardee made an order that the court of the Western District take ancillary jurisdiction of the cause with the Circuit Court for the Eastern District, and recognized and confirmed Armstrong as receiver—

"To the end that all the affairs, concerns, and business of said association may be liquidated, adjusted, and wound up under the supervision of the United States Circuit Court for the Eastern District of Louisiana."

By filing the bill in the Circuit Court for the Western District of Louisiana, supplemented by the order passed by Judge Pardee, the court of the Western District acquired jurisdiction of the cause, and any suits thereafter instituted by the receiver for the collection of the assets of the association were clearly within its cognizance, regardless of the citizenship of the parties or of the amount in controversy. *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; *Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 266, 39 L. Ed. 341; *Pope v. Louisville New Albany etc. Railway*, 173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814.

The appellant further insists that the building association was solvent at the time of the appointment of the receiver, and hence it is claimed that the order of appointment was unauthorized. If the term "insolvency," as applied to a building association, be construed to mean mere inability to pay its creditors, then the association was not insolvent at the time the court took charge of its

affairs by the appointment of a receiver. But such is not the true meaning of the term in its application to corporations of that character. The insolvency of a building association, employing the words of another, is a peculiar thing. "It is the inability of the building association, not to pay its outside debts (for that does not seem to have ever occurred, and, in the nature of things, can scarcely be thought of), but to satisfy the demands of its own members, that has been recognized as an insolvency." *End. Bldg. Ass'ns* (2d Ed.) § 511; *Towle v. American Bldg., etc., Society* (C. C.) 61 Fed. 446. And when in the course of its business it reaches the point where it finds itself unable to carry to completion the purposes of its creation—in a word, when the consummation of the scheme becomes impracticable—it may be said to be unable to satisfy the demands of its own members. "Hence," it is said by Mr. Endlich, "the insolvency of a building association, leaving no prospect of a consummation of its initial design, is recognized, if not as a dissolution of it, at all events as a sufficient ground for the abandonment of the enterprise and for proceeding to wind up the corporation. In such case the method to pursue is by way of petition by members to the court for the appointment of a receiver." 2 *End. Bldg. Ass'ns*, § 511. "Yet, because of the peculiar character of that which alone constitutes insolvency in a building association, it is not every person having a demand upon it who can have a standing to move the court to action. Such standing is accorded only to claimants in the character and capacity of stockholders." *Id.* § 512.

In the present case the bill was filed by Mrs. Miles, as a stockholder, and by its allegations a case was presented showing clearly the necessity of prompt action. Diversity of citizenship gave the court jurisdiction of the parties, and the subject-matter was plainly within its cognizance as a court of equity; and, being invested with full jurisdiction, had error supervened, it could not be availed of in this collateral proceeding. The rule has been clearly stated in the following language:

"The appointment of a receiver, by a court possessing general jurisdiction in law and equity, cannot be assailed collaterally, in any action or proceeding, merely because such appointment was inequitable or erroneous; and so long as the jurisdiction, the inherent power—not the exercise of that power, but the power of the court itself to make it—is not questioned, the appointment is conclusive upon all parties until it is adjudged to be vacated in a direct proceeding instituted for that purpose by some party rightfully challenging it; and the presumption is that it was regularly made and that the court had jurisdiction to make it. If the decree was improvidently granted, or if for any reason it should be set aside or modified, relief can be had upon application by any party interested to the court by which it was made; but the regularity of the appointment of the receiver cannot be questioned by any other tribunal." *Gluck & Becker, Receivers of Corporations*, § 8; *High on Receivers* (3d Ed.) § 39a, and authorities cited; *Edrington v. Pridham*, 65 Tex. 612.

We would not, however, be understood as intimating a doubt as to the propriety of the action of the court in making the order complained of. On the contrary, we regard it as one eminently proper to have been made under the circumstances of the case.

It is next and earnestly contended by the appellant that the bill filed by the appellee against him was premature, for the reason that

the note executed by him to the association did not become due and payable until November 1, 1906, or 142 months after its date. Touching this contention it is shown by the record that the appellant subscribed for 25 shares of the stock of the association, and executed his note, December 26, 1894, to the association for \$2,500, payable November 1, 1906, at its office in New Orleans, La., with interest at the rate of 6 per cent. per annum, payable monthly. This note was secured by a vendor's lien and privilege reserved, as well as by mortgage and by the deposit of the stock with the association as collateral security. The appellant thus became a member of the association, and it became his duty as a member to pay, under the by-laws of the association, certain monthly installments on his stock, together with interest on his note and other small amounts as a borrowing member, not necessary in this immediate connection to be specified. The theory of the appellant appears to be that his note did not and could not mature until it became due and exigible according to its terms; and especially it is insisted that the obligation as to him could not be considered as matured, since he had promptly paid all installments of interest and other dues required by the by-laws and demanded by his contract with the association. The record discloses that the appellant was not in default, and that he had discharged every duty imposed upon him by his contractual obligations. That the association had failed in the accomplishment of its purpose was not due to any delinquency on his part, but mainly to adverse decisions rendered by the courts of Mississippi on the question of usury. Notwithstanding the stubborn fact remains that the association had ceased to be a going concern. It was practically dead. The scheme had failed, and naught remained to be done but to devise necessary means looking to the winding up of its affairs and to the protection of its members. These objects could be accomplished only by collecting its outstanding indebtedness and marshaling its assets; and the courts have deemed it essential, *ex necessitate rei*, to depart from the ordinary rule in such cases by requiring borrowing members to pay forthwith the balances due by them, although their contracts may otherwise provide. The principle is aptly stated in the following language:

"In endeavoring to formulate a rule which shall do exact justice to all the parties, in view of the considerations stated, the courts have not arrived at altogether uniform results. On one point there seems to be a general consensus, although the distinct enunciation of the principle is only of very recent date. It is this: that, upon premature dissolution of the association, the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms for the payment of installments." *End. Bldg. Ass'ns* (2d Ed.) § 523; *Strohen v. Franklin, etc., Loan Ass'n*, 115 Pa. 273, 8 Atl. 843; *Towle v. American Bldg., etc., Soc. (C. C.)* 61 Fed. 446; *Curtis v. Granite State, etc., Ass'n (Conn.)* 36 Atl. 1023, 61 Am. St. Rep. 17, and note; *Leahy v. Nat. Bldg. & Loan Ass'n (Wis.)* 76 N. W. 625, 69 Am. St. Rep. 945.

The objection that the suit was premature cannot, therefore, be sustained.

The next assignment of error which we shall consider, and the most important one of the errors assigned, proceeds upon the the-

ory that the contract between the appellant and the association is usurious, in that it really provides for the payment of 12 per cent. interest instead of 6 per cent., as claimed by the latter. By article 8924 of the Louisiana Revised Code of 1870, it is declared:

"Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit: At five per cent. on all sums which are the object of a judicial demand, whence this is called judicial interest. \* \* \* The amount of conventional interest cannot exceed eight per cent. The same must be fixed in writing. Testimonial proof of it is not admitted in any case."

Th Code allowing conventional interest at 8 per cent., it is perfectly clear that the note of the appellant, providing for the payment of 6 per cent. interest, was not obnoxious to the charge of usury, unless, indeed, the stock issued by the association to him was a mere fiction, and intended simply as a device under cover of which a greater rate of interest might be exacted than that allowed by law. And such is the contention of the appellant; it being claimed by him that the association possessed none of the features of a building association proper, in which the underlying principle is mutuality, but that it was simply a money-lending concern, and hence that all stock installment dues paid by him should be imputed to the principal of his indebtedness. The association was organized in 1890 by notarial act, pursuant to the laws of Louisiana, including Act No. 115, p. 177, of 1888. This act seems to be the first law enacted by the Legislature of Louisiana providing specifically for the incorporation of building or homestead associations. It provides that the capital stock may be divided into shares and may be payable in installments, as may be provided by the respective charters of such associations. It requires bonds to be given by the secretary and treasurer, and directs that annual meetings of the shareholders shall be held and complete statements made at such meetings by the board of directors. The associations are authorized to purchase and sell real estate either for cash or on credit; and they are invested with power to improve, repair, and build upon real estate, and to make all contracts and do all acts and things necessary and proper in connection therewith. The act further provides that, in case such association shall purchase property from any person and afterwards sell it to the same person, then the association shall have the vendor's lien and privilege upon the property sold to secure the payment of the money by such person. Authority is given to the associations by the act to contract and agree with any person to purchase property and afterwards sell it to the same person, although the agreement be made at one and the same time, and such contracts are not to be considered as a loan, but as a sale to the association, and then a resale by the association to the person from whom it was acquired. Section 5 of the act, and the last save section 6, which provides when the act shall take effect, refers to pledges of stock by shareholders, and is in the following words:

"That it shall be lawful and competent for any shareholder of such associations, when making a contract with such association, to pledge the in-



stallments upon his stock in such association already paid in at the time of making such contract, and those to be paid in after the date of such contract, as security for any debt due by him to said association, and a declaration of such pledge in an authentic act shall create and constitute a full, valid and complete pledge; and the fact of such pledge shall be stamped on the face of the certificate of the stock so pledged." Sess. Acts 1888, No. 115, p. 177.

The charter of the association, following the authority conferred by the act of 1888, fixed the capital stock at \$50,000,000, to be divided into 500,000 shares of the par value of \$100 each. The shares were divided into two general classes; 1,000 shares to be known as "guaranty stock," and the remaining 499,000 to be known as "series stock." Members of the association holding series stock, were divided into two classes, to wit: Borrowing or advanced members, to whom loans were made; and nonborrowing members, or investors, who did not obtain loans from the association. The stock of each class was further divided into series, numbered 1, 2, 3, and so on; all stock issued in the same month having the same series number. The different classes into which the series stock outstanding at the date of the receivership was divided were known and designated as classes A, B, C, E, G, J, L, M, S, and Z. The principles of classification and the rights and obligations of each class were fixed by the by-laws of the association. All series stockholders, whose shares were not full-paid, were required to pay for their stock in monthly installments of 70 cents, except the stockholders of class C, who paid \$1.05, per month. Out of the payments of 70 cents per month 60 cents went to the "series stock fund" and 10 cents to the "guaranty stock and expense fund"; and out of the payment of \$1.05 per month 90 cents went to the former and 15 cents to the latter. Borrowing members of class A, series stock, in addition to the monthly installments of 70 cents for each share of stock, paid 6 per cent. per annum interest and 6 per cent. per annum premium on their loans, payable monthly, to wit, 50 cents interest per month and 50 cents premium per month on each \$100 borrowed. The scheme contemplated that this stock would mature whenever the amount of the monthly installments paid thereon, together with the amount of the dividends declared on and credited to it, should amount to \$100 per share. The loans advanced to members of class B were for the face value of the stock subscribed, evidenced by notes payable 142 months after date. Members of this class paid no premium, except in the event of the payment of the loans before maturity, and the notes executed by them bore interest at the rate of 6 per cent. per annum, payable monthly. Class B stock matured when 142 monthly installments of dues on the same had fallen due and been paid on the certificates, and members of this class did not participate in the earnings beyond the amount necessary to mature the stock. Upon the maturity of the stock the loan and stock canceled each other, both being alike extinguished, and the evidence of indebtedness was surrendered to the member.

Under the scheme devised by the association the guaranty stockholders seem to have had control and management of its affairs.

The holders of this stock elected the board of directors of the association; the series stockholders having no voice therein. The charter made provision for the establishment of branches in Louisiana and other states, to be controlled by local boards of directors, under the management and direction of the association and subject to the by-laws adopted by its board of directors. As to the right of members to vote, it was provided by the by-laws that every member, not in arrears and not indebted to the association, should be entitled to one vote for each share of stock held by him. It is not deemed essential to refer to the distinctive features of other classes of the series stock, nor to go into more minute details as to the characteristics of the stock of class A and class B. The rights and obligations of the holders of the several classes of stock, as well as the characteristics of the stock, are defined by the charter and by-laws, and are set forth at length in the report of the master hereinbefore referred to.

The appellant, desiring to obtain a loan from the association, applied for membership, as loans could be made only to members. He was admitted as a member, and a certificate for 25 shares of series stock, class B, was duly issued to him. His application for a loan of \$2,500 was granted, and to secure the same the usual notarial act was executed by the parties, by which the vendor's lien and privilege on certain real estate were reserved and special mortgage thereon given to the association. In addition the appellant also deposited his stock as collateral security. The appellant's application for membership and other steps leading up to the final consummation of the loan may be regarded as contemporaneous acts, although evidenced by separate and distinct instruments. As we have stated above, the appellant paid all interest on the loan and all stock installments and other charges growing out of his contract with the association; and it is disclosed by the record that as monthly interest payments were made they were credited as such, and that the monthly dues on his stock were imputed to the stock, and not to the principal of the indebtedness. Indeed, there is nothing in the record to indicate that the association ever regarded the payment of stock installment dues as anything but payment on the stock. In that respect all stockholders, investors and advanced members, were treated alike. The association dealt with the appellant as both a borrower and a stockholder. The scheme of the association was founded upon the principle of this dual relationship, and the contracts of the appellant recognized and especially provided for it. The act of 1888 not only invested the association with power to divide its stock into shares, to be paid in installments, but also made it lawful and competent for any shareholder, when making a contract with the association, to pledge the installments upon his stock as security for his indebtedness; and the act further provided that a declaration of the pledge in an authentic act should create and constitute a full, valid, and complete pledge. The contracts of the appellant conform to the charter and by-laws of the association and to the legislative act of Louisiana, and should therefore be sustained, unless obnoxious to the objec-

tion that they were intended as mere shifts to deceive and entrap the unwary.

In line with the contention of the appellant that the stock is a mere corrupt device to cover usury, it is said that the stock is without voting power, that it does not share in the earnings or dividends proper, and hence that the transaction is a mere disguise for a straight loan for 142 months upon which moneys, paid on the stock, should be credited as partial payments. This objection is not without force, and the validity of the series stock we are now considering has been doubted by Mr. Justice Whitfield in the case of *Crafton v. New South Bldg. & Loan Ass'n* (Miss.) 26 South. 362. But for the following reasons we are of the opinion that the contention of the appellant cannot be sustained:

(1) It has been shown that the note executed by the appellant is upon its face free from usury; that he became a borrower of the association's funds, and in a distinct capacity a subscriber of its stock. Under such circumstances it is the duty of the court to so construe the contracts as to make them legal, rather than to set them aside as unlawful. The principle is thus stated by Mr. Justice Brown, speaking for the court, in *Investment Co. v. Grymes*:

"The court must give to the terms of the contract, if fairly susceptible of it, a construction that will make it legal, but has no right to depart from the terms in which it is expressed to make legal what the parties have made unlawful. *Webb on Usury*, p. 482; *Archibald v. Thomas*, 3 Cow. 284." 94 Tex. 613, 63 S. W. 861.

The converse of the latter proposition is equally true. The court has no right to depart from the terms in which the contract is expressed to make illegal what the parties themselves have made lawful. At page 614, 94 Tex., and page 861, 63 S. W., the justice further said:

"If the transaction was such as to render the intention of the parties doubtful, the court would adopt that construction which would attribute to them a legal intention; but we cannot adopt any method for the solution of this question by which we must arrive at a different result from that shown by the contract, because it is impossible to conceive of the parties having an intention to use certain forms of contract that would produce a result different from that which they embodied in the contract actually made."

(2) The note of the appellant being on its face for legal interest only, it was incumbent on the appellant to show, in order to render the transaction usurious, that there was some corrupt agreement, or device, or shift to cover usury, and that it was in the full contemplation of the parties. But no such agreement was shown in this case. The rule is thus stated by the Supreme Court in *United States Bank v. Waggener*, 34 U. S. 399, 9 L. Ed. 163:

"Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent. '*Res ipsa loquitur*.' But where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement, or device, or shift to cover usury, and that it was in the full contemplation of the parties. These distinctions are laid down and recognized as early as the cases of *Button v. Downham*, Cro. Eliz. 642; *Bedingfield v. Ashley*, Cro. Eliz. 741; *Roberts v. Trenayne*, Cro.

**Jac. 507.** The same doctrine has been acted upon in modern times, as in *Murray v. Harding*, 2 W. Bl. 859, where Gould, J., said that the ground and foundation of all usurious contracts is the corrupt agreement; in *Floyer v. Edwards*, Cowp. 112; in *Hammet v. Yea*, 1 Bos. & P. 144; in *Doe v. Gooch*, 3 Barn. & A. 664; and in *Solarte v. Melville*, 7 Barn. & C. 431. The same principle would seem to apply to the prohibition in the charter of the bank. There must be an intent to take illegal interest, or, in the language of the law, a corrupt agreement to take it, in violation of the charter; and so it was stated in the plea in the case of *Bank of the United States v. Owens*, 2 Pet. 527, 7 L. Ed. 508. The quo animo is, therefore, an essential ingredient in all cases of this sort."

(3) The engagements of the appellant were entered into freely and voluntarily, with full knowledge of all their requirements and limitations. He made contracts with the association, both as a stockholder and a borrower, which upon their face were subject expressly to the charter and by-laws of the association. He dealt with the association at arm's length, and there is in the record an utter absence of evidence tending to show fraud, oppression, or undue advantage taken by the association in reference to the execution of his obligations. In the face of these facts the court is unable to set the contracts aside. Upon this point the Circuit Court of Appeals for the Ninth Circuit used the following language:

"The general rule is, we think, well settled that a court of equity is not authorized to set aside and annul a contract made by parties with full knowledge of all the terms and conditions of the same, without it is clearly and satisfactorily shown that there was fraud, oppression, or undue advantage taken with reference to its execution. *Wann v. Coe* (C. C.) 31 Fed. 369, 371; *Vermont L. & T. Co. v. Dygert* (C. C.) 89 Fed. 123, 124; *Boyce v. Fisk*, 110 Cal. 107, 116, 42 Pac. 473; 1 Story's Eq. Jur. § 331." *Pacific States Savings, etc., Co. v. Green*, 123 Fed. 46, 59 C. C. A. 167.

See *Manship v. New South Bldg. & Loan Ass'n* (C. C.) 110 Fed. 845; *Hieronymus v. N. Y. & Natl., etc., Ass'n* (C. C.) 101 Fed. 12, affirmed by this court 107 Fed. 1005, 46 C. C. A. 684.

The Supreme Court, in *Railway v. Voight*, 176 U. S. 505, 506, 20 Sup. Ct. 385, 44 L. Ed. 560, quote with approval the following language used by Sir George Jessel, M. R., in *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 465:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

(4) In view of the contractual relations of the appellant with the association; his recognition of it as a bona fide building association, with power to issue the stock of which he was a subscriber; and his use of its money, coupled with the payment of all interest and stock dues as required by its by-laws and by the terms of his own contract—he is not now in a position to question the validity of the stock. *Gibson et al. v. Safety Homestead & Loan Ass'n* (Ill.) 48 N. E. 580, 39 L. R. A. 202; *Leahy v. National Bldg. & Loan Association* (Wis.) 76 N. W. 625, 69 Am. St. Rep. 945. See, also,

**Banigan v. Bard**, 134 U. S. 291, 10 Sup. Ct. 565, 33 L. Ed. 932; **Homestead Company v. Linigan**, 46 La. Ann. 1118, 15 South. 369; **Manship v. N. S. B. & L. Ass'n**, supra; **Johnson v. National Bldg.**, etc., Ass'n (Ala.) 28 South. 2, 82 Am. St. Rep. 257.

(5) The contracts in question were made in Louisiana, and were to be there performed. Under the authorities their construction, upon the subject of usury and the measure of recovery in suits brought to enforce them, should be governed by the jurisprudence of that state. **Andruss v. People's Bldg.**, etc., Ass'n, 94 Fed. 575, 36 C. C. A. 336. In the present case the averments of the appellant's answer disclosed that he paid his last installment of stock dues in June, 1899. His answer setting up usury was filed June 2, 1902, or about 3 years after the payment of the stock dues which he claims tainted the transaction with usury. Assuming, *ex gratia* argumenti, that the stock installments, added to the rate of interest specified in the note, exceed the conventional rate of 8 per cent., and thus render the transaction usurious, still the claim of the appellant ought not to prevail because of his delay of more than 12 months in interposing the defense. Upon this point, discussing the statutes of Louisiana, the Supreme Court said in **Walsh v. Mayer**, 111 U. S. 36, 37, 4 Sup. Ct. 262, 28 L. Ed. 338:

"The Circuit Court held that, the whole interest paid being avoided by the Louisiana statute, a court of equity would impute its payment to the principal debt, and rendered a decree accordingly, deducting the whole amount of interest paid from the face of the note. In the view we take, it does not become necessary to decide whether the contract ought to be governed by the law of Louisiana or that of Mississippi; for we are of opinion that the decree in this particular is erroneous according to either. It is not claimed that there is any express provision in the Louisiana statute that requires such an application of payments made on account of unlawful interest. It is rested altogether upon the provision that forfeits the whole interest paid, and authorizes the debtor to recover it back within the time limited. But the same provision is contained in section 5198, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3493], in reference to national banks, under which it has been held that usurious interest actually paid cannot be applied to the discharge of the principal. **Driesbach v. National Bank**, 104 U. S. 52, 26 L. Ed. 638; **Barnet v. National Bank**, 98 U. S. 555, 25 L. Ed. 212. In **Cook v. Lillo**, 103 U. S. 792, 26 L. Ed. 460, the Louisiana statute was considered, and upon the decisions of the Supreme Court of the state it was decided that the usurious interest cannot be reclaimed, nor be imputed to the principal, unless a suit for its recovery is begun or plea of usury is set up to the claim within 12 months after the payment is made. **Cox v. McIntyre**, 6 La. Ann. 470; **Weaver v. Maillot**, 15 La. Ann. 395. It is said, however, that the law of Louisiana applies and governs so far as it allows the forfeited interest to be applied in reduction of the principal in an action on the note, but that the limitation of time within which by that law the right must be exercised, being part of the remedy merely, it is governed by the law of Mississippi, being the law of the forum, which contains no such limitation. But the right claimed under the law of Louisiana must be taken as it is given, and is not divisible. The provisions requiring it to be asserted in a particular mode and within a fixed time are conditions and qualifications attached to the right itself, and do not form part of the law of the remedy. If it is not asserted within the permitted period, it ceases to exist, and cannot be claimed or enforced in any form."

And it may be added that according to our understanding of the laws of Louisiana, which have been carefully examined, they are substantially the same now in respect of the question decided in

**Walsh v. Mayer** as they were when the opinion in that case was rendered.

Attributing, as we do, validity to the stock, and regarding the two contracts of loan and stock subscription as separate and distinct, although contemporaneously executed, we shall proceed to inquire whether the trial court committed error in rendering a decree against the appellant for the sum of \$3,158. This amount is composed of the following items: (a) Principal of note, \$2,500; (b) interest thereon at 6 per cent. per annum from June 1, 1899, \$525; and (c) attorney's fees of 10 per cent. on amount in suit, \$302.50—total, \$3,327.50, which was credited with \$169.50 as anticipatory dividend on the value of the 25 shares of stock held by appellant, leaving a balance due the receiver of \$3,158. It will be observed that the question of premium on the loan is not involved in this case, and we expressly refrain from expressing any opinion regarding it. The above statement of account discloses that the appellant was charged as a borrower with the amounts of the loan and interest, together with 10 per cent. attorney's fees, and that as a stockholder he was credited with an anticipatory dividend on his stock. The question arises whether there was error in that method of adjustment.

The method pursued was strictly in consonance with the contracts of the parties and the by-laws of the association, except as to the item of attorney's fees, and it may be added that it was in entire harmony with the maxim that "equity delighteth in equality." When it is recalled that at the date of the receivership there were outstanding in the hands of investors approximately 4,000 shares of class A stock, the injustice of attributing stock installment payments as credits upon the loan becomes easily discernible. The application of such a rule would enable the borrower to escape responsibility for his share of the losses, and shift them entirely to the shoulders of the nonborrowing or investing class. Both classes should stand as nearly as possible upon an equal footing. The association of which the appellant is a member has followed in the footsteps of many others of like character, and it has been compelled to throw up its hands under the stress of judicial assault. The day of reckoning has overtaken it, and its members, as between themselves, should share equally the losses, as well as other resulting disappointments. Excluding from consideration for the moment the item of attorney's fees, it is thought that no rule more equitable can be devised than the one applied in this case. It is sustained by reason and by the decided weight of judicial authority. Thus, in *Strohen v. Franklin Saving & Loan Ass'n*, 115 Pa. 279, 280, 8 Atl. 843, it is said by the court:

"The insolvency of the company, as before observed, puts an end to its operations as a building association. To a certain extent, it also ends the contract between it and its members, respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or non-borrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually receives, with interest. He would then be entitled, after the debts of the corporation are paid, to a

pro rata dividend with the nonborrower for what he has paid upon his stock. He will thus be obliged to bear his proper share of the losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses and throw them wholly upon the nonborrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent incorporation in this manner."

See *Spinney v. Miller* (Iowa) 86 N. W. 317, 89 Am. St. Rep. 351; *Curtis v. Granite State, etc., Ass'n* (Conn.) 36 Atl. 1023, 61 Am. St. Rep. 17; *Leahy v. National Bldg., etc., Ass'n* (Wis.) 76 N. W. 625; *Post v. Mechanics' Bldg., etc., Ass'n* (Tenn. Sup.) 37 S. W. 216, 34 L. R. A. 201; *Pioneer Savings, etc., Co. v. Cannon* (Tenn. Sup.) 36 S. W. 386, 33 L. R. A. 112, 54 Am. St. Rep. 858; *Andruss v. People's Bldg., etc., Ass'n*, 94 Fed. 575, 36 C. C. A. 336; *Douglass v. Kavanaugh*, 90 Fed. 373, 33 C. C. A. 107; *Hayes v. Southern Home Bldg., etc., Ass'n* (Ala.) 26 South. 527, 82 Am. St. Rep. 216; *Towle v. American Bldg., etc., Ass'n* (C. C.) 61 Fed. 446; *Manship v. New South Bldg., etc., Ass'n* (C. C.) 110 Fed. 845; *Coltrane v. Blake*, 113 Fed. 785, 51 C. C. A. 457; *Sullivan v. Stucky* (C. C.) 86 Fed. 491; *Pacific States Savings, etc., Co. v. Green*, 123 Fed. 43, 59 C. C. A. 167; *Richard v. Southern Bldg., etc., Ass'n*, 49 La. Ann. 481, 21 South. 643; 4 Am. & Eng. Enc. Law (2d Ed.) pp. 1081, 1082, and notes; *End. Bldg. Ass'ns*, §§ 528, 529.

The Supreme Court of Louisiana in the *Richard Case*, above cited, denying the right of a stockholder to impute stock payments made by him to his loan, used this language:

"The plaintiff made the application for the loan with the distinct statement it was on his shares; that all payments by him, other than interest, were to be imputed to the stock; and the method of payment of loan and stock, and that default of these payments would mature the note, were well defined in the contract. The plaintiff received the \$2,000, and has had the benefit of it at 6 per cent., along with the rights conferred on him as a shareholder. With these obligations imposed and the rights secured to him under the contract, he has evinced his own appreciation of the contract, and paid for a period the interest on the loan and the required payments on the stock. We cannot, therefore, without disregarding the contract placed before us and the plaintiff's interpretation of it, manifested by his acts, treat it as a mere loan on usurious interest, as alleged in the answer and contended in argument." 49 La. Ann. 483, 21 South. 643.

This case was cited with apparent approval by the Supreme Court in *Building & Loan Association v. Price*, 169 U. S. 54, 18 Sup. Ct. 251, 42 L. Ed. 655, where it was said:

"A question somewhat similar to this has been decided in *Richard v. Southern Building & Loan Association*, 49 La. Ann. 481, 21 South. 643, where it was held that a loan of this nature was not to be treated as usurious, for the reason that the payments supposed to constitute the usury were by the terms of the contract made upon the stock debt, and not upon the loan."

In Texas, where the adjudications of the courts have been unfavorable to building associations on the question of usury, it has been ruled that, unless the stock was a mere device to cover usury, payments made thereon should be applied to the stock agreeably to the stipulations of the parties. *Cotton States Bldg. Co. v. Jones*, 94 Tex. 497, 62 S. W. 741; *International Bldg., etc., Association v. Abbott*, 85 Tex. 220, 20 S. W. 118.

The assignment of error relating to attorney's fees next requires our attention. In respect of this assignment it is insisted by the appellant that by the terms of his contracts with the association attorney's fees matured only upon default made by him in the payment of interest, stock installments, and other dues, and that since he fully complied with the terms of his contracts during the life of the association such fees could not be properly charged against him. It is a principle generally, if not universally, admitted that when a building association becomes insolvent and goes into the hands of a receiver, the payment of stock dues, premiums, and fines ceases. See authorities above cited. Why, then, should attorney's fees be exacted? Should they not share the fate assigned to stock dues, premiums, and fines? The by-laws of building associations and the stipulations of parties procuring loans have in view, not insolvency, but success of the venture. And fines, forfeitures, and other penalties are imposed upon delinquent members, not chiefly to punish the offender, but rather for the more business-like purpose of encouraging promptness on the part of members in discharging their obligations, thereby assisting the association in its efforts to render the enterprise successful. But, when the scheme has failed, the fines and penalties can no longer be enforced. Nothing is left to be done but to marshal the assets, and it would be hard indeed on the member who had promptly met all engagements if he should be held to answer for the sins committed by others. But, tested by the engagements of the appellant as evidenced by his several contracts, the same result must follow. The fees were recoverable only upon the happening of the contingency, and the very contingency, as to which the parties had contracted. The contingency within the contemplation of the parties was default in the payment of interest and other dues by the appellant. But, as has been shown, he was not delinquent; he made no default; he promptly paid all demands against him. Hence, by the terms of his contract, he is relieved from the payment of attorney's fees. Discussing this question, it was said by Mr. Justice Brewer (now Associate Justice of the Supreme Court) in *Jennings v. McKay*, 19 Kan. 121:

"The allowance of attorney's fees in the foreclosure of a mortgage is based upon contract. *Stover v. Johnnycake*, 9 Kan. 367; *Coburn v. Weed*, 12 Kan. 182. The court can allow none, unless the mortgagor has stipulated to pay them, and can allow no more than he has stipulated to pay, and under no other circumstances than those under which he has stipulated to pay; in other words, the court can make no new contract for the parties. It simply enforces the contract already made."

See, also, *In re Roche*, 101 Fed. 956, 42 C. C. A. 115.

While we have not considered the specifications of error in the order of their arrangement by the appellant, it is thought that the discussion of the case embraces every material error assigned. The decree appealed from should be amended by eliminating the item of attorney's fees of \$302.50 charged against the appellant, and, as amended, it should be affirmed.

Ordered accordingly.

McCORMICK, Circuit Judge, dissents.



(2) **Franklin Opera House Company, Limited, v. Johnston Armstrong, Receiver.**

MAXEY, District Judge. The controlling question involved in the present appeal is similar to the principal one decided in *Gunby v. Armstrong*, supra. In the two cases, however, the situation of the parties is somewhat different. Here the Franklin Opera House Company was purchaser of the property originally mortgaged by Mrs. De Long to the building association, and the bill was filed against it as vendee of the mortgagor. A brief recital of the facts will illustrate the status of the parties. In April, 1895, Mrs. Lucy De Long applied to the association for 50 shares of class B series stock, and the usual certificate was duly issued to her. She then made application for a loan of \$5,000, and, the same having been granted, she executed on May 7th, following, by authority of her husband, her note to the association for the amount named, to wit, \$5,000, payable 142 months after date, in New Orleans, La., with interest at the rate of 6 per cent. per annum from date until paid. The real estate upon which the lien was sought to be foreclosed by the appellee was by the usual sale and resale subjected to the vendor's privilege and special mortgage to secure payment of the note and the performance of Mrs. De Long's contracts with the association. After she had paid about 18 monthly installments of interest on the loan and a like number of monthly installments on the stock, she conveyed the property, November 2, 1896, to the appellant for the sum of \$10,000, of which \$5,630 was paid in cash; and in reference to the remainder the act of sale contained the following clause:

"The said purchasing corporation, or its agent, does hereby assume the payment of the balance due by said vendor on the mortgage note dated May 7, 1895, secured by the vendor's lien and special mortgage in favor of the New South Building & Loan Association, of New Orleans, Louisiana, bearing upon and affecting the property herein conveyed, which said balance is now computed at four thousand three hundred and seventy dollars (\$4,370.00), and the payment whereof is assumed upon the terms contained in the act of sale from said building and loan association to the said Mrs. De Long."

The association was not a party to the act of sale entered into between Mrs. De Long and the appellant, and was ignorant of its existence until long after it had been consummated. Subsequent to the sale of the property by Mrs. De Long to the appellant, the latter paid to the building association and to the receiver \$1,995, which was applied as follows: To the payment of interest on the loan, \$875; to monthly installments on stock, \$1,085; and to fines, \$35. It also appears from the record that all stock installments were paid to the date of the receivership and all interest dues to October, 1899. Upon the hearing in the trial court, Mrs. De Long, who is not a party to the appeal, claimed to be the owner of the stock, and asserted its validity and her right to any dividends which might be ultimately declared thereon, while the appellant insisted that the installments of interest and stock dues paid by it, subsequent to its purchase of the property from Mrs. De Long, and by Mrs. De Long prior thereto, should be imputed to the loan, upon the following grounds: (1) That, as to the payments made subsequent to the purchase, it, not being the owner of the stock, should not be required to pay stock installments; and (2)

that the stock was a mere fiction and usurious device, and hence not valid as to either of the parties.

Touching the second reason assigned, we held in the Gunby Case that loan and stock contracts made by shareholders with the association were to be regarded as separate and distinct transactions, and that stock dues were attributable to the stock, and not as partial payments on the loan; and it was further held that the engagements entered into by the parties were valid obligations and binding upon them. If, then, the loan be free from usury and the stock valid as to the shareholder, it is not perceived how they could be otherwise considered when assailed by one who was a mere vendee of the property antecedently mortgaged to secure the loan; and certainly the plea of usury and of the invalidity of the stock should not be permitted to prevail in the present case, since Mrs. De Long, who made the note, subscribed for the stock, and executed the mortgage, was before the court earnestly insisting upon their fairness and validity.

As to the contention of counsel that the appellant was not the owner of Mrs. De Long's stock, and that consequently there was no obligation resting upon it to pay the installments, which had been applied by the association on stock dues, it may be said that the appellant assumed the payment of Mrs. De Long's note upon the terms contained in the act of sale entered into between her and the association, and, as that instrument retained a lien upon the property purchased by the appellant to secure the payment of all interest and stock installments, it would seem to be immaterial whether such installments were credited on the loan or imputed to the stock, since in any event they were chargeable against the property; and in order to relieve the property of the incumbrance voluntarily assumed by the appellant, and to acquire thereto complete title, it was necessarily compelled to pay the dues, whether they had been previously imputed in the one way or the other. In respect of the obligation assumed by the appellant, in the deed executed to it by Mrs. De Long, this case is readily distinguishable from *Manor v. Aldrich*, 126 Fed. 934, 61 C. C. A. 464, relied upon by its counsel; and hence that case is inapplicable to the one at bar.

In his statement of account the master, Mr. Kruttschnitt, charged the appellant and Mrs. De Long with the amount of the note, \$5,000, together with 6 per cent. interest from October 1, 1899, and attorney's fees of 10 per cent. upon the amount of recovery. The total thus found was credited with the sum of \$312 as an anticipatory dividend on the 50 shares of stock. In reference to the adjustment of the equities between Mrs. De Long and the appellant he reported as follows:

"It is to be borne in mind, however, that whilst the association has, in my opinion, the undoubted right to recover the full sum of \$5,000 and interest and attorney's fees as above stated, still the payment of that amount is secured, not only by mortgage on the opera house company's property, but also by pledge of Mrs. De Long's stock; and it is further to be borne in mind that she sold the property purchased by the opera house company for a price of \$10,000, whereof she received in cash \$5,630, and through some erroneous computation between herself and the company computed the balance due upon her mortgage note at only \$4,370, instead of \$5,000. It is further to be borne in mind that the Franklin Opera House Company has

paid the sum of \$1,085 in installments on stock, which installments were secured by mortgage on the property sold by Mrs. De Long to the company, and as to which the company did not assume her obligations. It would therefore seem quite clear that under her warranty Mrs. De Long would be bound to the opera house company to the extent of \$630 excess in the amount due on the mortgage note over the amount at which that indebtedness was computed in her act of sale to the opera house company, and for the further sum of \$1,085, amount of installments paid by the Franklin Opera House Company on account of her indebtedness on her stock."

As affecting the issue between Mrs. De Long and the appellant, the decree passed by the court subrogated the latter to the rights of the association and of the appellee as pledgee of Mrs. De Long's stock, and ordered the sale of the stock to satisfy the sum of \$1,715 adjudged in favor of the appellant against Mrs. De Long. After the most attentive consideration of the record, we are unable to conclude that the decree fails to protect the rights of the parties as fully as it was practicable to do in view of established facts. Error, however, was committed in charging the item of attorney's fees against the appellant. This question was considered in *Gunby's Case*, and what was there said need not be here repeated. In all other respects we are of the opinion that the record is free from prejudicial error.

The decree should be amended by eliminating the item of attorney's fees, and, as thus amended, it should be affirmed.

Ordered accordingly.

McCORMICK, Circuit Judge, dissents.

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**DOLAN et al. v. UNITED STATES.**

**BARRETT v. SAME.**

Nos. 2,027, 2,028.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1904.)

**1. INDICTMENTS—CONSOLIDATION—FEDERAL STATUTE.**

In Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], which authorizes the joinder in one indictment of charges, and the consolidation of indictments, against the same person for the same act or transaction, or for two or more acts or transactions connected together, or of the same class of crimes or offenses "which may be properly joined," it is not intended by the latter phrase to limit the joinder or consolidation to charges which might have been joined at common law, but merely to vest the trial court with discretion to refuse to permit a joinder or consolidation where it would prevent a fair trial or be unjust to the defendant.

**2. SAME.**

Separate indictments against the same persons under Rev. St. § 5427 [U. S. Comp. St. 1901, p. 3670], each charging them with having aided and abetted a different person in using a false certificate of citizenship as evidence of a right to vote, the acts charged being the furnishing of such false certificates for the use of such persons by the defendants, all of which were made by them at the same time, charge acts or transactions connected together, and may properly be consolidated under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720].

**3. ALIENS—CERTIFICATE OF CITIZENSHIP—OFFENSE OF USING FALSE CERTIFICATE.**

A certified copy of the record of a court showing the admission of an alien to citizenship constitutes a "certificate of citizenship," within the

meaning of Rev. St. §§ 5425, 5427 [U. S. Comp. St. 1901, pp. 3669, 3670], making it a crime to use or aid and abet another in using false certificates of citizenship for purposes therein specified.

**4. SAME—FALSE CERTIFICATE.**

A "false" certificate of citizenship, within the meaning of Rev. St. §§ 5425, 5427 [U. S. Comp. St. 1901, pp. 3669, 3670], which make it a criminal offense to knowingly use, or aid and abet another in using, "any false, forged, antedated or counterfeit certificate of citizenship," etc., is not limited to one which is forged, but includes one which is false in its recital of facts.

**5. SAME—OFFENSE OF USING FALSE CERTIFICATE—RECITALS OF CERTIFICATE.**

In Rev. St. § 5425 [U. S. Comp. St. 1901, p. 3669], making it a criminal offense to knowingly use any false or forged certificate of citizenship "purporting to have been issued under the provisions of any law of the United States relating to naturalization," the clause quoted refers to certificates which purport upon their face to have been issued after a compliance on the part of the alien named therein with the naturalization laws and as evidence of that fact, and a certificate to sustain an indictment based on such statute need not recite that it is issued under a law of the United States, there being, in fact, no statute authorizing or requiring the issuance of such certificates.

**6. SAME—AIDING AND ABETTING—CONSTRUCTION OF STATUTE.**

Rev. St. § 5427 [U. S. Comp. St. 1901, p. 3670], provides that "every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections" shall be punished, etc. In the original statute said four sections were all embraced in one section, which expressly declared the offenses now contained in the three first sections to be felonies, and the part which now constitutes section 5427 read, "Any person who shall \* \* \* aid and abet any person in the commission of any such felony," etc. In the revision such express declaration was omitted, and it has since been settled by decision that the offenses described in the first three sections are not felonies, but misdemeanors, under the common-law rule of construction applied to federal statutes, although the punishment prescribed is imprisonment in a penitentiary at hard labor, which, by the general understanding in this country, makes the offense a felony. *Held*, that such construction does not render section 5427 a nullity, but that the word "felony," as used therein, should be given its popular meaning, in order to give effect to the section in accordance with the manifest intention of Congress.

**7. CRIMINAL LAW—SUFFICIENCY OF VERDICT.**

A verdict in a criminal case which finds the defendants guilty upon certain counts of the indictments on which the trial was had, not guilty upon others, and which reports a disagreement as to the remaining counts, is entirely proper, and it is not error to receive such verdict and to enter judgment thereon as to the counts which were finally disposed of.

In Error to the District Court of the United States for the Eastern District of Missouri.

James L. Minnis and Chester H. Krum, for plaintiffs in error.

David P. Dyer and Bert D. Nortoni (Horace L. Dyer, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This case, like the case of *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476, arises out of the extensive frauds which were practiced in the city of St. Louis in the

fall of 1902 in the naturalization of aliens. The evidence adduced upon the trial may be fairly summarized as follows: The defendant John P. Dolan, at the time of the commission of the crimes charged, was chairman of the Democratic City Committee of the city of St. Louis. The defendant Thomas E. Barrett was marshal of the St. Louis Court of Appeals, and was also an active politician of the same party as the defendant Dolan. The defendant Frank Garrett was a police officer of the same political persuasion, who lived and boarded with the defendant Dolan. Both Barrett and Garrett were Dolan's active friends and political supporters. At the time the offenses were committed there was about to be held in the city of St. Louis and in the state of Missouri the regular biennial election for city and state officers. The 14th day of October was the last day for registration of voters for that election. Before voters of foreign birth could be registered, they were required to present to the registration officers their certificates of citizenship and have the same noted on the registration books. The defendant John P. Dolan was the Democratic candidate for the office of constable—a very lucrative position in the city of St. Louis. John Barbaglia, who was jointly indicted with the defendants, but was dismissed and used as a government witness, was a Democratic precinct committeeman of the Ninth Precinct of the Twenty-Fourth Ward, of which ward the defendant John P. Dolan was ward committeeman. Barbaglia was an active, aggressive young Italian, and president of the North American Italian Club located in said precinct. He resided on what is known in the city as "Dago Hill," which was an extensive Italian settlement, and was a leader among his people. The St. Louis Court of Appeals held several sessions of court in the nighttime for the purpose of naturalizing aliens. Mr. John H. Murphy was its clerk, and the defendant Thomas E. Barrett was its marshal. Barrett's part in the naturalization business was to stand in front of the judges and take from the aliens who passed into the court and before the judges a certain slip of paper which the alien bore, and which was of the following purport: "Hon. John H. Murphy, Clerk of the St. Louis Court of Appeals: Please deliver to the party named certificate of citizenship." This slip of paper was signed by the proper member of the City or the Jefferson Democratic Club of St. Louis. Barrett would lay these slips on the desk of the clerk of the court. Some of the slips he wrote himself, and some of the certificates of citizenship he delivered to the applicants. The evidence shows that the naturalization of aliens was carried on in this court on the evenings of the 6th, 8th, and 10th of October, 1902, on an extensive scale. The aliens were collected in the corridors of the court and grouped according to their nationality—Russian Jews, Bohemians, Italians, etc. At the proper time each group would be moved forward into the courtroom and the oaths administered to the aliens. The same witnesses testified generally for the whole group. To prepare for this large volume of business, the clerk, previous to the session of the court, signed and affixed the seal of the court to a large number of blank

certificates, so that all he had to do was to fill in the names and the country of the applicant's nativity, and deliver the papers to the aliens or to some of the managers who had them in charge. He would afterwards make up his record from the slips. On the evening of the 10th of October he had a large number of these blanks thus signed and sealed which were unused. These he afterwards placed in a locker in his office, to which the defendant Barrett had free access as marshal of the court. The locker was never locked. Notwithstanding this facility of procedure and a remarkable diligence in collecting aliens, Barbaglia discovered, after the 10th of October, that there were a number of his countrymen who had not been brought before the court and for whom no papers had been obtained. He reported this fact to the defendant Dolan. Dolan stated to him that there would be no further sessions of the court for purposes of naturalization, but requested him to prepare a list of the Italians who had not received certificates. This Barbaglia did, and delivered to him a list of 13 names. Dolan delivered the list to the defendant Barrett, who thereupon purloined from the locker in the clerk's office a sufficient number of blank certificates to which the clerk's signature and seal had been affixed, and sent them by the defendant Garrett to Barbaglia. Barbaglia, under the supervision and by the direction of Garrett, filled up these blanks with the names of the Italians contained in the list above referred to, and delivered these papers to such Italians. The Italians used the same as evidence of their right to be registered as voters and to vote, and, in fact, registered and voted at the election which was held in November.

In the month of January, 1903, an investigation was instituted by the United States attorney and a grand jury concerning these naturalization frauds, and in connection therewith the United States attorney sent out numerous letters and subpoenas, calling to his office and before the grand jury the Italians to whom it was believed fraudulent certificates of citizenship had been issued. Among the persons so summoned was the defendant John Barbaglia. Immediately on receiving the letter he reported the fact to the defendants Dolan and Barrett. They advised him to get in at once the fraudulent certificates which had been issued to the Italians without any appearance in court. The main reason assigned for doing this was that these certificates had been filled out in Barbaglia's handwriting, and with a different colored ink from that which was used by the clerk of the court in filling out such papers, and there was fear that those facts would lead to a discovery. Upon Barbaglia's applying to his countrymen for a surrender of the papers, they refused to comply with his request, for the reason that they had registered and voted upon the papers, and they were fearful that they would be prosecuted for violation of the state election laws. Barbaglia reported their refusal to Dolan and Barrett. Thereupon Barrett procured a sufficient number of blank certificates of citizenship to duplicate these fraudulent ones, and filled them out to correspond with the fraudulent certificates, using the ink in the clerk's office, and forged the name of the clerk thereto,

and affixed the seal of the court. Armed with these, Barbaglia was able to persuade all his countrymen to surrender the original certificates and accept the forged ones instead, except two, namely, Pietro Venegoni and Franck Ferrario. These surrendered certificates were immediately destroyed by Barbaglia by direction of Dolan and Barrett.

John Barbaglia was indicted and convicted at the May term of the District Court at St. Louis for his part in these transactions, and sentenced to the penitentiary for five years. After his conviction he made a full confession, and by means thereof, and other evidence to the discovery of which his confession led, the defendants Barrett, Garrett, and Dolan were indicted.

Ten indictments were found and returned against all four of the defendants, based upon section 5427 of the Revised Statutes [U. S. Comp. St. 1901, p. 3670]. These indictments are identical in language, except that each one deals with a separate Italian whom it is charged that the defendants aided and abetted in violating the provisions of sections 5425 and 5426 [U. S. Comp. St. 1901, p. 3669]. Each of these indictments contains ten separate counts. They are all based upon the same transaction, but are varied in their language to fit different offenses under the sections last mentioned.

The first count charges that the Italian feloniously used, for the purpose of registration as a voter, and for the further purpose of making it appear that he had been lawfully naturalized and admitted to become a citizen of the United States, a false certificate of citizenship purporting to have been issued to him by the St. Louis Court of Appeals.

The second count charges that the Italian feloniously used, for the purposes aforesaid, a certificate of citizenship procured by fraud.

The third count charges that the Italian feloniously attempted to use, for the purposes aforesaid, a counterfeit certificate of citizenship.

The fourth count charges that the Italian feloniously attempted to use, for the purposes aforesaid, a forged certificate of citizenship.

The fifth count charges that the Italian was feloniously possessed, with the intent to feloniously use the same for the purposes aforesaid, of a false certificate of citizenship purporting to have been issued to him by the St. Louis Court of Appeals, and which said false certificate then and there purported to have been issued under the provisions of the law of the United States relating to naturalization.

The sixth count charges that the Italian feloniously used, for the purposes aforesaid, a forged certificate of citizenship, then and there known to him to be forged.

The seventh count charges the Italian with being possessed, with the intent on his part to unlawfully use the same for the purposes aforesaid, of a counterfeit certificate of citizenship.

The eighth count charges the Italian with having obtained, accepted, and received a certificate of citizenship procured by fraud,

and purporting to have been issued by the St. Louis Court of Appeals.

The ninth count charges that the Italian feloniously used, for the purpose of registration as aforesaid, a certificate of citizenship purporting to have been issued to him by the St. Louis Court of Appeals, showing that he had been admitted a citizen of the United States.

The tenth count charges that the Italian used, as evidence of his right to vote in the Ninth Precinct of the Twenty-Fourth Ward of the city of St. Louis, a certificate of citizenship which he then and there well knew was unlawfully made and issued, and it sets forth fully the facts showing that the certificate had been so unlawfully made and issued.

Each of the counts charges all of the defendants with aiding and abetting the Italian therein named in the commission of the above offenses. No attempt has been made to set forth the counts fully. The offenses are there alleged with great particularity, and a copy of the unlawful certificate of citizenship is set out in each of the counts. It will be observed that the counts all relate to the same transaction, and are simply framed to fit the various phrases of sections 5425 and 5426, so that no variance could be claimed, whatever view might be entertained of the evidence as adduced.

Against the objection of the defendants, the ten indictments were consolidated on motion of the government. At the conclusion of the evidence the court directed the jury to return a verdict of not guilty as to indictments numbered 4,912, 4,913, and 4,926, and as to all the counts in the other indictments except counts 5 and 9. The jury returned the following verdict:

"We, the jury in the above-entitled cause, find, under the instructions of the court, the defendants not guilty as charged in indictments No. 4,912, 4,913, and 4,926, and under like instructions we find the defendants not guilty as charged in the first, second, third, fourth, sixth, seventh, eighth, and tenth counts of each of the indictments numbered 4,910, 4,911, 4,914, 4,915, 4,916, 4,917, and 4,918.

"And we, the jury, find the defendants, namely, Thomas E. Barrett, John P. Dolan, and Frank Garrett, guilty as charged in each of the fifth counts of indictments numbered 4,915 and 4,918.

"And we, the jury, find the defendants, namely, Thomas E. Barrett and Frank Garrett, not guilty as charged in the ninth count of indictment No. 4,915.

"And we, the jury, find the defendants Thos. E. Barrett and Frank Garrett not guilty as charged in the ninth count of indictment No. 4,918.

"And we, the jury, report that we are unable to agree upon a verdict as to defendant Dolan on the ninth count of indictments numbered 4,915 and 4,918.

"And we, the jury, find the defendant Frank Garrett not guilty as charged in the fifth count of indictments numbered 4,910, 4,911, 4,914, 4,916, and 4,917.

"And we, the jury, report we are unable to agree upon a verdict as to defendants Thomas E. Barrett and John P. Dolan on the fifth count of indictments numbered 4,910, 4,911, 4,914, 4,916, and 4,917.

"[Signed]

Joseph Weller, Foreman."

It will be observed that the jury find all the defendants guilty as charged in the fifth count of indictments numbered 4,915 and 4,918. These counts relate to the original certificates filled out by Bar-



baglia, bearing the genuine signature of the clerk, together with the seal of the court, which were delivered to the Italians Pietro Venegoni and Franck Ferrario, and which they refused to surrender in exchange for the forged certificates prepared by the defendant Barrett. These counts severally charge that each of the Italians was knowingly and feloniously possessed, with the intent on his part to unlawfully use the same for the purpose of registering as a voter in the city of St. Louis, in the state of Missouri, of a false certificate of citizenship purporting to have been issued to him by the St. Louis Court of Appeals, and which said false certificate then and there purported to have been issued under the provisions of the law of the United States relating to naturalization. The counts conclude by charging the defendants with aiding and abetting the Italians in the commission of the foregoing offenses.

The first assignment of error challenges the order of the court consolidating the indictments. It would be difficult, however, to conceive of a case coming more properly within section 1024 of the Revised Statutes than the case under consideration. The indictments present charges against the defendants which appear to be for "the same act or transaction," or at least, "for two or more acts or transactions connected together," and certainly "for two or more acts or transactions of the same class of crimes or offenses." It is contended, however, by counsel for the defendants, that all these early provisions of section 1024 are limited and qualified by the clause "which may be properly joined," and that we must look to the common law to ascertain whether the joinder is proper or not. We do not accept this construction of the statute. Section 1024 [U. S. Comp. St. 1901, p. 720] was intended to abrogate the technical rules of the common law on the subject with which it deals. The clause "which may be properly joined" simply vests in the trial court a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding the same would be permitted by one or more of the clauses mentioned in the first part of the section. There are often circumstances which would render a uniting of several offenses unjust to a defendant, and, as the old cases put it, "confound him in the making of his defense." Whenever such a situation arises, the trial court will protect the defendant's right to a fair trial.

"Whether the joinder was calculated to embarrass the prisoner, and, therefore, the offenses not 'properly joined,' within the meaning of the statute, was a question to be determined by the judge, in his discretion, on a motion to quash or to compel an election." *United States v. Bennett*, Fed. Cas. No. 14,572.

It is urged by counsel for the defendants that, "if the argument in support of the consolidation be observed to its ultimate consequence, you may consolidate two indictments for murder—one of A. and the other of B." And this is presented as a persuasive reason why the consolidation allowed was improper; but the Supreme Court, in the case of *Poindexter v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208, sanctioned the joining in one indict-

ment of two counts charging the murder of different persons. The opinion in that case amply justifies the practice of the trial court. See, also, *Williams v. United States*, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. Ed. 509.

A demurrer was interposed to the indictments, and to each count thereof, upon the ground that neither of said counts states facts sufficient to constitute an offense, because the paper set out therein as a "certificate of citizenship" shows upon its face that it is not such. The following is a copy of the certificate as it appears in each count of the ten indictments:

"United States of America.

"State of Missouri, City of St. Louis.

"In the St. Louis Court of Appeals. Oct. Term, 1902.

"Oct. 10, 1902.

"Pietro Venegoni a native of Italy who applies to be admitted a citizen of the United States, comes and proves to the satisfaction of the Court that at the time he arrived in the United States he had not attained his eighteenth year and that for the last two years it has been bona fide his intention to become a citizen of the United States; that he has resided in the United States at least five years, and in the State of Missouri at least one year, immediately preceding this application, during which time he has conducted himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and the Court, moreover, being satisfied that said applicant has taken the preparatory steps required by the laws of the United States, concerning the naturalization of foreigners, and he declaring here, in open Court, upon oath, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign power, prince, potentate, state or sovereignty whatsoever, and particularly to the King of Italy of whom he is at present a subject, therefore the said Pietro Venegoni is admitted a Citizen of the United States.

"State of Missouri, City of St. Louis—ss.:

"I, John H. Murphy, clerk of the St. Louis Court of Appeals (said court being a court of record, having common-law jurisdiction, and a clerk and seal), certify the above to be a true transcript from the record, as the same now remains in my office.

"In testimony whereof, I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this Oct. 10, 1902.

"[Seal.]

John H. Murphy, Clerk."

These documents are all the same, with the exception of the name of the Italian mentioned therein. It is contended by counsel for the defendants that these certified copies of the court record do not constitute a certificate of citizenship. The federal statutes nowhere define the term "certificate of citizenship," nor has there been any uniformity, in the practice of the various courts authorized by section 2165 to admit aliens to citizenship, as to the form of the document issued as evidence of such admission. Much light upon the meaning of the term may, however, be obtained from the acts of Congress and an early decision of the Supreme Court. The first statute which employs the phrase is the act of March 3, 1813 (2 Stat. 809). Section 2 of that act provides that it shall not be lawful to employ upon any public or private vessel of the United States any naturalized citizen of the United States, unless such

citizen shall produce "a certified copy of the act by which he shall have been naturalized, setting forth such naturalization and the time thereof." Section 13 provides that "if any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited any certificate or evidence of citizenship referred to in this act, he shall be punished," etc. This is the first penal statute dealing with the subject of documents evidencing the right of citizenship. It will be noticed that the first section quoted requires as evidence of that right "a certified copy of the act by which he shall have been naturalized," and the thirteenth section quoted refers to this document as a "certificate of citizenship." It is therefore manifest that Congress at that time entertained the view that a certified copy of the order or judgment of the court constituted a certificate of citizenship within the meaning of the criminal statute, which, in many of its provisions, is the same as the statutes upon which the indictments in this case were framed. The first case that came before the Supreme Court of the United States raising the question of the naturalization of an alien was *Campbell v. Gordon*, 6 Cranch, 176, 3 L. Ed. 190. The instrument which was there involved is set out in full in the argument of counsel for the appellant in the original reports of the court. It is simply a transcript of the journal of the court, verified as follows: "A copy. Teste: John C. Littlepage." This instrument is frequently referred to in the briefs of counsel and in the opinion of the court as a "certificate" or a "certificate of naturalization." It does not differ in form from the certificates here involved, except that the certificate of the clerk in the present case as to the genuineness of the copy is set forth with greater fullness. We, therefore, have a clear declaration, both by Congress and by the Supreme Court at an early day, that a certified copy of the record of the court, showing the admission of an alien to citizenship, constitutes a "certificate of citizenship." Other provisions of the statute point in the same direction. Subdivision 6 of section 2165 of the Revised Statutes [U. S. Comp. St. 1901, p. 1330], and section 2174 [U. S. Comp. St. 1901, p. 1334], both speak of "a certificate of his declaration of intention to become a citizen." This refers to the oath required by the first subdivision of section 2165, and consists of what is popularly known as "first papers." Inquiry among clerks of the federal courts discloses that it has never been the practice to issue as "first papers" anything but a certified copy of the oath mentioned in the first subdivision of section 2165. Such has been the practice since the passage of the first act authorizing the admission of aliens to citizenship. It has never been the custom of clerks to issue a certificate, under their hand and seal, purporting to state that the alien has made the preliminary declaration of intention. This having been the practice, it is manifest that Congress, in the statute of March 22, 1816 (being the sixth subdivision of section 2165, Rev. St.), and the act of June 7, 1872 (being section 2175, Rev. St.), considered such an exemplification of the record as a "certificate" of the alien's declaration of intention to become a citizen. Of course, if such an exemplifica-

tion constitutes, within the meaning of Congress, a "certificate" in the one case, it does in the other.

Webster defines a certificate as "a written testimony to the truth of any fact; a written declaration legally authenticated." Anderson's Law Dictionary defines it as "a writing giving assurance that a thing has or has not been done, that an act has or has not been performed." The certificates set forth in the indictments come clearly within these definitions. Popularly the term "certificate" would import a document in which the officer issuing the same purports to state on his own authority that certain acts have been done. No clerk of a court ought thus to speak as to judicial action unless authorized to do so by statute. A court can only speak by its records, and a clerk of court ought only to speak by a copy of such records. He ought not to attempt to declare his interpretation of their legal effect. If, therefore, any preference is to be given as between the practice of issuing an exemplification of the court records in the case of naturalization or a certificate wherein the clerk attempts to state the substance of such records, we should regard the former as the better practice. It is largely a matter of form. In the one case the officer recites the substance of the record in the body of his certificate; in the other he makes a full and accurate transcript of the record and verifies the same as a true copy by his official certification. There is no statute authorizing clerks of court to issue certificates of citizenship in any form. Their authority to do so arises from the fact that they have the custody of the records. It has been held that a certificate issued by the clerk which does not purport to be a transcript of the record is not proper evidence of naturalization. *Charles Green's Son v. Salas* (C. C.) 31 Fed. 106; *Miller v. Reinhart*, 18 Ga. 239. These decisions are unquestionably sound, for the clerk has no authority to certify the legal effect of his records, but can speak only by a transcript thereof. It has been repeatedly held that the proceeding whereby an alien is admitted to citizenship is a judicial proceeding, and that the order admitting him is a judgment. *Spratt v. Spratt*, 4 Pet. 393, 7 L. Ed. 897; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 430, 3 L. Ed. 391; *United States v. Gleason* (C. C.) 78 Fed. 396. This being the character of the proceeding, and there being no statute authorizing the clerk to issue certificates of citizenship which shall simply declare his interpretation of the action of the court, it is manifest that the better practice would be for him to issue a certified copy of the record. At least, such a copy may very properly be defined as a certificate of citizenship.

In section 5426 [U. S. Comp. St. p. 3669] several terms are employed—"order," "certificate of citizenship," "certificate," "judgment," or "exemplification"—and it is urged by counsel that Congress thus clearly indicates that a "certificate of citizenship" is something different from an "exemplification" or certified copy of the record, and that the term "certificate of citizenship," as used in those statutes, is confined to a document which purports to certify the legal effect of judicial action in naturalization proceedings. We cannot accept this interpretation. Congress, in using the series of terms, was not attempting

to define their meaning or point out that the one excluded the other, but, out of an abundance of caution, used them all for the purpose of bringing within the prohibition of the statute any document "showing any person to be admitted to be a citizen." The various terms are used for the purpose of avoiding, and not for the purpose of creating, a limitation. In legislation nothing is more common than to use a generic term and follow it with special words, through apprehension that the statute may be confined to one of the meanings of the general term if that is used alone. In such a case, to limit the generic term to so much of its proper meaning as would be left after deducting the significance of the special terms would be to defeat the very purpose had in mind by the legislature in employing both. The language of Mr. Justice Story in *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, which has been so frequently quoted and approved, is especially appropriate to the present objection, and to several of the other questions raised in the present case:

"I agree to that rule [that penal statutes are to be strictly construed] in its true and sober sense, and that is that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. But where the words are general and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And, where a word is used in a statute that has various known significances, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the text, and promotes in the fullest manner the apparent policy and objects of the legislature."

In this case a criminal statute, speaking of the force of men upon a vessel, uses the words "master," "officers," and "crew," and counsel contended that the last word should be limited to the ordinary seamen, to the exclusion of the officers, but the court refused to adopt the limitation.

It is next urged that the indictment is fatally defective because it appears that the certificate of citizenship charged to be "false" is shown by other averments of the indictment to be false only in respect of the recitals of fact which it contains, whereas the statute uses the term "false" in the sense of forgery only. If the term is thus restricted in the statute, the objection is well taken, for the indictment, after setting forth the certificate of citizenship as above quoted and charging it to be false, proceeds to point out the particulars in which it is false by a traverse of each of the recitals of fact therein contained, as follows:

"That he, the said Pietro Venegoni, did not, on the 10th day of October, 1902, apply to the St. Louis Court of Appeals to be admitted a citizen of the United States, nor did he prove to the satisfaction of the court that at the time he arrived in the United States he had not attained his eighteenth year," etc., etc.

The charge of the indictment, therefore, plainly is that the certificate is false in its recitals and not in its execution. The statute makes it a crime to be knowingly possessed of "any false, forged, antedated

or counterfeit certificate of citizenship," etc. It is manifest that the term "false" cannot be restricted to the meaning of "forged" without rendering the term entirely nugatory, for the statute itself employs both the terms "forged" and "counterfeit," in addition to the term "false." It is the duty of the court to give some effect, if possible, to every word which the Legislature employs. There is nothing in the context, or the mischief to be corrected, or the consequences entailed by giving to every word of the statute its full force, to justify the striking out of one of its terms. A certificate which is false in respect of those facts which alone would justify its issuance is as much within the mischief of the statute as a forged or counterfeit instrument. But the question raised is no longer open to controversy. It was settled by the Supreme Court of the United States in *U. S. v. Staats*, 8 How. 41, 12 L. Ed. 979. That was a prosecution under the act of March 3, 1823, which is embodied in section 5421 of the Revised Statutes [U. S. Comp. St. 1901, p. 3667]. It renders penal the use of any "false, forged or counterfeit" writing in support of a claim against the government. The indictment charged that the defendant "did cause and procure to be transmitted and presented to the Commissioner of Pensions of the said United States of America the said false and untrue affidavit or writing as a true writing, well knowing the said affidavit or writing was false and untrue." The same contention was there urged as is now made, that the word "false" as contained in that statute was confined to a forged instrument. The court says:

"The only doubt that can be raised is whether the writing transmitted or presented to the commissioner in support of a claim for a pension should not, within the meaning of the statute, be an instrument forged or counterfeited in the technical sense of the term, and not one genuine as to the execution but false as it respects the facts embodied in it. \* \* \* The case is within the mischief intended to be guarded against, and also within the words; and we think the considerations urged, founded upon the form and structure of the general provision, though plausible and calculated to excite doubt, not sufficient to take it out of them. A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with intent to defraud, presents a case not distinguishable in principle or in turpitude or in its mischievous effects from one in which every part of the instrument is fabricated; and, when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it."

As the opinion explains, there is much in section 5421 which would justify the limiting of the term "false" as there employed, because all the clauses of the statute except the last show clearly that the term is restricted to forged and counterfeited documents. The language of that statute, however, which the court said rendered such an interpretation "plausible," is entirely absent from the statute which we are considering.

It is further objected that the statute requires the certificate of citizenship to be a document "purporting to have been issued under the provisions of any law of the United States relating to naturalization," and that the certificate in question does not satisfy this requirement. If the attention be fixed wholly upon the issuance of the certificate, the objection is no doubt sound, because there is in fact no law of the United States either requiring or authorizing the issuance of certificates

of citizenship. Such a refined interpretation of language, however, would defeat any penal statute, for it is always possible to find a meaning that will have that result. The very fact that there is no federal law authorizing the issuance of such documents demonstrates that Congress did not intend to restrict the statute in question to certificates so authorized. The clause quoted manifestly refers to certificates which purport upon their face to have been issued after a compliance on the part of the alien named therein with the naturalization laws, and as evidence of that fact. The certificate in question answers fully to that requirement. As part of this same objection, counsel points out that, in the case of papers issued under section 2167 to aliens who were minors when they arrived in the United States, there is no express provision requiring a record to be kept of the proceedings, as there is in the cases provided for by section 2165. The statute does require, however, that all these proceedings shall be had in courts of record, and no express statutory provision is necessary to authorize such courts to keep a record of their proceedings, nor does the absence of such authority affect in any way the evidential force of a transcript of such records.

Section 5427, under which the defendants are indicted, provides: "Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections," etc. It is now settled that the crimes created by the three preceding sections are not felonies, but misdemeanors. For this reason, counsel contends that the statute should be treated as a nullity, and the judgment reversed. For reasons which we have already explained, we cannot adopt a construction which thus defeats the manifest intention of the Legislature. The mistaken reference is easily explained. In the original statute sections 5424, 5425, 5426, and 5427 were all embraced in one section. It expressly declared the offenses now contained in the three first sections to be felonies. That part of the section which is now embraced in section 5427 then proceeds as follows: "Every person who shall knowingly and intentionally aid and abet any person in the commission of any such felony," etc. In the revision there is no language which expressly declares the offenses created by the three first sections to be felonies, and the compilers simply copied that part of the original section which is now embraced in section 5427 without taking account of this omission. Whether this was caused by an oversight or because the revisers failed to appreciate the technical meaning of the word "felony," no one can say. All the offenses created by the first three sections are punishable by imprisonment in the penitentiary at hard labor. By the general understanding in this country, a crime which may be thus punished is a felony, and it has required a great body of judicial opinions to settle finally that the term when used in the United States statutes must be confined to its common-law meaning; namely, an offense which is punishable by death or forfeiture of lands or goods. *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272; *Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *United States v. Coppersmith* (C. C.) 4 Fed. 198. All the cases, however, on this subject have arisen since the revision of the federal statutes in 1878. Neither meaning of a term which is thus

open to debate can be seized upon to destroy a statute whose real purpose is entirely plain. It is one of the elementary rules of statutory construction that, if a term has both a popular and a technical meaning, it will be assigned its popular meaning when that will give effect to the intention of the Legislature which the technical meaning would frustrate. Sutherland on Statutory Construction, § 250, and cases there cited. See, also, as declaring the proper rule for the interpretation of penal statutes, *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080.

Finally, it is contended that the court erred in receiving the verdict of the jury, which, though finding the defendants not guilty as to some of the counts of the indictments and guilty as to others, reported that the jury was unable to agree on the remaining counts. It is insisted that no verdict could properly be received which did not dispose of every count of the indictments by a finding either of guilty or not guilty. In the case of *Selvester v. United States*, 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029, the court had this precise question under consideration, and held that such a verdict was entirely proper.

This disposes of all the errors assigned which we consider of sufficient importance to entitle them to a separate discussion. Numerous other minor matters are presented in the briefs, which have been carefully considered, but whose proper decision can in no way affect the conclusion which we have reached.

The judgment of the lower court is affirmed.

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SURGHENOR et al. v. RANGER et al.

RANGER et al. v. SURGHENOR et al.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1904.)

Nos. 1,297, 1,279.

**1. MEXICAN LAND GRANT—TRANSFER OF TITLE BY GRANTEE—CONSTRUCTION OF INSTRUMENT.**

A purchaser of a concession of land from the state of Coahuila and Texas under article 24 of the Mexican colonization law of 1825, before the land had been selected, executed a writing by which, in consideration of a sum of money, the receipt of which was acknowledged, he covenanted to sell the land to two other persons, who agreed to perform in his stead all the conditions of the grant. The purchasers, by a similar instrument, again transferred their right to a third person, upon whose application the grant was surveyed, and title of possession issued to him by the commissioner, reciting that the application was presented by him as attorney in fact for the original purchaser. *Held*, that since, under the settled law, the original purchaser had the power to alienate his concession at once, before the lands were selected, the instrument executed by him constituted an act of sale, and not merely an executory agreement to sell, and that under it the final purchaser, when instituted in possession, took full title, legal as well as equitable; there being, under the Spanish law then in force, no distinction between legal and equitable titles as at common law.

**2. SAME—CONVEYANCE EXECUTED BY ONE PARTNER—VALIDITY.**

An instrument of sale of a Mexican concession of land in Texas, executed in 1832, by one of two persons who were named as grantees in a



prior conveyance to them, and signed by him "for himself and his partner," under which the commissioner duly authorized thereto by law issued to the grantee title of possession to the lands selected by him under the grant, and under which he was instituted and remained in possession, will be held to have been executed with the consent of the owner who did not sign, and to have passed the title and interest of both; there being evidence that they were partners in a mercantile business, which at that time in Texas consisted in dealing in lands to a greater or less extent, and a verbal sale of land being valid under the Spanish law then in force.

In Error to the Circuit Court of the United States for the Southern District of Texas.

Jas. E. Ferguson and Frank Andrews, for John W. Surghenor and others.

H. Masterson and F. G. Morris, for Solomon Ranger and others.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was the Texas action of trespass to try title. It involved the title to the league of land described in the pleadings. It was brought by John W. Surghenor et al., plaintiffs in error, versus Solomon Ranger et al., defendants in error. The parties, by stipulation, agreed that the questions of fact and law be tried by the court without a jury. "The court having heard the pleadings, \* \* \* and all the evidence of the respective parties having been introduced, documentary and written, as well as parol, and the evidence having been concluded, on this, the 31st day of March, A. D. 1903," the court rendered judgment, reciting therein substantially as follows: (1) That the land in controversy is a part of 11 leagues that were granted to William Hardin, as attorney of Jose Dolores Martinez, by the Mexican government, on the 28th day of November, A. D. 1833; (2) that the plaintiffs are the heirs and legal representatives of William Hardin, deceased, and hold whatever title to the land in controversy that was acquired by William Hardin during his lifetime; (3) that the several instruments and muniments of title which were introduced in evidence by the plaintiffs, and duly considered by the court, show that the equitable title to said land was in William Hardin at the date of his death, and descended and passed to the plaintiffs in this case as his legal representatives; (4) that the muniments of title introduced in evidence and duly considered by the court are sufficient, in the opinion of the court, to pass the title to the land in controversy in this suit to William Hardin, and therefore sufficient to pass the title to the plaintiffs herein, but that the plaintiffs do not hold the legal, as distinguished from the equitable, title to said land. Other conclusions are noted which we do not deem it necessary to recite. The judgment then proceeds:

"Upon the foregoing findings of fact and conclusions of law, the court is of the opinion that because the plaintiffs possess and hold only the equitable title to said lands, and because this is a court of law and not of equity, and because the equitable title cannot be heard and determined in this court in this cause, as presented, it being a case at law and not in equity, that the plaintiffs are not entitled to recover, and that judgment should be given for the defendants."

The assignment of errors presents six specifications, but to the single effect that the court erred in its conclusions that the plaintiffs do not hold the legal, as distinguished from the equitable, title to the land.

On the 30th of August, 1830, Jose Dolores Martinez, a Mexican residing at Nacogdoches, Tex., in the then state of Coahuila and Texas, petitioned the Governor of that state to concede him by way of sale 11 leagues of land, and on March 16, 1831, the Governor granted under sale to the petitioner the 11 leagues of land which he solicited, using the customary forms, not necessary to be recited. On September 7, 1832, the citizen Jose Dolores Martinez, Adolphe Sterne, and Charles Taylor appeared before the proper officer at Nacogdoches, and declared that the party of the first part agreed to sell to the parties of the second part 11 leagues of land, which he had acquired by means of a purchase from the aforesaid Supreme Governor, being a grant executed in his favor dated the 16th day of March, 1831, and to transfer in their favor the corresponding document as soon as he has obtained formal possession of same; and the parties of the second part bind themselves to make the following payments:

"First, they bind themselves to observe all the requisites expressed in said grant, such as making payments to the government in conformity with the law of colonization to which it is subjected to establish same, cultivated in accordance with said law, and to incur all necessary expenses in order to obtain the aforesaid possession, relieving the grantor and assuming on their own account and risk all the requirements to which the aforementioned grant is subject; and, in order that said agreement may be binding, the said Jose Dolores Martinez agrees and promises that he will sell to the said Adolphe Sterne and Charles Taylor for the period mentioned, the said 11 leagues of land for the above stipulated considerations, and the further sum of Two Hundred Dollars, and that he will not sell the said land to any other person although he may be offered more for it, and that he will execute in their favor a corresponding instrument in accordance with this contract of sale, he receiving from them in my presence as a sign or pledge, the sum of Two Hundred Dollars to him paid to his entire satisfaction, hereby promising not to retract from said contract or agreement, and should he do so, he will return to them the Two Hundred Dollars which he has just received and as a penalty shall pay Eleven Thousand Dollars with costs, damages. Both contracting parties concede that this contract is perfectly executed and renounce all laws in their favor, especially that which says that the contracting parties about to execute a sale may repent; equally those which prefer the four year contract or extension of same under a plea of ignorance of value; and the contracting parties herewith make a gift, perfect and irrevocable, to each other, of the surplus value of the same, themselves renouncing all laws or privileges which may be in their favor. And signing said contract they bind themselves to observe all its forms, empowering the judges of whatever jurisdiction they may be and especially those of this town, to enforce the fulfilment of same, subjecting themselves in the event that they should forfeit the same, to all the severity of the laws, as if sentence had been passed upon them."

On the 14th day of April, 1833, before the proper officer, in the town of San Felipe, of Austin, Adolphe Sterne, a resident of the town of Nacogdoches, personally known to the officer, appeared and declared:

"That whereas the citizen, Jose Dolores Martinez, by public writing, dated Sept. 7, 1832, in the town of Nacogdoches before the citizen, Jose MaMora, only judge of said town, obligated himself to the grantor and *his partner*, the citizen, Charles Taylor, to sell the 11 leagues of land which he had by means of a sale from the government of the State, through his grant of March 16, 1831, executing in his favor the corresponding instrument as soon as he should

obtain possession thereof in form, and, whereas, and in consideration of which, the citizen, William Hardin, has delivered to the grantor One thousand dollars, which he confesses having received to his satisfaction, upon which he renounces the laws of non numerata pecunia, does not deliver and prove, but agrees that the said Sterne, for himself and *his companion the said Taylor*, trespasses and transfers to the said Hardin said writ of sale, with all its obligations, rights and actions, which it is expressed by both parties, and the grantor for himself and *his aforesaid companion*, places and substitutes the said Hardin in his stead, with all his obligations, rights and actions, and confers upon him absolute power and as sufficient as by right is required, so that he may act and receive for him judicially and extra-judicially, and if necessary to appear in court, and even to secure the fulfillment of the herein mentioned writing, that he may ask, act and certify and labor practically for the grantor, his said partner and for himself, without restriction in all tribunals, superior and inferior, to dispose of the eleven leagues of land at his own discretion, conferring upon him the absolute power which he needs, with a free, frank and general administration, incidents, dependencies and annexes, having the power to substitute him when and whenever occasion demands, revoking any and all substitutes, he conveys to him all his title, real and personal, useful, mixed, direct, executive and others, to which he has a claim and which he can convey; he constitutes him acting attorney for his own cause and business, placing him in his stead, degree with subrogation in legal form, and delivers unto him in my presence, to which I certify, the original writing of obligation, in order that he may use same in connection with this grant as he may deem proper, declaring that it is certain that he has not conveyed nor transmitted same, and hereby obligates himself not to transmit or deliver same, or to revoke this transfer, totally or partially, and should he do so, wishes same not to be valid in court, hereby approving and ratifying same.

"[Signed]

Adolphe Sterne,  
"For Himself and His Partner."

At Nacogdoches, on November 11, 1833, William Hardin presented himself to the commissioner, Vicente Aldrete, by writing, in the following words:

"Mr. Commissioner Citizen Vicente Aldrete: Wm. Hardin, a citizen of the Village of Liberty and residing in this town before you would present myself and say that as appears by the testimonio which duly accompanies on two necessary leaves, the Supreme Government of the State conceded to the citizen Dolores Martines, on the 16th of March, 1831, eleven sitios of land, on the vacant lands of the state, and in class of purchaser. In view thereof, and in the name of said Martines, representing him as substituted by Mr. Adolfe Sterne, attorney of said Martines, which appears by the accompanying document which I pray you may return to me for the proper uses, I pray that you may be pleased to order that there be surveyed to me the aforesaid eleven sitios of land upon the margins of the Trinity river on the vacant lands that may be found there, issuing to me the corresponding title or titles to give me the possession of the aforesaid sitios to protect the right of the party I represent, in all of which I shall receive justice; it being what I ask."

Thereupon the commissioner made the following order, namely:

"By being presented and admitted in the most proper form of law, with the accompanying documents, let the documents asked for be returned to the party, and this will pass to the surveyor, Citizen Jose Maria Carbajal, that he may make the surveys of the eleven sitios that the party solicits on the indicated lands, and he will proceed in entire conformity with the laws, and the notes and maps that he may form of them he will remit to me, that in view of them I may proceed in a proper manner. Thus I determine and sign with two assisting witnesses, according to the law.

"[Signed]

Vicente Aldrete."

And thereafter, on November 28, 1833, the commissioner authorized "to give possession to various Mexicans, who by sale have lands conceded to them by the same supreme government in the Department of Texas," duly passed the final instrument of possession, using in part the following language:

"Inasmuch as the citizen Jose Dolores Martinez has conceded to him by the Most Excellent Sir Governor eleven leagues of land in class of purchaser, according to an order dated the 16th of March, 1831, which his attorney in fact, William Hardin, has presented. In the name of the State I concede to, confer upon and put him in effective and personal possession of eleven leagues of land upon the Trinity river [describing the land, its classification, etc.]. Therefore, using the powers granted me in virtue of my commission, by the law and consequent instructions, I issue the present title and command that testimonio [first certified copy] of it be taken and be delivered to the interested party, in order that he may possess and take the benefit as his own of the eleven leagues, which have been granted to him as a purchaser, he, his children, heirs and successors, or whoever of him or of them may have cause or may represent action or right, this being the will of the state."

We assume that the Circuit Court concluded as it did with reference to the jurisdiction of that court sitting at law to adjudicate the issues between these parties upon the authority of *Fenn v. Holme*, 62 U. S. 481, 16 L. Ed. 198. We quote from the opinion in that case;

"The inquiry then presents itself as to who holds the legal title to the land in question. The answer to this question is that the title remains in the original owner, the government, until it is invested by the government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnell et al. v. Broderick* [13 Pet. 436, 10 L. Ed. 235], in which it is declared that Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of the legal title. Until it issues, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to enforce the possession in ejectment."

In this case there is no question as to the full title having passed from the government to its grantee. The substantial question between these litigants seems to arise out of a difference as to the sound construction of the writing executed by Jose Dolores Martinez on the 7th of September, 1832, the question being, does that writing evidence an act of sale, or a letter of attorney with a promise to sell? When this instrument was offered in evidence, in connection with plaintiffs' other offerings, the defendants, by their counsel, objected to its introduction, specifying as one ground of their objection that this instrument "in which Jose Dolores Martinez agreed to convey his interest and title to his concession to eleven leagues of land from the Mexican government was an executory contract, and was only a promise to convey, and did not convey the legal title to said concession, and only conveyed, if anything, equitable title, and therefore could not be admitted in evidence in the United States court sitting at law."

Titles issued to purchasers under the laws of the state of Coahuila and Texas had annexed to them—except such as were granted to the military and some other favored persons—conditions, upon the non-performance of which the titles were subject to forfeiture, but until which the fee was in the grantee. These titles conveyed all the estate and interest which the government had to convey as absolutely as did

the final act of consummation by the Spanish government after the performance of the conditions. No such act of confirmation of the government was required or was contemplated by the colonization laws; but, when the title of possession issued, the government had done the final act on her part. Nothing remained to be done to consummate the title of the grantee, who was thereby invested with the legal seisin of the land in fee. *Hancock v. McKinney*, 7 Tex. 452.

In *Hunnicut v. Peyton*, 102 U. S. 361, 26 L. Ed. 113, it is said:

"It has repeatedly been decided in Texas that purchasers under the twenty-fourth article of Mexican Laws of 1825 can alienate their grants as soon as the concession has been made to them, before the land was selected, or the title of possession was issued [citing *Ryan v. Jackson*, 11 Tex. 391; *Clay's Heirs v. Holbert*, 14 Tex. 189]. In *Martin v. Parker*, 26 Tex. 254, it was held that a formal act of sale by the original grantee, with a power to the purchaser to obtain the title of possession, must be held to constitute the purchaser the absolute owner of the property, when he is put into possession of the land and the evidence of title by the proper officer of the government."

Turning to the case in 26 Tex., as referred to above by Mr. Justice Strong, we give more fully the substance of the language used by Chief Justice Wheeler in that case. He says:

"At the time of the acquisition of the title by Reynolds, the common-law distinction between legal and equitable titles did not obtain. Before the deed in question was executed, Reynolds received a power of attorney from Manchaca to apply for and obtain the title of possession. Repeated decisions of this court have settled that those who acquire land by purchase under the twenty-fourth article of the colonization law of the 24th of March, 1825, could sell as soon as the grant was obtained, and before the title of possession was issued [citing *Ryan v. Jackson*, 11 Tex. 391; *Clay's Heirs v. Holbert*, 14 Tex. 191; *Fulton v. Duncan*, 18 Tex. 34]. A power to apply for and obtain the title and sell, the attorney being required therein to take upon himself the fulfillment of the obligation and requirements of the law, has been considered as evidencing a sale, valid under the colonization law. [*Ryan v. Jackson*, 11 Tex. 391.] Here there was a formal act of sale with power to obtain the title of possession. This, we think, must be held to constitute the purchaser the absolute owner of the property, when, under the power conferred, he came into the possession of the land. The vendor, having authority to sell, expressly conferred by the law, it must, we think, be held that the act of sale operated to pass the title in full and absolute property to his vendee, when the latter was put in possession of the land and evidences of title by the proper officer of the government."

It appears from the report of the case of *Manchaca v. Field*, 62 Tex. 135, that on the 16th of March, 1831, Jose David Sanches applied to the Governor of Coahuila and Texas for a concession of 11 leagues of land under the twenty-fourth article of the colonization law of March 24, 1825. Concession was issued March 18, 1831. The final title to 10 leagues (of which the lands in controversy were a part) was extended in the name of Jose David Sanches on the 3d of October, 1833. On November 22, 1831, Sanches executed to one Jose Penida an instrument which empowered Penida, as his attorney, to take possession of 10 of the 11 leagues, to which he was entitled under his concession, and to hold and alienate the same as his own property, Sanches undertaking to abide by and ratify the acts of Penida, done under the authority so conferred. On the 9th of July, 1832, Penida indorsed this instrument to one Frost Thorn, to whom he grants and conveys all the powers

conferred on him by the instrument, designating it as a power of attorney. On the same day Penida executed to Thorn a bond reciting the payment of \$50,000, and binding himself under a penalty in a like amount to convey to him 10 leagues so soon as he, Penida, should have complied with his obligation to the government and obtained possession of the land. The final title was extended on the 3d of October, 1833. It is issued in the name of Jose David Sanches, and recites that the grant is made on the application of his attorney, Frost Thorn, who is put in possession of the land. The court held that the instrument executed by Sanches to Penida, though in form a power of attorney, was in effect a sale of the concession, and that by the indorsement of the instrument by Penida to Frost Thorn, and the contract to convey to him, the superior title to the concession and to the land, when granted, was vested in Thorn.

It will be observed that these transactions occurred substantially in the same period covered by the muniments of title evidencing the Jose Dolores Martinez grant, namely, between the 30th of August, 1830, and the 28th of November, 1833. A closely analogous question, if not substantially the same, arose in the case of *Gainer v. Cotton*, 49 Tex. 101. We quote from the opinion the following language:

"The doctrine which appellants attempt to invoke and apply to it [the instrument] springs from and has no foundation save in the technical distinctions of the common law between legal and equitable titles. But the bond from Gainer to Love is not a common-law instrument. It was made before the introduction of the common law as the rule of decisions in Texas. If, by the bond, any right to or interest in the land vested in Love, it was not a mere equity, which might become stale or be lost by his failure or neglect to assert it, or to demand some other character of conveyance. The purchase price being fully paid, and the sale being absolute and unconditional, so was Love's title. \* \* \* This being the nature of the contract at the date of its execution, it was not affected or changed by the subsequent introduction of the common law, with its technical distinctions between legal and equitable titles." Citing *Hanrick v. Barton*, 16 Wall. 174, 21 L. Ed. 350.

In the case just cited by Judge Moore (*Hanrick v. Barton*, 16 Wall. 174, 21 L. Ed. 350), Judge Bradley uses this language:

"This being the law of Texas when the deed was executed, it was sufficient in form and mode of execution to pass a perfect title at that time from La Serda to the grantee, for it is well settled that, if a title once becomes vested, no subsequent change of laws as to forms or solemnities of conveyance will divest it."

The defendants contend that Hardin in no event acquired more than Sterne could convey; that the contract made by Martinez was with Adolphe Sterne and Charles H. Taylor; that Sterne alone contracted with Hardin; that the contract was not made with them as partners, and that there is no evidence in the record that they sought to acquire this land as partnership property, though there is some evidence that they were partners as merchants; that, in the contract of conveyance, he, in the body of the instrument, speaks of Taylor as his companion, and, though the word "partner" is used after Sterne's signature, it must have been used in the sense of companion or co-owner; but, if he is to be understood as saying that they bought this claim as partnership property, this is only a self-serving act of Sterne, a declaration in his own interest, and cannot be accepted as evidence of the fact.

In this connection we observe: The language of the conveyance to Hardin, and Adolphe Sterne's signature thereto, set out in the foregoing part of this opinion, bearing on the point here presented, we have marked by italics. This instrument and the writings to which it refers were presented to Vicente Aldrete, the commissioner, authorized "by the supreme government of the state to give possession to various Mexicans, who by sale have lands conveyed to them by the same supreme government in the department of Texas"; and he, in the instrument in which he concedes possession of the lands, recites that the order of the Most Excellent Sir Governor, dated the 16th of March of the year 1831, by which was conceded to Martinez 11 leagues of land, was presented to him, the commissioner, to extend possession, by the attorney in fact, Citizen William Hardin.

We do not deem it necessary to canvass the merits of the respective translations of the Spanish writing which put the grantee of these lands into possession and completed the title thereto; nor do we canvass with critical nicety the relations of the pronoun which is made the subject of learned argument by the respective counsel in this case. It appears sufficiently clear to us, as it evidently did to the learned Circuit Court, that the attorney in fact was the party in fact who was put in possession of the land in question by the public act of the commissioner, Vicente Aldrete. It was this commissioner's duty to inquire into and pass upon the authority of Hardin to represent Martinez as his attorney in fact. Being on the spot where the transactions were had, and at the time when they were current, his opportunity and means for arriving at a correct decision in reference thereto was ample, and superior to any we now have.

The counsel for the defendants admit that there is in the record some evidence that Adolphe Sterne and Charles Taylor were partners as merchants. We may add there is some evidence that they were merchants after the fashion of those early times, dealing in general merchandise of every description then and there in use, and dealing likewise, in connection with their general trade, in lands, which were, perhaps, then the largest element of commerce in Texas. Most of the Mexicans then resident in Texas, and most of the American colonists, had lands in larger or smaller quantities, and had little else in which to deal, or with which to barter for other things they might need or want. If, in this connection, we may be permitted to refer to *Gainer v. Cotton*, supra, we learn therefrom that on July 26, 1836, Adolphe Sterne was a judge of the first instance for the jurisdiction of Nacogdoches, and that on the 12th of March, 1838, Charles Taylor was the chief justice of that county. We think it sufficiently appears from the evidence in this case that Sterne was the elder, probably much the elder, of these two, that Taylor was a brother-in-law of Sterne, and that Sterne was the active manager of their business in the years 1831, 1832, and 1833. There is nothing appearing on the face of the papers in this case, or in the proof, or in the known history of the times, to negative the assumption or presumption that Sterne acted in this transaction with the knowledge and consent and authority of Taylor. In this connection it is to be remembered that the Spanish civil law, which was in force in Texas at the time, recognized verbal, as well as written, grants to land.

*Manchaca v. Field*, 62 Tex. 141. In *Landry v. Martin et al.*, 15 La. 10, the Supreme Court of Louisiana, after mature consideration, decided that the Spanish government recognized verbal, as well as written, grants to land. *Herndon v. Casiano*, 7 Tex. 335. On this subject we make the following excerpts from the opinion of Mr. Justice Brown, in the case of the Maxwell Land Grant Company v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279:

"The question whether an oral transfer of land was recognized as valid by the law of Mexico was not argued upon the hearing of this case, and may be open to some doubt. There appears to be a diversity of opinion upon the point. Upon the one hand, the Supreme Court of California, which state also inherited the civil law from Mexico, has uniformly held that a conveyance of land resting solely upon parol was void by that law [citing and commenting on the California cases].

"It will be observed in this connection, however, that the court [California court] relies largely upon the extract from the *Recopilacion*, which appears to have embodied a system of laws applicable to all the Spanish possessions in the Indies. The law referred to seems to have been a mere fiscal regulation, designed for the purpose of securing to the government its alcabala or excise tax upon the transfer of land, rather than for the protection of the parties to such transfer: \* \* \* From Schmidt's Civil Law of Spain and Mexico, published in New Orleans in 1851, \* \* \* it would appear that no distinction was made between personal and real property. \* \* \*

"It is also said, in the useful and exhaustive work of Mr. Hall upon Mexican Law (page 489), that there was no statute of frauds in Spain or Mexico, and that a verbal sale of real estate was valid. He also speaks of the public writing (*escritura publica*), stated by earlier authors to be essential to the sale of real estate, as being a mere fiscal law, created for the purpose of collecting the alcabala, or tax, on sales, and that the law did not declare that sales made otherwise should be null and void."

It might be that, if this contention of the defendants were sound and carried to its ultimate effect, it would touch the vitals of the original grant itself, the validity of which neither of the parties to this suit questions. In *Gonzales v. Ross*, 120 U. S. 626, 7 Sup. Ct. 716, 30 L. Ed. 801, the Supreme Court uses this language:

"The extension of title by the commissioner, in these Mexican grants, completed the title without any patent or other act of the government, and notwithstanding the imposition of conditions subsequent."

The court then cites, with distinct approval, the case of *Hancock v. McKinney*, *supra*.

Applying the language of the Supreme Court in *Hunnicut v. Peyton*, 102 U. S. 360, 26 L. Ed. 113, to the case before us, we are unable to see why the proceedings herein done did not vest the legal title to the lands granted in William Hardin. The possession was delivered to him, and he was instituted therein. The interest of Martinez, whatever it was, both legal and equitable, had been sold by him to Sterne and Taylor, and they had sold it to Hardin. The institution into possession must, therefore, have inured to the benefit of Hardin. It is a mistake to allege, as the defendants now do, that the final extension of title was to Martinez. It may be that Hardin would have held the land for the use of Martinez, had he been only the attorney of Martinez, but he was more. He was a grantee of all the Martinez right.



Although the judgment of the Circuit Court was in favor of the defendants, they have sued out a cross writ of error, and complain of certain adverse rulings sustaining objections to the introduction of the evidence of certain witnesses called on their behalf in support of their pleas of the statute of limitations, which rulings the defendants, in anticipation of a possible new trial, desire to now have considered and corrected in this court. As the rulings in question, if erroneous, have wrought no hurt to the defendants, the occasion has not arisen for us to pass upon them.

The judgment of the circuit court is reversed, and the case is remanded with directions to award a new trial.

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**FECHELETER et al. v. PALM BROS. & CO.**

(Circuit Court of Appeals, Sixth Circuit, November 23, 1904.)

No. 1,278.

**1. EQUITY JURISDICTION—SUIT FOR ACCOUNTING—INADEQUACY OF LEGAL REMEDY.**

A bill for an accounting under a contract between two large mercantile houses, which required each to render to the other annually a statement of its entire business for the preceding year, and to pay to the other a percentage of its gross profits, states a case of equitable cognizance, on the ground that the remedy in equity, through a statement of the accounts by a master, is more complete and adequate than that at law by an action of account.

**2. EQUITY PLEADING—BILL FOR ACCOUNTING—PRAYER.**

It is not a ground of demurrer to a bill for an accounting that no specific relief beyond the accounting is prayed for, where the bill states a case of complicated accounts, such as to give the court jurisdiction, and contains a prayer for general relief, under which a money decree will be entered if complainant shall be entitled thereto.

**3. CORPORATIONS—POWERS—FORMING PARTNERSHIP.**

In the absence of express statutory authority, a corporation has no power to enter into a partnership.

**4. PARTNERSHIP—EVIDENCE TO ESTABLISH—SHARING IN PROFITS.**

As between the parties to a contract, whether or not it creates a partnership is governed by their actual agreement and intention; and the fact that there is a participation in profits is, at most, only evidence of an intention to form a partnership, which may be overcome by other facts or circumstances showing a different intention.

**5. SAME—CONTRACT CONSTRUED.**

A contract between a firm and a corporation engaged in the same line of business in different places provided that each should have the privilege of buying from the other at cost price such goods as it might select from the stock of such other, and also that each should pay to the other at the end of each year "a sum of money equal to" a designated percentage of its gross profits, defined in the contract to mean the proceeds of its gross sales, deducting therefrom only the first cost, import duties, and carriage. *Held*, that such contract did not provide for a sharing of profits, as profits, such as to raise a presumption of a partnership, and that, in view of its other provisions inconsistent therewith, it could not be construed to create a partnership as between the parties, and was not, therefore, ultra vires as to the corporation.

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† 4. See Partnership, vol. 38, Cent. Dig. §§ 3, 15, 39, 73.

**6. CONTRACTS—LEGALITY—AGREEMENT IN RESTRAINT OF TRADE.**

A contract between two mercantile houses engaged in the same line of business, by which each acquires an interest in the gross profits made by the other, is not on its face illegal, as tending to create a monopoly, and void as against public policy.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a bill filed to obtain an accounting under a contract between the complainants, comprising a firm engaged in business in the city of New York under the name and style of Palm, Fechteler & Co., and the defendant, a corporation organized under the law of Ohio, and doing business in Cincinnati under the corporate name of Palm Bros. & Co. This contract bears date of February 17, 1899, but took effect from and after January 1, 1899, and was for a term of 12 years. The important features are as follows:

"Now, therefore: This agreement made between the firm of Palm, Fechteler & Co., of New York, N. Y., Casper Fechteler, Frank Fechteler, F. Emilie Moller and Pauline Moller, copartners of said firm, parties of the first part, and the Palm Brothers & Company, of Cincinnati, Ohio, a corporation organized under the laws of the State of Ohio, party of the second part, witnesseth as follows:

"First. Said parties of the first part, for and in consideration of the agreements and covenants hereinafter mentioned to be performed by said party of the second part, and with a view of increasing the business and gains of the parties of the first part, agrees and covenants with the said party of the second part to sell, furnish and supply to said party of the second part at the actual cost price, during the continuance of this contract, all such transfer and silk ornaments, special designs and decalcomania goods, as said party of the second part may choose to select and order; and said parties of the first part further agree and covenant with said party of the second part to pay said party of the second part, at the end of December of each year, to wit, on the 31st day of December of each and every year, during the continuance of this agreement, a sum of money equal to thirty-six per cent. of the total and entire gross profits made and realized during the whole year next preceding said day by said parties of the first part out of its entire business as manufacturers, importers and dealers in transfer and silk ornaments, special designs, decalcomania goods and painters' supplies, including a sum of money equal to thirty-six per cent. of the whole and entire gross profits made by its branch house in Chicago, Illinois, as well as any other branch houses that may now or hereafter be established; the first payment under this agreement to be made on the 31st day of December, 1899.

"And said parties of the first part covenant and agree to employ a capital of not less than one hundred thousand dollars in carrying on and prosecution of said business during the continuance of this agreement.

"Second. Said party of the second part, for and in consideration of the covenants and agreements herein agreed to be performed by said parties of the first part, and with a view of increasing the business and gains of the party of the second part, agrees and covenants with said parties of the first part to sell, furnish and supply to said parties of the first part, at the actual cost price during the continuance of this agreement, all such transfer and silk ornaments, special designs and decalcomania goods, as said parties of the first part may choose to order and select; and said party of the second part further agrees and covenants with said parties of the first part to pay said parties of the first part, at the end of each and every year, to wit, on the 31st day of December of each and every year during the continuance of this agreement, a sum equal to sixty-four per cent. of the total and entire gross profits made and realized during the whole year next preceding said day by said party of the second part out of its entire business transactions in the business defined and specified in its articles of incorporation, including the profits made by its branch houses, which may now or hereafter be established; the first payment under this agreement to be made on the 31st day of December, A. D. 1899."

The complainants' bill, among other things, charged that the defendant had endeavored to escape liability under its contract by carrying on a large business through the instrumentality of a corporation known as the Palm Letter Company; that this was a subsidiary corporation, owned, officered, and managed by the corporators of the defendant; that large sales of goods, really made by defendant to its own actual customers at a small trade discount, had been charged as sales to this Palm Letter Company at a very large trade discount; that this Palm Letter Company was in substance a mere branch or agency of the Palm Bros. & Co., and used only as a means of hiding gross profit on sales made by defendant in order to escape liability for a definite proportion of such profits to the complainants. It is charged that defendant denied liability to account for the gross sales made by this subsidiary company as sales made by itself, and, when complainants refused to assent to their contention, openly repudiated the contract, and refused to further abide by it.

To this bill the defendant corporation interposed a demurrer upon several distinct grounds. This was sustained. Thereupon an amended bill was filed, and the same demurrer again interposed. This was again sustained, and the bill dismissed.

Charles B. Wilby, for appellants.

Edward Colston, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The first ground of demurrer goes to an alleged failure of the complainants to aver performance or excuse for nonperformance of certain acts which they, under the contract, were required to do and perform before they can compel an accounting by defendant. One of these grounds was that each party should deliver to the other, on or before the close of each year, a full and itemized statement or invoice of stock on hand, of assets and liabilities, and a balance sheet of all its business transactions during the year. Another provision required the complainants to employ a capital of not less than \$100,000 in the carrying on of their business. But without determining the character of these covenants, it is only necessary to say that the amended bill cured the defects complained of by the averment that "all the provisions of said contract by complainants to be performed during the year 1899 had by them been performed, and performance thereof accepted by defendant." As the bill was filed in 1900, and only sought an accounting for the business of 1899, this averment must be regarded as a sufficient averment of performance upon the part of the complainant.

2. It is also assigned as ground for demurrer that the bill does not state a case cognizable in equity. It is true that an accounting is not sought upon the technical ground of accident, fraud, mistake, or discovery. But if the remedy at law in an action for an accounting is not so complete and adequate as in equity, that alone is ground for equitable jurisdiction. Where it is evident that, under the machinery of a court of law, great difficulties would attend the statement of an account, courts of equity have a jurisdiction concurrent with courts of law. This case involves contract and mutual accounting, and the entire transactions of two large mercantile establishments

must be examined, and accounts compared. The production of books of account will be absolutely essential to the correct ascertainment of the basis upon which the amount due from one to the other shall be ascertained, and this renders essential the functions of a master. It is clearly a case where the remedy in equity is more full and adequate. Story, Eq. Juris. §§ 67, 452, 457; *Gunn v. Brinkley Carworks*, 66 Fed. 382, 13 C. C. A. 529; *Kirby v. R. Co.*, 120 U. S. 130, 134, 7 Sup. Ct. 430, 30 L. Ed. 569.

3. It has also been assigned as ground for demurrer that the bill prays only for an accounting. But this, as we have seen, is, in complex cases, a distinct ground of equitable jurisdiction. There is added a prayer "for all other relief to which your orators will be entitled in equity and good conscience." It is not essential to good pleading that there shall be a prayer for any particular relief. Under a prayer for general relief, any relief appropriate to equity and proper under the facts may be prayed at the bar. Story, Eq. Pl. § 41. Lord Northington, in *Manaton v. Molesworth*, 1 Eden, 26, said that it was quite a common saying that "the prayer for general relief was the best prayer after the Lord's Prayer." Having taken jurisdiction upon the ground that there are complicated accounts to be stated, the court will not turn the party out in whose favor the account shall go, but will pronounce a money decree under this prayer for general relief. *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550; *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 53 C. C. A. 551.

4. The real controversy, and the ground upon which the court below mainly based its action, was that the contract sued upon was an agreement for a partnership between the complainants, who will hereafter be designated as the New York firm, and the defendant, a corporation of Ohio, and that the corporation had no power to enter into a partnership. Corporations, unless expressly authorized, have no power to enter into partnership either with each other or with individuals. The agency of each partner for the partnership is inconsistent with the management of the corporation by its stockholders through directors and officers chosen only by themselves. *Mallory v. Oilworks*, 86 Tenn. 598, 8 S. W. 396; 1 *Morawetz on Corporations*, § 421; *Brice, Ultra Vires* (3d Ed.) pp. 205 to 512, inc.; *People v. North River Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Ex parte Liquidation of N. B. Life Association*, L. R. 8 Ch. Div. 704; *Geurinck v. Alcott*, 66 Ohio St. 104, 63 N. E. 714. The law in Ohio under which the defendant was organized neither expressly nor by implication confers the power to enter into such a partnership agreement as will subject the corporation to the incidental control which every partner has, as the agent of the partnership, over the affairs of the firm.

5. But does the contract in suit actually create the relation of partners between the complainants and the defendant corporation, assuming the corporation to have the power to enter into such relation? The question here presented is not whether the nature of the agreement is such that liability as a partner might exist as to

third persons, but whether this contract provides for an actual partnership.

The defendant has repudiated the contract, and defends, when sued, upon the ground that it had no power to enter into a partnership agreement. To make good this defense, it must show that the contract is one for a partnership—an actual partnership—and it will not do to say that, although no actual partnership was intended or existed, it is enough to show that third persons might hold both complainants and defendants liable as partners, although in fact no such relation existed. Liability as a partner to third persons misled by appearances may sometimes arise, though no actual partnership exists. But this rests upon the doctrine of estoppel. Partnership is a fact—a fact sometimes made out, like other facts, from circumstances, as well as by direct evidence. Evidence may raise a presumption of a partnership so strong as to be conclusive when third persons are involved. And this is the case when one has held himself out as a partner to one ignorant of the actual fact. But this case presents no such question, as the rights of third persons are not involved. Indeed, it would be difficult to imagine a case of liability to third persons upon the ground of holding out, when the supposititious partnership was with a corporation incapable, as matter of law, of entering into such a relation. If the contract sued upon is not one which deprives the stockholders of the corporation of their power and duty to manage the corporate affairs, or subjects the corporation to the domination incident to the affairs of a co-partnership, it is not *ultra vires*. It devolves, therefore, upon the defendant to establish that the contract into which it has entered is, in substance and legal effect, one of partnership.

It is not very prudent to define a partnership. Many definitions have been attempted, and Sir George Jessell, Master of the Rolls, in *Pooley v. Driver*, L. R. 5 Ch. Div. 459, 471, referred to the fact that no less than fifteen such definitions by different learned lawyers, no two of which he says agree, are given in the third edition of *Lindley on Partnership*, pp. 2, 3. Concerning these he says, "And I suppose anybody, by reading the fifteen, may get a general notion of what a partnership means."

The Supreme Court, in *Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. 972, 973, 36 L. Ed. 835, has, through Mr. Justice Gray, defined a partnership. The very learned justice in that case said:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

All would possibly not agree that the contribution by each of "property or service" is essential.

Sir George Jessell, in *Pooley v. Driver*, cited above, states that under English law you can have a partner, a dormant partner, "who puts nothing in—neither capital nor skill, nor anything else."

Undoubtedly, there must be an association of two or more persons for the purpose of carrying on a trade or business or adventure together and dividing the profits. The presence or absence of cer-

tain other incidents of a partnership by special arrangement between the parties would not seem to be of the essence of the matter. *Fleming v. Lay*, 109 Fed. 952, 955, 48 C. C. A. 748.

There is found in some of the earlier cases a disposition to regard evidence of a participation in profits as affording so cogent a presumption of a partnership as to make one liable to third persons, though ignorant of the fact, in defiance of the positive agreement of the parties that they should not be partners. *Grace v. Smith*, 2 W. Black. 998; *Waugh v. Carver*, 2 H. Bl. 235; *Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762; *Wood v. Vallette*, 7 Ohio St. 172.

This rule—that by operation of law one was liable as a partner to third persons, irrespective of the actual agreement between the parties, or of any misleading, seems to have been rested upon the theory that one who shares in the profits must also share in the losses and stand liable for the debts. The reason given in *Waugh v. Carver*, 2 H. Bl. 235, for this, is that in taking part of the profits he takes a part of the fund which the creditor relies upon for payment. This reasoning has been repeated in many cases following *Waugh v. Carver*. But as Judge Story observes, this reasoning is utterly fallacious, inasmuch as profits do not exist until creditors are paid or provided for, as well as because creditors rely upon the entire assets, and not the net profits. Story, Part. 36, and note 3.

If the presumption arising from evidence of a participation in profits had been as rigid as some of the judges have supposed, it was possible from that circumstance alone to fasten liability in the face of other evidence showing that in actual fact no partnership existed. But as this doctrine was based only upon a presumption of the fact of partnership from evidence of a participation in profits, it has never been regarded as an irrebuttable presumption, and its cogency as evidence of a partnership has been much relaxed by subsequent cases in which a wider view of the subject has been taken. The most that can be said of it, as the law is now understood, is that a participation in profits is strong evidence of a partnership, and enough, unless explained by other circumstances showing a different relation. *Cox v. Hickman*, 8 H. L. Cases, 268, 304, 306, 312, 313; *March & Co. v. Court of Wards*, L. R. 4 P. C. 419, 435; *In re Eng. & Irish Soc.*, 1 Hem. & Mil. 85; *Ross v. Perkins*, L. R. 20 Eq. 331, 335; *Pooley v. Driver*, L. R. 5 Ch. Div. 458, 476, 479.

While the reference to agency as a test of partnership has not been accepted with much favor by the courts of either England or the United States, inasmuch as an agency is a consequence, and not a cause, of partnership, made so prominent in *Cox v. Hickman*, the case has otherwise met with general approval as a more reasonable statement of the inferences deducible from evidence of a participation in profits. *Davis v. Patrick*, 122 U. S. 138, 151, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Story on Partnership, §§ 38, 49, notes; *Meehan v. Valentine*, 145 U. S. 611, 620, 623, 12 Sup. Ct. 972, 36 L. Ed. 835; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387.

If participation in profits is only evidence of a partnership, and subject to be explained even as to third persons, it must follow

that the intent and agreement of the parties themselves should govern in all cases, and that the same rule should apply in favor of third persons, unless there has been conduct calculated to deceive, which applies between the parties themselves. This was the view taken by Judge Story before *Cox v. Hickman* and *Meehan v. Valentine*, as shown in his forty-ninth section of his work on Partnership, where he says:

"In short, the true rule, *ex sequo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons. It is upon this foundation that the decisions rest which affirm the truth and correctness of the distinction already considered as a qualification of the more general doctrine contended for."

Nor is there anything in conflict with this conclusion in the summary of the law in *Meehan v. Valentine*, 145 U. S. 611, 623, 12 Sup. Ct. 972, 975, 36 L. Ed. 835, where, speaking by Justice Gray, it is said:

"In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership."

The intent to be partners is made out when we find a business carried on for the joint benefit of two or more persons, with an agreement for a mutual participation in profits, as profits. The fact that one of the incidents of a partnership—mutual liability for debts—has been eliminated by agreement does not change the essential nature of the relation, which is nevertheless that of a partnership. *Fleming v. Lay*, 109 Fed. 952, 955, 956, 48 C. C. A. 748. Such a stipulation, though good between the parties, will not be valid as against third persons. This view reconciles the inconsistency of holding that a partnership exists in defiance of the agreement and intention of the parties, as exhibited in some of the cases which seem to sanction the notion that there may be a partnership as to third persons, though there had been no conduct to create an estoppel, and none between the parties themselves.

But in every phase of the question as to the cogency of evidence of a participation in profits it has been understood that the person sought to be charged as a partner must have an interest in profits,

**as profits.** Thus it is said by Judge Story in section 49 of his work upon Partnership, adopting the view of Collier upon Partnerships, "that in order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual; that is, each person must have a specific interest in the profits as a principal trader." *Meehan v. Valentine*, 145 U. S. 611, 619, 623, 12 Sup. Ct. 972, 36 L. Ed. 835. Hence it always has been the rule that if you could show that the participation in profits was not a sharing in profits as a principal—in profits as profits of a joint business—but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or money advanced as a loan, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership, for there would be no participation in profits as a principal, no receipt of profits as profits. Upon the contrary, the relation of creditor would be made out; the amount of the debt being a sum of money estimated by a certain proportion of the profits, as a mere measure or yardstick. "The way in which the profits are to be participated in is the essence of the whole matter." *Cotton, L. J.*, in *Ex parte Tenant*, 6 Ch. Div. 303, 316. This definition of sharing in profits as evidence of a partnership is supported by all the cases, and we need cite but a few of the more recent and controlling: *Berthold v. Goldsmith*, 24 How. 536, 542, 543, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 619, 12 Sup. Ct. 972, 36 L. Ed. 835; *Story*, Part. §§ 33, 34; *Burnett v. Snyder*, 81 N. Y. 550, 37 Am. Rep. 527.

Applying these principles, the case at bar is of easy solution. The contract in suit does not in terms provide for a partnership, nor contemplate any of the incidents of a partnership, unless the provision in reference to the participation of each in the profits of the business of the other establishes the relation and liability of partners. But it is very clear that the provision for a participation in profits does not contemplate any sharing in profits as a principal or division of profits, as profits. "Profit" implies, without more, the gain resulting from the employment of capital—the excess of receipts over expenditure. *Black's Law Dictionary*, citing *Connolly v. Davidson*, 15 Minn. 519, 530 (Gil. 428), 2 Am. Rep. 154; *Story* on Part. § 36, note 3.

The old cases drew a distinction between net profits and gross profits. In discussing the kind of participation in profits which operated to create the relation of partners, it is said that:

"The true meaning of the language, an 'interest in profits, as profits,' seems to be that the party is to participate, indirectly at least, in the losses, as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits. If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the gross profits, then it will be otherwise." *Story* on Part. §§ 34, 42, and cases cited.

Under the contract in suit, the sharing was to be not in the net gains or profits made by the one party in the business carried on by the other, but in the gross profits. That net profits were not meant, they make plain by a definition found in the fifth paragraph, where



it is stated, in substance, that "gross profit" means the aggregate sales made, whether collected or not, after deducting the cost, import duties, and carriage, and that "no other charges, expenses or losses of whatever kind or nature shall be deducted from said gross profits." Thus the participation was in the gross amount of sales after the deductions above mentioned were made. The losses in bad debts and the cost of business might consume the margin between the cost and sale price, and yet the complainants would be entitled to receive a certain per cent. of the gross profit, though the business had made no actual gains, or had even made a loss. There was, then, no sharing in losses, and, under the old cases, no participation in profits, as profits, such as would, without more, raise a presumption of partnership.

But the absence of any intent or purpose to form a partnership is made plain by a wider view of the case:

(a) The covenant of the complainants, composing the New York firm, is that they will "sell, furnish and supply" to the Cincinnati corporation "all such transfer and silk ornaments, special designs and decalcomania goods" as may be ordered, etc.

(b) The covenant of the second party, the Cincinnati company, inferably engaged in the same limited and special sort of business, is that it will also "sell, furnish and supply the New York firm all such transfer and silk ornaments, special designs and decalcomania goods" as said parties may choose and order.

(c) Each agrees that the goods so furnished the other shall be at actual cost price.

(d) But as a further consideration for this mutual right of picking and choosing from the stock and designs of the other, the contracting parties agree that, in addition to paying the actual first cost of goods bought by one from the other, each shall pay "a sum of money" to the other at the end of each year which shall be "equal" to an agreed per cent. "of the total and entire gross profits made and realized out of its entire business as a manufacturer, importer and dealer in transfer and silk ornaments, special designs, decalcomania goods and painters' supplies," including the business of branch houses, etc. The "sum of money" to be paid by the New York firm is to be equal to 36 per cent. of its gross sales, while the "sum of money" received from the Cincinnati company is to equal 64 per cent. of the gross sales of the latter. This difference was doubtless based upon the estimated greater value of the business of the New York firm.

Thus, though there is to be a sharing in gross profits, it is not to be a participation in profits, as profits, or as a principal in trade. Upon the contrary, the plain purpose is that each, in consideration of the privilege of picking and choosing the goods or designs made or imported by the other, agrees to pay the actual cost of such goods so selected and furnished, and also "to pay" the other at the end of each year "a sum of money equal to" a definite per cent. of the entire gross sales of the party making the payment, less only the actual cost and carriage of such goods. It is an agreement to pay, not to divide as principals would do, but to pay a sum of money

"equal to" (that is, measured or estimated by) a certain proportion of the gross profits. It is evident from these considerations that the character in which the one party would receive a proportion of the gross profit realized from the business of the other would be that of a creditor, rather than that of a principal trader.

Unsupported as the claim of a partnership is by any provisions giving either party the slightest control of the business of the other, or any indication that the plan is a mere scheme or device to carry on trade as partners without subjecting themselves to the incidents and liabilities of such an arrangement, we can but reach the conclusion that the learned judge below erred in the view he took of the contract.

6. Another ground of demurrer is that the contract is in restraint of trade and void as against public policy. It is difficult to see upon the face of the contract in suit any purpose to illegally restrain trade or commerce, bring about a monopoly, or enhance prices illegally, either under the Ohio statute (93 Ohio Laws, 143) or at the common law. It has never yet been supposed that, if one mercantile house or manufacturing concern obtained an interest in the other, such a contract, irrespective of all actual or probable effect upon the public, would be a contract void as tending to monopoly. It may be that these two establishments were the sole makers or dealers in the goods they dealt in, and that an enhancement of prices would therefore follow, to the public detriment. But we can know nothing about the importance of the dealing between these concerns, except that which appears upon the face of the bill and its exhibit—the contract sued upon. No such evils as suggested are borne out in any degree by that which is before us upon this ground of demurrer.

Decree dismissing the bill reversed, with directions to remand for an answer.

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#### DISHON v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. November 30, 1904.)

No. 1,316.

##### 1. REMOVAL OF CAUSES—MOTION TO REMAND—FAILURE TO ANSWER PETITION ALLEGING FRAUDULENT JOINDER.

Where a petition for removal filed by one of two defendants shows that its codefendant has not been served with summons, and affirmatively alleges that he in no manner contributed to the injury sued for, and that it is not the plaintiff's intention to prosecute the action against him in good faith, but that he was fraudulently joined as a defendant for the sole purpose of defeating the jurisdiction of the federal court, if no issue is joined upon such allegations they are to be taken as true; and a motion to remand, which raises only the legal question of the sufficiency of the petition, should be overruled, where the petition is otherwise sufficient.

##### 2. RAILROADS—INJURY OF PERSON CROSSING BETWEEN CARS ON SIDE TRACK—CONTRIBUTORY NEGLIGENCE.

A section hand was caught and crushed between two cars on a side track at a station, which were moved together by an engine as he was attempting to pass through between them, where they were standing

about a foot and a half apart. A freight train was due, and was in fact at the station, and the engine was engaged in switching on the side track, but the deceased went between the cars without looking or listening to ascertain its whereabouts. *Held*, that he was guilty of contributory negligence, which, as matter of law, precluded a recovery for his death, whatever the capacity in which he was crossing—whether as a private individual, or an employé exercising a privilege as such—and without regard to whether or not the railroad company was negligent in moving the cars without warning.

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

For opinion below, see 126 Fed. 194.

Rawlings & Voris, E. V. Puryear, and Robt. Harding, for plaintiff in error.

John Galvin and Maurice L. Galvin (Edward Colston, of counsel), for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for the wrongful death of the plaintiff's intestate, alleged to have been caused by the joint negligence of the Cincinnati, New Orleans & Texas Pacific Railway Company and George Coffman, one of its engineers, in operating a train of cars. Suit was brought in the circuit court of Jessamine county, Ky.; it being alleged that the plaintiff and the defendant Coffman were citizens and residents of that state.

The negligence complained of is thus averred:

"Plaintiff avers that the defendant George Coffman is, and was on the 30th day of July, 1901, a citizen and resident of the state of Kentucky, and in the employment of the defendant Cincinnati, New Orleans & Texas Pacific Railway Company, as its engineer, and was on the said date engaged in operating and managing one of the defendant's trains of cars in the town of High Bridge, Jessamine county, Kentucky, for said Cincinnati, New Orleans & Texas Pacific Railway Company. Plaintiff avers that on the said date the defendant Cincinnati, New Orleans & Texas Pacific Railway Company was the owner of a section house at High Bridge, in said county, and leased or furnished to its section boss to use and occupy same, and to furnish food and lodging therein to employés of said defendant company, and suffered and permitted and licensed said employés boarding therein to go to and from said house across its railroad in front of said house, and upon said date his intestate, John Dishon, deceased, was in the employment of said defendant company as a section hand and a boarder at said section house; and plaintiff avers that on said 30th day of July, 1901, after working hours, and when said Dishon was coming from said house, and crossing said railroad in front of said [house], the defendant Cincinnati, New Orleans & Texas Pacific Railway Company and the defendant George Coffman, by their gross negligence and carelessness in operating and managing its train of cars, backed the same over and upon and against the plaintiff's intestate, thereby knocking him down and fatally injuring him, from which injuries inflicted by the joint gross negligence of said defendants said Dishon died shortly thereafter, and, by reason of the killing of said Dishon as aforesaid by said defendants, said Dishon and his estate had been damaged in the sum of thirty thousand dollars (\$30,000), and plaintiff is entitled to recover said sum aforesaid in damages."

The petition was filed on November 14, 1901, and summons issued. The return on the summons issued to Jessamine county,

made December 12, 1901, shows that the railway company was served November 29, 1901, and George Coffman was not found. The return on the summons issued to Kenton county, made November 27, 1901, shows that George Coffman was not found. No other returns appear in the record. On March 3, 1902, Coffman not yet having been served, and the day having been reached when the railway company was required to make defense, it filed a petition, with bond, for the removal of the case to the United States Circuit Court. This petition, after stating the amount sued for, which exceeded the jurisdictional sum, and that the railway company was a citizen of Ohio, and the plaintiff a citizen of Kentucky, alleged:

"Your petitioner further says that in this suit plaintiff has fraudulently, wrongfully, improperly, and illegally joined as codefendant one George Coffman, who is alleged by plaintiff in his petition to be a citizen and resident of the state of Kentucky; and your petitioner says that George Coffman was fraudulently, wrongfully, improperly, and illegally joined as a codefendant in this suit because of the alleged fact, if it is a fact, that said George Coffman is a citizen and resident of the state of Kentucky, for the sole purpose of defeating the jurisdiction of the United States court. Your petitioner says that it denies that the said George Coffman is a citizen and resident of the state of Kentucky, and says that George Coffman has never been served with summons herein, and that it is not the purpose or intent of the plaintiff to prosecute the action in good faith against the said George Coffman, but that the said George Coffman was made a party defendant herein for the sole purpose and reason of attempting to defeat the removal of this cause to the Circuit Court of the United States, and to defeat the jurisdiction of the said Circuit Court of the United States; and your petitioner further says that the said George Coffman did not in any manner or degree contribute to the death or injury of said plaintiff's decedent through his own negligence, or through any joint negligence with this petitioner. Your petitioner further says that it is the only defendant in court in this action, and that said plaintiff at the time of filing his said petition well knew that the said George Coffman was not guilty with the petitioner of any joint negligence, and that said George Coffman is a sham defendant, and is so made a defendant for the sole and only purpose of fraudulently, improperly, and illegally defeating the removal of this case to the United States court, and defeating the jurisdiction of the United States court in this cause as aforesaid."

This petition was verified by the affidavit of the general manager of the railway company. No answer to it was filed, nor in any other way was issue joined upon its averments. The case being removed to the United States court, there was a motion to remand, which was overruled. The case came on for trial. Coffman had not been served with summons, and no evidence whatever was introduced connecting him in any manner with the transaction complained of. After the testimony was all in, a motion to direct a verdict for the defendant was sustained, and the case comes here on two assignments of error—first, in overruling the motion to remand; and, second, in giving the peremptory instructions.

1. While there is the broad averment that both the railway company and its engineer, Coffman, were guilty of "joint gross negligence," the only act charged to support this was the negligent backing of the train of cars against plaintiff's intestate while he was crossing the track under sufferance or license from the railway company. The only act complained of, therefore, was that

of the engineer, and, because of it, negligence was imputed to the railway company. We are not satisfied that under the ruling in *C. & O. Ry. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, such an act constitutes joint negligence, for which both the railway company and its engineer may in one action be held liable. *Warax v. C., N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637; *Hukill v. Maysville & B. S. R. Co.* (C. C.) 72 Fed. 745; *Helms v. N. P. R. Co.* (C. C.) 120 Fed. 389; *Davenport v. Southern Ry. Co.* (C. C.) 124 Fed. 983; *Gustafson v. Chicago, R. I. & P. Ry. Co.* (C. C.) 128 Fed. 85; *Shaffer v. Union Brick Co.* (C. C.) 128 Fed. 97; and *American Bridge Co. v. Hunt* (C. C. A.) 130 Fed. 302. But as we have certified the question to the Supreme Court in the case of *Alabama Great Southern Railway Co. v. H. C. Thompson, Administrator*, recently before us, we refrain from discussing it now.

2. We think the court was right in refusing to remand the case to the state court. At the time the petition for removal was filed, nearly three months had elapsed since summons issued for Coffman had been returned, "Not found." No efforts were being made to bring Coffman into court and prosecute the action against him. The petition for removal, which was verified, denied that Coffman was a citizen of Kentucky, averred that he had not been served with summons, and alleged that it was not the purpose of the plaintiff to prosecute the action against him, but that he had been made a party defendant for the sole purpose of preventing the removal of the case to the United States court. It further averred that Coffman "did not in any manner or degree contribute to the death or injury of said plaintiff's decedent through his own negligence, or through any joint negligence with this petitioner"; that the plaintiff knew this when he filed his petition; and that Coffman was a sham defendant—made so for the sole purpose of fraudulently defeating the jurisdiction of the United States court.

Conceding that the intent with which a party is made defendant is not material, where a cause of action exists, and the defendant is brought into court in good faith, with the intention of keeping him there and prosecuting the case against him to a conclusion, it is settled that where a person is made a defendant for the sole purpose of preventing the removal of the case to the United States court, and without any intention of prosecuting the case against him, the court will consider him a merely nominal or sham defendant—made so for a fraudulent purpose—whose presence in the case can be ignored.

The averments of the petition for removal were not simply denials of the allegations of the plaintiff's petition. They were affirmative in form and substance. They charged a case of fraudulent joinder. If, as they alleged, Coffman did not in any sense contribute to the death of the plaintiff's intestate—if the plaintiff knew this fact, and, although Coffman was not a citizen of Kentucky, made him a party defendant for the sole purpose of defeating the removal of the case to the United States court—a case for removal, regardless of Coffman's nominal presence, was presented. If these averments were not true, the plaintiff should have denied them,

and an issue would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out.

In *Dow v. Bradstreet Co.* (C. C.) 46 Fed. 824, it was held that a codefendant joined for the mere purpose of preventing a removal might be regarded by the federal court as a merely nominal party; Judge Shiras saying:

"To properly present the question, the allegations of fact relied on as showing the fraudulent joinder of the party should be made in the petition for removal, unless they otherwise appear upon the face of the record. If the facts alleged, if true, make out the charge of fraudulent misjoinder of parties for the purpose named, and the other party desires to take issue upon the truth thereof, then the trial thereof must be had in the federal court." Citing cases.

In this case the court further says, after recounting the allegations of the petition (page 828):

"The motion to remand does not raise an issue upon the facts thus alleged and sustained, but presents the legal questions already discussed, and upon these the ruling must be adverse to the motion to remand."

In *Durkee v. Ill. Cen. R. Co.* (C. C.) 81 Fed. 1, the petition for removal alleged that one of the defendants was joined for the sole purpose of defeating the jurisdiction of the federal court; and it was held that, no issue being taken, the facts alleged in the petition, which was supported by affidavit, would be taken as true, and the motion to remand overruled. It was open to the plaintiff to join issue upon the facts alleged in the petition for removal. If he did not, "the allegations of the petition, being supported by affidavits, will be taken as true." There was a motion to remand, but it was held it did not operate as a denial of the allegations of the petition for removal.

In *Kelly v. Chicago, etc., Ry. Co.* (C. C.) 122 Fed. 286, Judge Philips said (page 289):

"Even where the petition stating the cause of action on its face presents a joint liability between a resident and a nonresident defendant, it may nevertheless be shown in the petition for removal that in fact no cause of action exists against the resident defendant, and that his joinder as a codefendant was for the purpose of defeating the removal of the cause, and that where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried by the United States court, and, if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted." *Ross v. Erie R. Co.* (C. C.) 120 Fed. 703; *Dow v. Bradstreet Co.* (C. C.) 46 Fed. 824; *Durkee v. Ill. Cen. R. Co.* (C. C.) 81 Fed. 1; *Prince v. Ill. Cen. R. Co.* (C. C.) 98 Fed. 1; *Arrowsmith v. N. & D. R. Co.* (C. O.) 57 Fed. 170.

In *Weaver v. Northern Pacific Ry. Co.* (C. C.) 125 Fed. 155, Judge Knowles says:

"Where the petition for removal states jurisdictional facts, such as citizenship, etc., which are not true, the plaintiff may traverse these facts by allegations in the nature of a plea in abatement, and the court can receive evidence to determine the same." *Dillon's Removal of Causes*, § 158, note 4.

In *Board of Commissioners v. Toronto Bank* (C. C.) 128 Fed. 157 (March 12, 1904), Judge Pollock said:

"Whether the citizenship of the parties, or other jurisdictional facts essential to confer jurisdiction upon this court, actually exist, is always a question of fact, which must be determined, in case of removal into this court from a state court, by this court from the allegations of the petition for removal, if no issue is joined thereon, or from the proofs offered in support of such petition, if issue is joined thereon." Citing *Plymouth Mining Co. v. Amador Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232; *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76.

The undenied allegations of the petition for removal, taken in connection with the fact that Coffman had not been served, and no attempt was being made to serve him, and no explanation of the failure to serve him was given, amply justified the court, in our opinion, in refusing to remand the case.

3. High Bridge is a station on the defendant railway just north of where it crosses the Kentucky river over what is known as "High Bridge." The station house was near the bridge, on the west side of the main track. On the east of the main track, extending north from the station, were two side tracks; the one next the main track being a passing track, used for the meeting and passing of trains; and the one east of it, the house or storage track, used for storing cars and loading and unloading freight. To the east of the house track, and a short distance from it, was the section house, which was owned by the railway company, leased and occupied by the section boss, McCarthy, and in which a number of the section hands boarded. High Bridge is a small village, of 200 or 300 inhabitants, and the store and post office are on the west side of the main track.

The claim of the plaintiff was that the railway company licensed and permitted its sectionmen, who boarded at the section house, to cross the tracks in front of the house, and for this purpose maintained an opening between the cars which happened to be standing upon the house track. The railway company denied that it maintained an opening between the cars for that purpose, asserting that whatever openings had existed were the result of chance. The testimony was conflicting; the witnesses for plaintiff testifying there was a path from the section house to and across the tracks, and at this point an opening was maintained, while those for the defendant testified that the path led only to the tracks, and not across them; that no opening was purposely left, but the hands who desired to cross the tracks used whatever opening there happened to be, and, if there was none, either crawled under, climbed over, or went around the cars.

The deceased was a section hand, and boarded at the section house. On the day of the accident, after his day's work was done, and he had eaten supper, he left the section house, in company with two other hands (McCarthy and Keith) to go over to the station house. No business or duty called them there. Their object was to pass the time until bedtime. Just before the three left the supper table, the engine of the freight train, then at the station on its regular trip and time, went by on the passing track,

going north. McCarthy heard it, and there is a fair, though not conclusive, presumption that the deceased did too. If the deceased did, he might have expected the engine would soon be on the house track, moving the cars there. But it is not material whether he did or did not. It was the time for the freight train, and he knew the uses to which the house track was put. The three young men passed out of the gate, and turned towards an opening which existed between the cars about 15 or 20 feet south. This opening was only about a foot and a half wide. McCarthy was in front. About 10 feet behind him came the deceased and Keith. McCarthy testified that when he came to the opening he "rushed through"—"squeezed through between the cars sideways." The deceased and Keith came along, talking together. Reaching the opening, the deceased entered it, but before he got through the car to the north of him was shoved back by the engine then at work on the house track, and he was caught and crushed. Keith had just started to enter the opening when the cars came together. They knocked him back uninjured.

The negligence complained of was the backing of the cars against the decedent without notifying him by the bell or whistle of the engine that the movement was about to be made. The court below did not pass upon the question whether there was testimony for the jury tending to show the plaintiff was guilty of negligence, or upon the question whether the testimony made out a case of contributory negligence on the part of the decedent, but placed his peremptory instructions upon the proposition that, if the deceased was licensed to cross the track through an opening left by the company between the cars, the privilege was conferred upon him as an employé, and he could only exercise it by virtue of his employment. This being the case, in the enjoyment of this privilege he assumed the risk of negligence of his fellow employés engaged in moving the cars upon the house track. Therefore the only negligence claimed or shown was that of fellow servants, for which the railroad company could not be held liable.

The opinion of the court below upon this point of law is a well-considered one, containing an interesting review of the cases. In view, however, of the opinion of this court in the case of *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, in which we held that a coal miner, who, during the noon hour, while not engaged in work, goes to a different part of the mine for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon his employer the duty of a master, to see that the entries through which he passes from and to the part of the mine where he is employed are kept in safe condition for passage, we prefer to base our judgment sustaining the action of the court below upon the fact that, whatever the capacity in which the deceased was crossing the track—whether as a private individual or as an employé, exercising a privilege as such—and whether the railroad company was or was not guilty of negligence in closing the opening between the cars without warning the deceased by the bell or whistle of the engine of what he



might expect, the testimony makes out a plain case of contributory negligence on the part of the deceased.

If the deceased had been about to cross these tracks at a public crossing, where he had a clear right to cross, it would have been his duty, in approaching the crossing, to exercise the faculties given him for his own protection—to stop, if prudence demanded it, and to look and listen. A railroad crossing is a dangerous place, and care and caution are required from one about to use it. He may not throw the entire burden on the railway company. The neglect of an approaching engine to blow its whistle or ring its bell does not excuse him for a failure to use his eyes and ears, when they would have warned him of the approach of the cars. The principle is elementary. *R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago & St. Paul Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *N. P. Ry. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blount v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *C., N. O. & T. P. R. R. Co. v. Farra*, 66 Fed. 496, 13 C. C. A. 602; *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190; *Gilbert v. Erie R. Co.*, 97 Fed. 747, 38 C. C. A. 408; *Neininger v. Cowan*, 101 Fed. 787, 42 C. C. A. 21; *McCann v. Chicago, etc., Ry. Co.*, 105 Fed. 480, 44 C. C. A. 566; *Mobile & O. R. R. Co. v. Coever*, 112 Fed. 489, 50 C. C. A. 360.

The deceased was not about to use a public crossing. Under the claim of the plaintiff, he was crossing by mere license or sufferance, and certainly must be held to have been bound to exercise not less care than if he were crossing where he had a clear right to cross.

The three young men came out of the section house together. They walked down to the narrow opening between the cars. It may be remarked incidentally that this opening of itself indicated it had not been left for persons to pass through. It was too narrow. McCarthy was in front; the deceased and Keith, behind, talking together as they walked. Neither McCarthy nor Keith stopped; neither listened; neither looked to see whether the engine was coming back. Neither of them saw the deceased either stop or look or listen. It is obvious they would have noticed it if the deceased had either stopped or looked or listened. If he had stopped and looked and listened, he would undoubtedly have observed that the engine was on the house track, switching cars. A witness who testified to certain obstructions conceded that, when near the track, one could have noticed the engine. These facts make out a plain case of negligence on the part of the deceased which contributed to his injury.

The judgment of the lower court is affirmed.

## THREE STATES LUMBER CO. v. BLANKS.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1904.)

No. 1,319.

## 1. REPLEVIN—EXECUTION OF WRIT—ESTOPPEL OF PLAINTIFF.

A plaintiff in replevin who has obtained possession of property through the writ is estopped to claim that it was wrongly issued or executed, or to contradict the marshal's return.

## 2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The question of what will excuse a plaintiff for nonreturn of property replevied, on his failure in the action, is one of general law in Tennessee, and the decisions of its Supreme Court thereon are therefore not binding on a federal court.

## 3. REPLEVIN—LOSS OF PROPERTY TAKEN—LIABILITY.

Under Shannon's Code Tenn. § 5144, which gives a plaintiff in replevin, in case his title is not sustained, the option to return the property or to pay its value as fixed by the jury, the fact that the return of the property has become impossible does not relieve plaintiff from liability for its value.

## 4. SAME.

Plaintiff replevied lumber which was on a barge in the Mississippi river. The barge afterward sank, and plaintiff caused the lumber to be loaded on another barge, which it had towed to a different place, where it filed a libel for salvage and towage, and recovered a decree by default, for the satisfaction of which it caused the lumber to be sold. On the trial of the replevin suit it was determined that plaintiff had no title to the lumber. *Held*, that the sale at its own instance could not be set up as a defense to defeat a judgment for its value.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

The plaintiff in error instituted an action of replevin in the court below to recover 250,000 feet of lumber which it claimed had been unlawfully taken out of its possession by the defendant. The writ was returned as executed "by taking the within described property out of the possession of the within named H. B. Blanks and delivering the said property to O. H. Scoggins, agent of the Three States Lumber Co. \* \* \*" The defendant, by special plea, admitted plaintiff's title to 15,000 feet of lumber so replevied, and pleaded the general issue as to the remainder. Upon the issues joined, the jury found for the defendant as to 235,000 feet of lumber, and assessed the value at time of taking at \$2,820 and interest thereon from that time, amounting to \$241.11. They also awarded the defendant \$822.50 as damages for the seizure and detention. A judgment was thereupon rendered for the return of the lumber so assessed, or its value, with interest, and for the damages for wrongful detention, as assessed by the jury. From this judgment the plaintiff has sued out this writ of error.

W. A. Percy, for plaintiff in error.

Tim E. Cooper, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Many errors have been assigned, but in the argument those which

¶ 2. Conformity of practice in common-law actions in federal courts to that of state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.

are relied upon may, in substance, be reduced to two: (1) That the court erred in not instructing the jury to return no verdict for the return of the lumber replevied, nor for the value, nor for any damages for detention. (2) That the court erred in not instructing the jury that any verdict in favor of the defendant must be limited to the market value of the lumber replevied on the day of its seizure, less a pro rata part of the award to plaintiff as salvage in a certain admiralty proceeding against same, to be mentioned hereafter.

That the plaintiff did not have the title or right of possession or any sort of special property in the 235,000 feet of lumber seized under its writ of replevin was conceded, and the only controversy was in respect of the character of the judgment in favor of defendant. In Tennessee the action of replevin is regulated by statute, and the plaintiff is required to give a "bond in double the value of the property, payable to the defendant, conditioned to be void if the plaintiff abide by and perform the judgment of the court in the premises." Shannon's Code Tenn. § 5131. By section 5144 it is provided that, "if the issue is found for the defendant, or the plaintiff dismisses or fails to prosecute his suit, the judgment shall be that the goods be returned to the defendant, or, on failure, that the defendant recover their value, with interest thereon and damages for the detention, the value of the property and the damages to be assessed by the jury trying the cause. \* \* \*

The defense against a judgment in favor of the defendant for the value of the property and for damages for detention was grounded upon the following circumstances:

The lumber seized was upon a barge lying at the bank of the Mississippi river. The defendant had contracted to sell to the Chicago Mill & Lumber Company a large amount of lumber, and had loaded upon a barge belonging to that company something more than 400,000 feet when the marshal executed the plaintiff's writ of replevin. This writ he returned "as executed as the law directs by taking the within described property out of the possession of the within named H. B. Blanks, and delivering said property to O. H. Scoggins, agent of the Three States Lumber Company, for the said Three States Lumber Company." Although there was upon the barge considerably more than 250,000 feet of lumber, no separation appears to have been made, and there was evidence tending to show that, although the plaintiff's agent claimed possession of only 250,000 feet, he took possession of the barge and all of the lumber thereon, and made no effort to separate that seized or claimed from that not so claimed. However defective such a levy may be as against the defendant or a stranger, in a proceeding where such a question might be properly made, it is clear that if the plaintiff obtained the actual possession of the lumber of the defendant under his replevin writ, whether by right or by wrong, he is, for the purposes of the questions here to be considered, estopped to say that the writ was wrongly issued or executed, or to contradict the return of the marshal. 6 Bacon, Abridgment (Wilson's Ed.) star pages 59, 60.

This barge, while lying at the bank of the river, sank through stress of storm, and about half of the lumber was submerged. The plaintiff thereupon raised the barge; and loaded the lumber upon other barges hired by it, and carried the lumber to Cairo, Ill. There the plaintiff

caused the entire 400,000 feet of lumber to be libeled in a proceeding started by itself in the District Court of the United States for the Southern District of Illinois, for the purpose of enforcing against same a claim in favor of itself for salvage and towage. By due course of proceedings in said cause, said lumber was seized, and a salvage allowance of \$1,833.29 made in favor of the libelant, and said lumber was exposed and sold under decree of said court for the sum of \$2,000. After satisfying costs and libelant's salvage claim there remained in court the sum of about \$50 for the owners, whoever they may be, who had shared in the benefit of the libelant's salvage services.

The decree of the district court in this proceeding is now relied upon as a complete defense to any demand of the defendant for a judgment for the return of the lumber seized, or for its value, or for its detention, although the plaintiff had no shadow of title or right to the lumber taken under its writ of replevin. The conclusiveness of that decree as a decree in rem is not and cannot be collaterally disputed. By that decree it is effectually determined that the plaintiff had rendered salvage services to the extent of \$1,833.29, and that the same could be enforced, at its demand, against the lumber in question. Under the sale made in pursuance of that decree, the title and right of possession have effectually passed to the purchaser.

The question we must decide is whether that proceeding operates as a discharge of the plaintiff's obligation to prosecute his suit with effect, or return the property replevied to the defendant, or pay its value, and damages for detention. Replevin is one of the most ancient and well-defined writs known to the common law. The plaintiff in replevin does not take or hold the goods replevied as a bailee or custodian, nor are the goods in any sense in custodia legis. It is an ancient common-law proceeding by which the owner recovers possession of his own. It is defined in the old books as "a redelivery to the owner, by the sheriff, of his cattle or goods distrained upon any cause, upon surety that he will pursue the action against him that distrained. If he pursue it not, or if it be adjudged against him, then he who took the distress shall have it again, and for that purpose may have a writ of retorno habendo." 6 Bacon, Abridgment (Wilson's Ed.) side page 52. By the statute of Westminster II, c. 2, § 3, 13 Edw. I, the sheriff was required to take pledges from the plaintiff in an action of replevin that he would prosecute the suit and return the property replevied if the court should so direct, and by a later statute of the time of George II he was required to take a bond with sureties that he would prosecute without delay, and for the return of the property in case its return should be awarded. 24 Am. & Eng. Ency. Law (2d Ed.) p. 529. If the goods were not restored under the writ of retorno habendo, this was a breach of obligation to return, and the return of elongata or eloinment by a sheriff on a writ de retorno habendo is conclusive in an action on the replevin bond. *Caldwell v. West*, 21 N. J. Law, 411. The plaintiff's possession of the goods is for himself. His pledges or sureties are substituted for the goods, and he holds subject to his own disposition, free from any lien in behalf of his sureties. 6 Bac. Abr. \*67. His failure to establish his title fixes his status as a wrongdoer. Being a wrongdoer, he is not permitted to set up even a blameless loss or de-

struction of the defendant's property, while wrongfully withheld from him, as a discharge of his obligation to return the goods or pay their value and damages. *Cobbey on Replevin*, § —; *Shinn on Replevin*, § 812; *Am. & Eng. Ency. of Law* (2d Ed.) p. 536; 6 *Bacon, Abridgment* (Wilson's Ed.) side page 67; *Wells on Replevin*, §§ 455, 601. The case of *Whitfield v. Whitfield*, 44 *Miss.* 254, cited to the contrary, is overruled by *George v. Hewlett*, 70 *Miss.* 2, 12 *South.* 855, 35 *Am. St. Rep.* 626; *Carpenter v. Stevens*, 12 *Wend.* 589, is also overruled by *Suydam v. Jenkins*, 3 *Sandf. (N. Y.)* 643. The other Mississippi cases cited in brief of plaintiff in error are likewise explained away in *George v. Hewlett*, cited above.

The Tennessee Code provisions prescribing the bond to be executed and the judgment to be rendered when the plaintiff fails in his suit do not materially depart from the common law and the terms of the ancient statutes requiring the plaintiff to give security for the return of the property if it shall be so adjudged, unless it be in respect to interest upon the value, and the option to the plaintiff to return or pay value. The statute in no wise deals with the consequence if the plaintiff is unable to return by reason of the loss or destruction of the property replevied. The Tennessee Supreme Court in *Bobo v. Patton*, 6 *Heisk.* 172, 19 *Am. Rep.* 593, held that the death of an animal replevied, without fault, relieved the plaintiff from his obligation to either return or pay value. But this was put upon the ground that "if a bond or obligation possible of performance at the time of execution becomes impossible by the act of God, or of the law, or of the obligee himself, the obligation will be saved"; citing *Com. Dig. Condition D*, 1 *Coke on Litt.*, and certain earlier Tennessee cases, dealing with bonds made under decree of courts of equity for the forthcoming of property committed to the custody of the obligor as receiver or custodian. The decision did not profess to be an interpretation or construction of any statute, but was put upon principles of general law. It is, therefore, not a decision which a court of the United States is required to follow with respect to the liability of a plaintiff in replevin whose suit was prosecuted in a court of the United States, under a bond made in such court according to the requirement of the Tennessee statute. The general principles governing courts of the United States in respect of state laws and state decisions are so fully considered in *Swift v. Tyson*, 16 *Pet.* 1 et seq., 10 *L. Ed.* 865, *Venice v. Murdock*, 92 *U. S.* 494, 23 *L. Ed.* 583, *Chicago v. Robbins*, 2 *Black*, 418, 17 *L. Ed.* 298, and *B. & O. Rd. v. Baugh*, 149 *U. S.* 368 to 376, inclusive, 13 *Sup. Ct.* 914, 37 *L. Ed.* 772, and by this court in *Wilson v. Perrin*, 62 *Fed.* 629, 11 *C. C. A.* 66, *Byrne v. Rd. Co.*, 61 *Fed.* 605, 9 *C. C. A.* 666, 24 *L. R. A.* 693, *Zacher v. Fidelity Co.*, 106 *Fed.* 593, 45 *C. C. A.* 480, and *Elliott v. Felton*, 119 *Fed.* 270, 56 *C. C. A.* 75, that it is unnecessary to further consider the matter.

The question as to what will excuse a plaintiff for the nonreturn of property replevied when he fails to establish his title is clearly a question of general law, and was so regarded by the Tennessee court in the case cited. It is not a decision establishing a rule of property, as in *Warburton v. White*, 176 *U. S.* 484, 20 *Sup. Ct.* 404, 44 *L. Ed.* 555; nor does it involve the construction of a state statute, as in *Byrne*

v. Rd. Co., cited above; nor the effect or validity of a chattel mortgage, as in *Wilson v. Perrin*, cited above; nor the title of a foreign receiver to local property under a general assignment, as in *Zacher v. Fidelity Trust Co.*, cited above; nor the extent of the powers and liability of a local municipal corporation, as in *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260. The obligation of the plaintiff in a replevin suit does not become impossible of performance by the loss or destruction of the goods replevied, because his obligation is an alternative one, and, if it has become impossible to return to the defendant the goods wrongfully taken, it is not impossible to pay their value. And under Shannon's Code Tenn. § 5144, he is given the option to return the goods or pay their value.

Nor is such a plaintiff a mere custodian, responsible only for negligence. As we have seen, replevin is a redelivery to the owner of goods wrongfully taken or detained. If in fact he is not the owner, his claim was groundless, and he must restore that wrongfully taken, and will not be heard to say that he held at the risk of the true owner, and was liable only for negligence as a receiver or other bailee. But if we shall regard the case of *Bobo v. Patton*, 6 Heisk. 172, 19 Am. Rep. 593, as a case which we should follow as defining the local law in reference to replevin bonds instituted under the code provisions of Tennessee, that decision is by no means controlling in the case now under consideration. The property replevied in that suit was an animal, which died from disease contracted without plaintiff's fault or agency. This was held to relieve the plaintiff from liability to return, that being, of course, impossible, and to also relieve him from his obligation to pay her value. The death of the animal wholly without the agency or fault of the plaintiff was, in fact, a blameless misfortune. But in the case at bar the plaintiff, through his own act and active agency, elected to cause the goods replevied to be exposed to sale for the satisfaction of an alleged salvor's lien in its own favor. How can it be said that this property has been lost or destroyed or taken from him without any active agency of his own? Quite another question might arise if this proceeding had been adverse to the plaintiff. The proceeding was one in rem. The defendant did not appear or defend, so that no judgment in personam was rendered.

Considering the conclusiveness of the proceeding as to the lumber, and its liability as a whole to the salvage and towage claim asserted by the plaintiff as sole libellant, the fact remains that the lumber was so seized and subjected to this claim only at the instance of the plaintiff and solely for its own benefit. There was evidence that the plaintiff's agent was not only in the possession of the replevied lumber, but of the entire cargo, as well as the barge. Whether it be regarded as in possession of the replevied lumber as owner, or only as a bailee or custodian, it was under obligation to protect it against loss or injury, and in taking it off the submerged boat it was but saving its own or that committed to it as a bailee. *Fleming v. Lay*, 109 Fed. 952, 956, 48 C. C. A. 748. But whatever its rights against the barge and the remainder of the cargo, it could not have a salvor's lien against its own property or that in its care which it was under legal obligation to save. Salvage is a reward for services successfully rendered in saving prop-

erty from maritime danger by one under no obligation or duty to render the service. *The Neptune*, 1 Hagg. Adm. 227, 276; *Firemen's Ass'n v. Ross*, 60 Fed. 456, 9 C. C. A. 70; *The Harvey* (D. C.) 84 Fed. 1000; *Murphy v. The Suliote* (C. C.) 5 Fed. 99; *The Nebraska*, 75 Fed. 598, 21 C. C. A. 448. The barge upon which this lumber was situated was sunk at the bank, and in such shallow water that only about half of the entire cargo of lumber was submerged. By the services of the plaintiff the barge was raised, the lumber taken off, and re-laden upon another barge chartered by the plaintiff.

Conceding, for the purposes of this case only, that the plaintiff was wholly without fault, and that under the case of *Bobo v. Patton* the injury sustained by the replevied lumber should be regarded as a loss or destruction pro tanto, and allowance made for this in the recovery against plaintiff for damages for detention, the question remains whether the subsequent carrying of the lumber to Cairo, and there enforcing against it both a salvage and towage claim, by means of which the lumber has passed beyond the control of the plaintiff, is a discharge of his liability to pay the value of defendant's lumber. What plaintiff did in saving the defendant's lumber from loss and injury by water it was under obligation to do as one in possession under claim to ownership. What it did in carrying it, after it was saved, to Cairo, and there causing it to be seized and sold, it did voluntarily and in its own exclusive interest. The obligation to return the replevied lumber or pay its value and damages for detention has not become impossible through an "act of God, or of the obligee, or of the law," except as the law was put in force by the plaintiff for its own purpose. An obligation which is excused by act of law is where a covenant or condition subsequent, which is law when made, becomes subsequently unlawful by a change in the law. Thus, when property was conveyed to be used for burial purposes, and such use becomes subsequently unlawful, the forfeiture is excused. *Board of Commissioners, etc., v. Young*, 59 Fed. 96, 8 C. C. A. 27. Other illustrations are found in *Marquis of Angelsea v. Rugeley*, 6 Q. B. 107; *Brewster v. Kitchin*, 1 Ld. Raymond, 317, 321; *Presbyterian Church v. City of N. Y.*, 5 Cow. 538. We have not been referred to any case which gives sanction to the claim that a plaintiff in replevin may relieve himself from his obligation to return or pay for property replevied in case he is cast in the suit, when he, as in this case, by his own institution of a suit in rem disables himself from the duty of returning. In *Washington Ice Co. v. Webster*, 68 Me. 449, taxes assessed against the defendant on the replevied property were paid by the plaintiff voluntarily, no seizure having been made to enforce collection. The payment was disallowed in reduction of damages for detention.

The judgment below was for the value of the lumber at the time it was taken, with interest. That much was in strict accordance with section 5144, *Shannon's Code Tenn.*, as construed in *Mayberry v. Cliffe*, 7 Cold. 117. The jury also found, upon evidence, that there had been a rise in the value, and they accordingly assessed the difference between the value when seized and the value at date of trial as damages for detention. This, too, is in accord with the construction placed on

the act by the case cited above. But the court told the jury that they might mitigate damages for detention if they found that this lumber had been damaged by the sinking of the barge, without fault of the plaintiff. The jury rendered a special verdict in these words and figures:

We, the jury, find for the defendant:

235,000 feet of cottonwood lumber at \$12.00 per thousand, amounting to .....	\$2,820 00
Interest from January 22, 1902, to date.....	241 11

\$3,061 11

We also fix damages at.....	822 50
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Total.....	\$3,883 61
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We arrive at the damage in the following manner:

117,500 feet, at \$18.00 per thousand.....	\$2,115 00
117,500 feet, at \$13.00 per thousand.....	1,527 50

Total.....	\$3,642 50
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Less value at time of seizure.....	2,820 00
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Damage.....	\$ 822 50
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It thus appears from the verdict that the jury found that one-half of the lumber seized had not been damaged at all, and that the other half had sustained a damage of five dollars per thousand, which reduced the value of the lumber at date of trial by \$587.50, and this was accordingly deducted from the damages for detention. The plaintiff has thus been allowed to reduce the damages recoverable otherwise by the amount of the injury done the lumber by the sinking of the barge while it was in its possession. This was admissible only upon the theory that plaintiff was liable only for a loss due to its own negligent act. The plaintiff in error cannot complain of this, and the defendant in error has not.

In our view of the case, the plaintiff has obtained a better result than it was entitled to, and the judgment must be affirmed.

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## GALBRAITH v. ILLINOIS STEEL CO.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1904.)

No. 1,046.

### 1. NEGLIGENCE—NEGLIGENT PERFORMANCE OF BUILDING CONTRACT BY SUBCONTRACTOR—LIABILITY TO OWNER.

Plaintiff, who was owner of a building, contracted with a company to install therein a sprinkler system according to plans and specifications made a part of the contract, which provided for a tank on the top of the building, having a triangular steel support. The company contracted with defendant for the construction of such support, but in the actual construction a tie member specified in the plans was omitted by defendant. The tank having been placed thereon and filled with water, to a weight of 85 tons, the support collapsed during a high wind, owing to the absence of the tie member required by the contract, and a large loss and damage resulted to plaintiff. *Held*, that plaintiff could not maintain



an action in tort to recover such loss from defendant, whose duty was measured by the requirements of the contract, and was enforceable only by the other party to the contract.

Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Plaintiff in error (plaintiff below), owner of a six-story business block in Chicago, contracted with the Manufacturers' Automatic Sprinkler Company to install in her building a complete sprinkler system. Among other things, the sprinkler company agreed to construct on top of the building, according to plans of Ritter & Mott, engineers, a steel framework on which to stand a wooden tank of 20,000 gallons capacity. The sprinkler company contracted with defendant to erect the steel support. Defendant was given the drawings and specifications prepared by Ritter & Mott, and in making therefrom its shop plans, and in putting up the steel support, omitted a tie member—one side of the triangular top. Ritter & Mott's plans informed defendant that a tank 16 feet in diameter would rest upon the steel support, but did not disclose the height and capacity of the tank. Defendant did its work in the manner above stated, and left the building. Thereafter a tank company employed by the sprinkler company came upon the building and made and placed the tank. Then the sprinkler company connected the tank with the system of pipes and sprinkler heads throughout the building. The tank was filled and the system was maintained by plaintiff for 30 days before the accident occurred which gave rise to this controversy. The steel support weighed 5 tons; the tank and water, 85. The wind, blowing at 40 miles an hour against the tank surface, caused the structure to collapse. The evidence tends to prove that the collapse would not have happened, except for the absence of the tie member. Plaintiff paid out large sums in repairing the building and sprinkler system, in reimbursing tenants for damage to goods, and in settling personal injury claims. To recover these, she brought this action on the case against defendant. At the conclusion of her evidence the court, on defendant's motion, directed a verdict for defendant, on which was entered the judgment now sought to be reversed.

Ralph R. Bradley, for plaintiff in error.

Kemper K. Knapp, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Plaintiff contends that defendant, outside and independently of its contract with the sprinkler company, owed her a duty to use reasonable care in constructing the steel support; that the evidence shows that defendant failed to exercise such care; that such failure was the proximate cause of her losses; and therefore that she has made out a good cause of action against defendant. And in support of her contention plaintiff cites numerous authorities.<sup>1</sup>

On the other hand, defendant insists that this case falls within the rule that a contractor, manufacturer, or vender is not liable to persons who have no contractual relations with him for negligence

<sup>1</sup> Sibley on the Right to and Cause for Action, p. 44; Enc. of Law & Procedure (section on "Actions"); Whitaker's Smith on Negligence (2d Ed.) p. 111; also page 32; Pollock on Torts (Ed. 1887) pp. 347, 350; Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224; Bishop on Noncontract Law, § 79; Thompson's Commentaries on the Law of Negligence, vol. 1, p. 626; Addison on Torts (Dudley & B. Ed.) p. 17; Shearman & Redfield on Negligence (4th Ed.) vol. 1, p. 23, § 22; Huset v. J. I. Case Threshing Machine Company, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

in the construction, manufacture, or sale of the article he handles, and illustrates its argument by comparison with many cases.\*

If the sprinkler company had suffered from defendant's omission of the tie member, that company could have maintained against defendant an action *ex contractu*, for defendant had engaged to put in the tie member, or an action *ex delicto*, for defendant failed to discharge a duty it had assumed to the sprinkler company. In both cases the measure of right and duty would be the same, because it would be intolerable that an action *ex delicto* should be maintained by one contracting party against the other on account of the complete and exact performance of the contract. If defendant owed to the sprinkler company any duty to exercise care that the completed structure should withstand the wind, then, if the contract had called for the very steel support that defendant erected, full performance of the contract would be no defense to an action *ex delicto* for breach of the supposititious duty. It follows that the only duty owing by defendant to the sprinkler company was to perform the contract as it was made, and that the only party who could sue defendant for a breach of the duty that was created and measured by the contract was defendant's contractee, the sprinkler company.

Plaintiff cannot recover from defendant simply by showing defendant's breach of its contract with the sprinkler company, nor simply by showing defendant's breach of its duty to the sprinkler company. There was no contract relation between the parties to this case. What duty arose from the fact that defendant went upon plaintiff's building to execute its contract with the sprinkler company? There is the general maxim of the law of negligence that one, in following his business or pleasure, shall use reasonable care to avoid injury to others. That is a duty owing from everybody to everybody. And in this case, if defendant's workmen, during the erection of the steel support, had negligently dropped a

\* *Winterbottom v. Wright*, 10 M. & W. 109; *Collis v. Selden*, 8 C. P. 495; *Mayor of Albany v. Cunliff*, 2 N. Y. 165; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Daugherty v. Herzog*, 145 Ind. 253, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 28 Am. St. Rep. 220; *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444; *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; *Bailey v. Northwestern, etc., Gas Co.*, 4 Ohio Cir. Ct. R. 471; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Davidson v. Nichols*, 93 Mass. (11 Allen) 514; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *McCaffrey v. Mossberg & Granville Mfg. Co. (R. I.)* 50 Atl. 651, 55 L. R. A. 822; *Burke v. De Castro*, 11 Hun, 354; *Swan v. Jackson (Sup.)* 7 N. Y. Supp. 821; *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567; *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 803; *Salliotte v. King Bridge Co.*, 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; *Blakemore v. B. & E. Ry. Co.*, 8 El. & Bl. 1035; *Barrett v. Singer Mfg. Co.*, 31 N. Y. Super. Ct. 545; *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Marquardt v. Ball Engine Co.*, 122 Fed. 374, 58 C. C. A. 462; *Wharton on Negligence* (2d Ed.) 438.

girder on a passer-by in the street, or down through the roof and floors of plaintiff's building, *Bickford v. Richards*, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224, and other decisions, would be good precedents for applying the maxim. In such a case there would be a breach of a duty that was not created and measured by the contract, and the inquiry whether defendant, on finally leaving the premises, had fully completed its contract, or had negligently failed in its duty in that regard, would be utterly irrelevant.

But plaintiff's case requires her to assert that defendant owed her the duty to use reasonable care to see to it, before leaving the job of erecting the steel support, that the final structure would not be apt to be blown over on account of the lack of the proper number of steel girders to make it safe. If such a duty existed, it would be one owing equally to the passer-by in the street, it would have being separate and apart from the duty that was created and measured by the contract between defendant and the sprinkler company, and it might or might not be coextensive with defendant's duty to the sprinkler company. If it were coextensive, it would be for the reason that defendant's contract with the sprinkler company called for such a steel support that the final structure would be reasonably safe. And since a duty cannot be shifted, defendant could not rely on the proposal of its customer, but would have to determine for itself, and at its own peril, whether or not the steel support shown in the proposed contract would in fact be sufficient to co-operate properly with the other parts of the system to make a reasonably safe final structure. If defendant's alleged duty to plaintiff were of different dimensions from those of its duty to the sprinkler company, it would be for the reason that defendant's contract with the sprinkler company did not call for such a steel support that the final structure would be reasonably safe. And in such a case defendant would be confronted with the situation that its performance of its duty to the sprinkler company would be a breach of its duty to the rest of the world.

Defendant's supposed duty to plaintiff being created by law, if at all, and therefore being absolute, and defendant's duty to the sprinkler company being of a size determinable by the contracting parties, the question of the two duties' coextensiveness is irrelevant, for, if defendant owed plaintiff the supposed duty, that duty could not be diminished or altered by defendant's contract with another. Hence, in inquiring into the origin, nature, and extent of defendant's duty to plaintiff, the irrelevancy of the terms of defendant's contract with the sprinkler company. And since the terms of the contract are immaterial, it is obvious that the question of performance is impertinent on the part of any one but the sprinkler company.

If defendant, constructor of one part, was bound to use reasonable care that the entirety, when turned over to the possession and use of a stranger, should withstand the winds, so were the builders of other parts. Take the tank company for example. It came upon the premises after defendant had gone. The fact was obvious that one side of a triangle was missing. The final effect of

putting upon that support 85 tons' weight in the form of a sail was the blowing over of the structure. If defendant were required to look beyond its contract, and to ascertain the weight of the tank that was to be furnished by another, its capacity, the weight of the water, the sail area, and the speed of the winds, in order to determine whether the final and completed structure would be safe, it would be equally just to require the tank company to figure (and with reasonable accuracy, at its peril) on the tensile and torsional strength of steel, and the adequacy of the designs for the support on which it engaged to set its tank. If the law should hold all the builders and makers and doers in the land to a particular duty to their contractees, and at the same time to another absolute duty to use care that the thing shall be innocuous as it passes through the hands of all mankind—a duty separate and distinct from the first, which might or might not be coextensive with the first, but, whether so or not, unavailing to avoid the second—we fancy few persons would be willing to do business, in the face of the insufferable litigation that would ensue. True, the common law—that inexhaustible fount, of which the taps are in the hands of the courts—might have been turned to watering plaintiff's contention; but we think it evidence of the perception of a sound public policy that the courts, with virtual unanimity, have refrained from opening the gates.

To the rule there are exceptions. One must not, knowingly or unknowingly, fail to exercise care in the preparation or sale of an article intended to affect human life. One must not knowingly send out an instrumentality which is imminently and immediately dangerous, without notice of its nature and qualities. From the steel support, as defendant left it, no danger threatened. None came from it immediately, but only through additions and acts of the tank company, the sprinkler company, and plaintiff. This case is not within the exceptions. And furthermore the subsequent and independent intervening acts of the tank company, the sprinkler company, and plaintiff saved defendant's omission of the tie member from being the proximate cause of the accident.

GROSSCUP, Circuit Judge (dissenting). I cannot concur in the conclusions reached, but have time only to outline, in the most general way, the ground for my dissent.

I do not base my dissent on the proposition that defendant owed the plaintiff any general duty, irrespective of his contract with the Sprinkler Company, to see to it that the structure designed by the architects was reasonably safe. I build my view of plaintiff's right of action solely on defendant's failure to put in the tie member of the triangle called for in the plans, and solely because it was called for in the plans, a failure that confessedly caused the injuries. Upon this predicate let me briefly restate the salient facts.

Plaintiff had a contract with the Sprinkler Company to install in her building a sprinkler system according to certain plans and specifications made a part of the contract between them. The plan specified a steel triangular support for the tank, including, specific-

ally, the tie member. In actual construction the tie member was left out. The collapse followed—followed as the direct result of the omission. Now one thing seems quite sure: The plaintiff would have had, in some form, a right of action against the Sprinkler Company for the damage resulting; for the inclusion of the tie member was in the contract between them, and the Sprinkler Company was bound to see that the contract was performed. Another thing seems certain: The Sprinkler Company would have had, in some form, a right of action against the defendant for the loss to which it would thus be subjected; for the inclusion of the tie member was in the contract between the Sprinkler Company and the defendant, and the defendant was bound to perform that contract. Thus, by circumlocution at least, plaintiff's losses eventually would have reached the defendant, through a train of legal proceedings that, practically, would have made the defendant directly responsible to the plaintiff for the losses suffered. I am very much inclined to think that in such a case, where defendant is thus obligated to the Sprinkler Company, and the Sprinkler Company to the plaintiff, there exists such privity of contract as would give the plaintiff a direct right of action, *ex contractu*, against the defendant.

But I do not rest my conclusion upon the existence of privity of contract. In matters involving, as these contracts did, the personal and property safety of others than the immediate parties to the contracts, there is, it seems to me, a duty raised to take reasonable care that the contract obligations are carried out. Public policy injects into such a relationship an obligation additional to the bare contractual obligation—an obligation running to all who are directly affected by the performance or non-performance of the contract. There is thus raised between defendant agreeing to put in an essential part of the building, according to plans and specifications, and the plaintiff affected in personal and property safety by defendant's performance of that obligation, a privity of duty that may be made the basis of an action *ex delicto*.

The character of modern constructions, and the minute divisions and sub-divisions that enter into them, make the existence of such privity of duty almost imperative. Where, in the old times, when the precedents relied upon were established, but two or three trades were employed in the construction of a building, a score or more are now called in. The modern structure is the work of many trades. To safely erect such structures, plans and specifications covering the whole, by competent architects, are not simply a convenience—they are a necessity. Through such plans and specifications alone, can the work of the many trades be co-ordinated. Through them alone, in the midst of diversity can the owner build to a given end. Plans and specifications, therefore, are essentially the Law of the Building. They are in practical effect, the owner's direction to the contractors—not simply to the immediate contractor, but to all who take contracts subservient thereto, a direction that each contractor by taking his contract in reality accepts; and safety and good faith demand not simply that contractors

should perform their contracts with each other, but that each contractor, by living up to the Law of the Building, should obey the direction thus given and accepted and thus perform his duty to the owner—indeed to all who may, in person or property, be directly affected by the building's being erected in accordance with the plans and specifications. To hold otherwise, it seems to me, would be to inject into the construction of modern buildings, a dissection and looseness of responsibility, so menacing to personal and property safety, that it ought not, on merely technical reasoning or antiquated precedents, to be longer tolerated.

Judgment affirmed.

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FRENCH v. FRENCH.

(Circuit Court of Appeals, Sixth Circuit. December 20, 1904.)

1. EVIDENCE—ADMISSION—HARMLESS ERROR.

Where in an action on a note the verdict in favor of defendant must have been rendered on the first defense alleged in defendant's answer, denying that the note was plaintiff's property, alleged error in the admission of evidence relative to a subsequent different defense was harmless.

2. BILLS AND NOTES—TRANSFER—EVIDENCE.

In an action on a note by an administrator of the payee, evidence reviewed, and *held* to sustain a verdict finding that the title to the note had been transferred by indorsement and delivery to a third person.

3. SAME—INSTRUCTIONS.

Where it was alleged that the note sued on had been transferred by plaintiff's intestate to her daughter by indorsement and delivery, a requested instruction that such indorsement was of no effect unless accompanied by a delivery of the note to the indorsee, with the intention of transferring the title thereof from the payee to the indorsee, and that unless there was such delivery the plaintiff was entitled to consider the indorsement of no effect and cancel the same, was objectionable, as submitting rather the question of plaintiff's right to erase the indorsement, than whether the note was executed and delivered to the indorsee in such a way as to pass title.

4. SAME—TRANSFER—INSTRUCTIONS.

In an action on a note alleged to have been transferred by the payee to her daughter, an instruction that if that was the payee's intention, if she made the indorsement, and the note was delivered to the daughter, or delivered to the father for the daughter, or delivered to any one for the daughter, the title passed and the note belonged to the daughter, and not to the mother, thereafter, and the mother's administrator could not recover thereon, but if the indorsement was made by the mother without any view of making provision for the daughter, not intending that the title to the note should pass to her, and there was no delivery of the note to her, or to anybody for her, then the title remained in the mother, was not erroneous, as laying too much stress on the mother's intention in making the indorsement to pass title to the daughter.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Stanley Matthews, for plaintiff in error.

C. B. Jamison and Sherman T. McPherson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought by Henry Willard French, as administrator of the estate of his mother, Mary Willard French, upon a promissory note reading as follows:

"Hartford, Conn., Aug. 16, 1884.

"On demand I promise to pay to the order of Mrs. Mary Willard French three thousand dollars. Value received.

"[Signed]

Alfred Willard French."

It is indorsed:

"Pay my daughter, May W. French.

"[Signed]

Mary W. French."

This indorsement, however, was erased by the plaintiff, the administrator, after the note came into his hands.

On the trial, two defenses were relied on: First, that immediately after its execution and delivery the note was indorsed and delivered by the payee to her daughter, May W. French, and was and is still the property of the latter, and not that of the plaintiff; second, that the note was executed and delivered by the defendant to his mother, Mary Willard French, and by her indorsed, delivered, and given to her daughter, May W. French, under a certain family arrangement, and without intention by the parties thereto of the note being considered a lawful personal demand upon the defendant, and without any consideration whatever. The case was tried before a jury, evidence being introduced in support of each of these defenses, and a verdict rendered for the defendant. The assignments of error go to the admission of testimony, over the objection of the plaintiff, tending to support the second defense, and to the refusal to give certain requests to charge made by the plaintiff.

1. The argument at bar was directed principally to the question whether or not the court erred in admitting testimony in support of the second defense. The plaintiff insisted that the purpose of this testimony was to vary and contradict a written contract, and therefore it was inadmissible, both under the general rule and the application thereof made in *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991. On the other hand, the defendant contended that the note was wholly without consideration, and was never executed and delivered and accepted as a note, but as a mere memorandum of a family arrangement. The court below admitted the testimony upon this latter theory, that it went to the consideration of the alleged note, and tended to show, not that the terms of the note were different from what stated, but that it was not, in point of fact, a note at all, but merely a memorandum. In view of the decisions in *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991, and *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, the question is not without interest; but we are relieved from its consideration by the fact that we are satisfied from an examination of the record that the jury based its verdict wholly upon the first defense, and therefore, if the court erred by improv-

erly admitting testimony under the second, no prejudice resulted to the plaintiff.

The testimony introduced in support of the first defense tended to show that Henry French, Sr., owned a residence in Hartford, Conn., upon which there was a mortgage of \$5,500. He was indebted to his son, Alfred Willard French, in a certain amount, which was then increasing. He was growing old and in failing circumstances. He had used in his business money belonging to his wife, Mary Willard French. It was supposed the house would sell for \$10,000, and that the outstanding claims would amount to about \$7,000. Under these circumstances, he made and delivered to his son, Alfred Willard French, the defendant, a deed of this real estate; and Alfred executed and delivered to his mother, Mary Willard French, a note for \$3,000, payable on demand. There were present at the time of the execution and delivery of this note the father and mother, the son, Alfred, and the daughter, May W. French. The daughter lived with the father and mother, and, in a sense, was a dependent. After the receipt of the note, in order to make some provision for her, the mother then and there indorsed and delivered it to the daughter, the indorsement being written by the father and signed by the mother, and the daughter turned the note over to her father to keep for her. The father and mother lived together until the death of the latter in 1891. The note was in the possession of the father or mother, or both, until the mother died, and then he took it and kept it until he died in 1899. After his death it was found in his clothes. After the death of the mother, Alfred sold the house for \$7,325, being \$1,825 above the mortgage. At one time the father lost the note, and then, acting for his daughter, May, requested his son, Alfred, for a new note for \$1,800—representing substantially the amount he had received for the house in excess of the mortgage—and Alfred made such a note and sent it to his sister, May. She, however, believing that Alfred had accounted for all he got out of the house in excess of the mortgage, and that nothing was due her, destroyed it.

There was no testimony contradicting that of the defendant and his sister, May, that the note was indorsed and delivered to her by her mother, and by her handed to her father to keep for her. The plaintiff, when he first went on the stand, testified that he was present at the time of the indorsement, and that there was no delivery of the note. Subsequently, on reflection, he took the stand again, and admitted he was not present. Practically the only testimony claimed to be inconsistent with the defense that May W. French was the owner of the note was that of the plaintiff and his sister-in-law, Minnie French, who testified that Henry French, Sr., after his wife's death, made several demands on the defendant to pay the note. In reply to this, the defendant offered in evidence letters from his father showing a written recognition of the fact that the latter held the note as agent for his daughter, May, but the court excluded them, stating that these declarations or demands of Henry French, Sr., long after the execution and delivery of the note, were not competent. The plaintiff also testified that, on the



day of his mother's funeral, the father went to his mother's bureau drawer and took the note out, saying, "I thought it better to come and get this, to take it with me." It is claimed this was proof of possession by the mother, but in view of the fact that the indorsement was on the note, and that it had been delivered to the father to keep, the evidence is equally consistent with the theory that he had had and kept continued possession of the note. He seemed to know where the note was, and, in thus taking it with him, the inference is fair that he was but carrying out the trust imposed by his daughter, May.

The court, after stating the two defenses, and the general nature of the testimony introduced in support of each, said:

"If you find that the title is in the plaintiff, and that there was no family arrangement, then the plaintiff is entitled to recover the face of the note, with interest. If you find that the title is in the plaintiff here, but that there was a family arrangement under which the defendant was to pay upon this note whatever remained after satisfying the mortgage, then this plaintiff would only be entitled to recover such balance, which, it seems to be conceded, is \$1,825, with interest. If, on the other hand, you find the title did pass to the daughter, then your finding should be for the defendant, because the effect of that finding would be that this plaintiff is not the owner of the note, and has no right to sue upon it, and no right to recover upon it."

Upon this submission, the jury found for the defendant. It is obvious that in doing so they based their verdict upon the first defense, namely, that the plaintiff was not the owner of the note, but that May W. French was. Indeed, the court had said to them respecting this defense:

"The daughter says the note was delivered to her and she held it in her hands, and that she gave it to her father to take care of for her, and I am not able to recall any testimony to the contrary."

Evidently the second defense—the defense of the family arrangement—had nothing whatever to do with the verdict. That was based on the first defense, and very properly so, for the testimony in support of it was so conclusive that, in our opinion, it would have justified the court in directing a verdict upon that ground.

2. The plaintiff requested the court to give four separate special instructions, which the court declined to do. The first of these is clearly bad. The third and fourth relate to the second defense—that of the family arrangement—and may therefore be passed. The second reads as follows:

"I further charge you that the writing of the words across the back of the note, 'Pay to my daughter, May W. French,' is of no effect unless the same was accompanied by a delivery of the note to May W. French with the intention of transferring the title thereof from Mary Willard French to her, and that, unless there was such delivery, the plaintiff in this case had the right to consider said words of no effect, and to cancel the same."

The charge is objectionable on the ground that it seems to submit to the jury rather the question whether the plaintiff was right in erasing the indorsement, than the question whether the note was executed and delivered to May W. French in such way as to pass the title to her.

The law governing the transfer of the title to a note by indorsement and delivery is stated with sufficient clearness in the charge of the court. After reciting the indorsement, which was conceded, the court said:

"The claim of the defendant is that she intended to give it [the note] to May in order to make provision for her support. If that was her intention, if she made that indorsement, and the note was delivered to the daughter, or delivered to the father for the daughter, or delivered to any one for her daughter, the title passed, and the note belonged to the daughter, and not to the mother, thereafter, and the plaintiff would not be entitled to recover in this action."

Continuing, the court said:

"But if that indorsement was made by the mother without any view of making provision for the daughter, not intending that the title to the note should pass to her, and there was no delivery of the note to her, or to anybody for her, then the title remained in the mother."

It is submitted that too much stress was thus laid upon the intention of the mother, in making the indorsement, to pass the title to the daughter; that the mother may have intended to pass the title when she made the indorsement, but yet may never have delivered the note. But after all, the intention with which an indorsement is made can best be inferred from what was done with the note. If delivered in accordance with the indorsement, obviously the intention was to pass the title, and this was all the court meant by putting the matter as he did. As the court subsequently said, phrasing it another way:

"You are to determine the fact as to whether the mother intended to pass the title in this note to the daughter. If she did intend to pass the title—if there was a delivery to her, or to anybody for her, in furtherance of that intention—then the title did pass, and the title is not in this administrator, and he is not entitled to recover."

It is to be remembered that there was no dispute as to the indorsement. That was conceded.

No error appearing in the record to the prejudice of the plaintiff in error, the judgment of the court below is affirmed.

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### BRYAN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1904.)

No. 1,341.

**1. COUNTERFEITING—EVIDENCE—SEPARATE OFFENSES—ADMISSIBILITY TO SHOW INTENT.**

In a prosecution for uttering counterfeit 5-cent pieces, where it was completely and satisfactorily shown that defendant had in his possession and passed certain counterfeit 5-cent pieces, evidence that molds for making 25-cent pieces were found in a tool chest used jointly by defendant and another was admissible to show a criminal intent in passing the 5-cent pieces.

**2. SAME—DISMISSAL OF COUNT OF INDICTMENT—EFFECT ON EVIDENCE.**

Where an indictment for counterfeiting alleged in one count the passing of counterfeit 5-cent pieces, and, in another count, charged defendant with possessing molds for counterfeiting 25-cent pieces, the dismissal of

the latter count did not operate to withdraw from the jury evidence introduced thereunder, where such evidence was admissible to show criminal intent under the former count.

**3. CRIMINAL LAW—TRIAL—ARGUMENT TO JURY—INTERRUPTION BY COURT.**

Where counsel erroneously stated in his argument to the jury that the effect of the dismissal of one count of an indictment operated to withdraw the evidence introduced thereunder from the consideration of the jury, it was proper for the court to interrupt him in such statement.

In Error to the District Court of the United States for the Western District of Texas.

W. M. Walton and Geo. S. Walton, for plaintiff in error.

Henry Terrell, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The plaintiff in error was duly charged by indictment, embracing five counts, with having violated the laws of the United States on the subject of counterfeiting the government money, as follows: (1) Uttering one counterfeit five-cent piece on the 31st of July, 1902; (2) uttering one like five-cent piece on August 1, 1902; (3) having in his possession on August 13, 1902, two counterfeit five-cent pieces; (4) with having in his possession on the 13th of August, 1902, two certain counterfeit molds in likeness of United States quarter-dollar pieces; (5) with having on July 1, 1902, made and forged fifty counterfeit five-cent pieces.

Early on the morning of August 13, 1902, W. H. Forsyth, an agent of the United States secret service, accompanied by F. H. Lancaster, a deputy United States marshal, went to the house of the plaintiff in error, who will hereinafter be called the defendant. The defendant was not then up. The officers aroused him, and at once searched him, and to some extent examined the house in which he was living. They then, having the defendant under arrest, went with him to the house of one J. H. Brown, and from there (the house of J. H. Brown) they took the defendant and Brown to a warehouse in which there were a carpenter's workbench and tool chest. The defendant and Brown made no objection to accompanying the officers to the warehouse. The front door of the warehouse was locked. Lancaster got the key to this lock from either the defendant or Brown—he cannot say which—and unlocked the front door. The officers then searched this shop, and found some pieces of metal—babbitt, half-and-half, and lead. They then turned to the tool chest. The key to this was given to the deputy marshal by J. H. Brown. Before unlocking the chest both the defendant and Brown, in answer to the deputy marshal's questions as to whose chest it was, replied that they both had used it; had tools in it; that it was a partnership box. Thereupon he unlocked the chest or box, and searched it and found— At this point the defendant objected to any testimony as to what was found in the tool chest or box until it was proven that the defendant was the owner or in possession thereof, and exercised personal control of the same. The same objection having been made at the same

point in the progress of examination as witnesses of each of the officers, the objection was overruled, and the witness Lancaster testified that in the bottom of the tool chest he found two 25-cent molds made of plaster paris. The date, he thinks, was 1900. These molds were wrapped in paper. He did not open the package, but handed it to Mr. Forsyth, who did open it, and exposed the said molds to view. He searched further in the chest, and thinks he found a piece of babbitt metal. Soon after the search of the tool box was finished, Mr. Forsyth went away, and while he was absent Lancaster said to defendant and J. H. Brown, who was also under arrest, that it would save searching if they would tell where the five-cent molds were, and one of them said that they need not search any further—"You got everything;" and the witness believes that he said the nickel molds had been destroyed.

The nickels referred to in the first, second, and third counts of the indictment were all identified satisfactorily, and satisfactorily proven to be counterfeit, and were introduced in evidence to the jury. Three of the nickels exhibited and introduced in evidence had been sent by mail to the witness Forsyth at Dallas. In the search the witnesses made of the defendant, they found in one of his pockets one counterfeit nickel of the same date and mold mark as those which Forsyth had received. In the other pocket they found a genuine nickel of the same date. On the genuine nickel there were particles of plaster paris, or what the witness took to be and believed were such. The witness also found in a room in Bryan's house, that seemed to be unoccupied, two cans, small size, that had in them some mixed plaster paris, and also a piece of glass about three inches in diameter with some mixed plaster paris on it. On this glass was a space about an inch and a half in diameter, where some object with a roundish bottom had been placed, and around this place were smears of mixed plaster of paris. They also found a small paper sack with unmixed plaster of paris in it. In this connection, the witness Forsyth described the modes of counterfeiting by use of plaster paris to make molds, etc.

The witness Dee Simpson stated that in the afternoon of July 31, 1902, the defendant bought from him three bundles of fodder for which he paid two nickels, and on the 1st of August, same year, he bought a piece of tobacco, for which he paid one nickel. Mr. J. H. Brown was near by when defendant bought and paid for the fodder. These three nickels this witness turned over to his employer, M. H. Reed, and says that "after a few days we mailed these three nickels to W. H. Forsyth, at Dallas, Texas." Witness M. H. Reed states, "These three nickels were sent by me to W. H. Forsyth, at Dallas, Texas, between the 3d and 7th of August, 1902." The bill of exceptions shows these three nickels were identified as the three nickels passed by defendant to Dee Simpson, and were satisfactorily shown to be counterfeit. The defendant, testifying on his own behalf, said:

"I passed two nickels on Dee Simpson for fodder, and one nickel for tobacco, but did not know they were counterfeit. The government, I am told in the evidence, found a counterfeit nickel on my person when they arrested

me; also one genuine nickel that had some little specks of plaster of paris on it."

He accounts for his possession of all of the nickels, and states that whether they were false or genuine coins he does not know. He also accounts for the possession of plaster of paris and the piece of glass referred to in the testimony, and states that he never engaged in counterfeiting, never knowingly had any counterfeit money in his possession, is a poor man, is a carpenter by trade, and works for his living and the support of his family. He then proved by a number of witnesses that plaster of paris was used in numerous mechanical pursuits, such as carpenters, plumbers, and menders of broken articles, framing of pictures, etc. The defendant proved his good character as a truthful, honest, law-abiding citizen by nine witnesses. He also proved that his business was that of a carpenter.

The bill of exceptions shows that the government offered in evidence two sets of 25-cent molds and several pieces of metal, testified to and about by the two witnesses, W. H. Forsyth and F. H. Lancaster, as being on the workbench and in the tool-chest, to the introduction of which evidence the defendant objected because neither the workbench nor the tool chest had been proved to have been in the actual possession of, or under the control of, the defendant, so as, in law, to charge him with the guilty possession or control thereof, and, until such proofs were in, such molds and metal were not legally admissible in evidence against him. These objections were by the court overruled, and the said two sets of 25-cent molds, and the said babbitt, half-and-half, solder, and other metals were by the government introduced in evidence to the jury. It shows further that the court declined to submit to the jury for their consideration the fourth count in the indictment, and thereupon the government dismissed that count; and the defendant then orally requested the court to withdraw the said two sets of molds as evidence, as well as the evidence relative thereto, from the jury, as the same had become irrelevant and immaterial to the other issues joined on the remaining counts of the indictment. This motion the court declined to grant.

The assignment of errors presents substantially only two questions: Did the court err in admitting, over the objections of the defendant, the testimony of the witness W. H. Forsyth and of the witness F. H. Lancaster on the subject of the warehouse of Evans & Turner, the tool chest therein found, and the molds for making 25-cent pieces found in said box or tool chest, and the metals found in said box or tool chest? Second. Did the court err in interrupting counsel for defendant in his argument to the jury, wherein he was arguing that the count in the indictment in regard to the defendant being charged with the possession of the molds for counterfeiting quarter-dollar pieces had been dismissed by the court, and therefore the evidence that had been adduced to support that count went out of the case, even as said counts had gone out, and could not be considered by the jury as touching the other counts in the indictment?

The distinguished counsel who represented the defendant below, and who has filed an able brief in this court, says that the first of these alleged errors is well taken, because up to the time of the admission of the testimony objected to there had not been delivered to the court and jury any testimony whatever to connect the defendant Harvey F. Bryan with the warehouse, tool chest, metals, or molds, or legally charging him with the possession thereof, or, with the guilty knowledge of same, of counterfeiting money of the United States. And further that after the government, through its accredited officer, had dismissed the fourth count, to permit the evidence just referred to to remain before and with the jury to consider in connection with other counts in the indictment for other offenses, when the other evidence had plainly and indisputably cut defendant off wholly and clearly from any responsibility whatever for or because of the existence or whereabouts of said molds and metal, or the possession thereof or any part thereof; and this, too, when said evidence was unquestionably irrelevant and immaterial to the other counts in the indictment not dismissed, and when the defendant had, by an express special, written charge, requested the court to withhold such evidence from the jury.

We are unable to concur in these suggestions of the able counsel. It appears to us from our examination of the record that no question was made, or could have been made, as to the satisfactoriness and completeness of the proof that the defendant did pass the coins charged in the first and second counts of the indictment, and that on the date mentioned he had in his possession the coins mentioned in the third count of the indictment as being spurious; that these coins were all identified, and were satisfactorily shown to be spurious; and that nothing remained to establish the guilt of the defendant as charged in these three counts of the indictment, except the intent or motive with which the three spurious coins that had been passed were passed, and the two spurious coins that were in his possession were held by him. It seems to have been the theory of the counsel for the defendant that all the proof with reference to the tool chest and its contents, as testified to by the witnesses who examined the same, was admitted and could only have been properly admitted under the fourth count in the indictment, and that, when that count had been dismissed by the government, this proof which had been admitted in its support was necessarily by that dismissal withdrawn from the case. In reference to that count and the admission of this evidence, the counsel suggests that when the testimony was admitted it was in the nature of direct evidence introduced for the purpose of convicting plaintiff in error on the count No. 4 of the indictment. That may very well be one of the grounds on which this testimony was admitted at the time it was admitted, and it may be conceded that it was in the nature of direct evidence to support that count of the indictment; but it by no means follows that, because it was in the nature of direct evidence to support one count in the indictment, it thereby had, or for any other reason shown in this record, lost its character as indirect evidence to illustrate the intent, and from which, with other circum-

stances, the jury could deduce the intent of the defendant in doing the acts otherwise fully established against him, charged in the counts Nos. 1, 2, and 3. The only remaining question open under these counts at the conclusion of the proof was the one of fraudulent intent or not. "And upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for a single act taken by itself may not be decisive either way, but when taken in connection with the others of like character or nature, the intent or motive may be demonstrated with almost conclusive certainty." *Wood v. United States*, 41 U. S. 360, 10 L. Ed. 987. "Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." *Castle v. Bullard*, 64 U. S. 187, 16 L. Ed. 424.

The deputy marshal who had the defendant and Brown in custody at the time the tool chest was opened and examined says: "Before unlocking the chest, both defendant and Brown, in answer to my question as to whose chest, replied that they both had used it; had tools in it; that it was a partnership box." Brown owned a workbench and a tool chest, both of which occupied a place in the warehouse known as the "Turner & Evans Warehouse," the front door of which was kept locked, and to it Brown had the key. The defendant testified that he and Brown worked together sometimes on jobs of carpentry; that he had some tools, and kept them in Brown's toolchest; that he had no key to the chest, and did not own, possess, or control it. The witness Lancaster had found in the defendant's house two cans that had in them some mixed plaster of paris; also a small paper sack with unmixed plaster of paris in it; also a piece of glass described, on which was a space where some object with a roundish bottom had been placed, and around this space were smears of mixed plaster of paris. They found in the tool chest two plaster of paris molds for making 25-cent pieces, and on the workbench several pieces of metal, babbitt, half-and-half, lead solder, and a small piece of metal that had been melted. One of the pieces of metal was in the tool chest, and the balance was lying loose on the workbench. They testified that babbitt metal, half-and-half, lead solder, and other metals are used in making counterfeit money. The witness Dee Simpson testified that Brown was near by when defendant bought and paid for the fodder, in payment of which he passed two of the counterfeit nickels.

The case seems to us to be one which clearly authorizes a reference to the circumstances shown by the proof objected to, because those circumstances are connected sufficiently with the established transactions of the defendant to illustrate in some measure his intent in the conduct charged against him to have been criminal, and should have been admitted, and doubtless would have been admitted, by the trial judge, even if the fourth count in the indictment had never been inserted therein; and, having been admitted, they were not, as the judge distinctly announced, withdrawn from the jury by the dismissal of the fourth count. This being so, it was not error in the judge to arrest the argument of counsel to the jury at the time and in the manner specified in the bill of exceptions and in the assignment of errors. On the contrary, it was the duty of the trial judge to interpose as he did. *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453.

We find nothing in *Thompson v. Bowie*, 4 Wall. 471, 18 L. Ed. 423, or in *United States v. Ross*, 92 U. S. 284, 23 L. Ed. 707, or in *Xenia Bank v. Stewart*, 114 U. S. 231, 5 Sup. Ct. 845, 29 L. Ed. 101, which required or authorized the trial judge in this case to exclude the evidence objected to by the defendant, or to withdraw that evidence after the dismissal of the fourth count in the indictment.

The judgment against the defendant is therefore affirmed.

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COMMERCIAL NAT. BANK v. NACOGDOCHES COMPRESS & WAREHOUSE CO.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1904.)

No. 1,372.

1. ESTOPPEL—FAILURE TO SPEAK OUT—INDUCING RELIANCE ON FORGED RECEIPTS.

Plaintiff was engaged in the banking business, and received from a depositor warehouse receipts for cotton, ostensibly issued to the depositor by defendant, as collateral for a loan to the depositor. It thereupon wrote to defendant, stating that it had accepted the receipts as covering the transfer of the cotton. The receipts were forgeries, and the depositor had no cotton in warehouse corresponding with them; but defendant, knowing that the receipts were forgeries, or at least that there was no cotton corresponding therewith, made no reply to the letter until after the depositor had failed, and its deposit with plaintiff, which it could have retained to reimburse itself, had been considerably diminished. *Held*, that defendant was liable in damages for plaintiff's loss, on the theory of estoppel, in having remained silent when it knew that plaintiff was relying on the forged receipts, until plaintiff's position with respect to its depositor was altered for the worse.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This action was brought by the Commercial National Bank, a corporation chartered under the national banking act, against the Nacogdoches Compress & Warehouse Company, a corporation created under the laws of the state of Texas. The plaintiff claimed that it had been damaged in the sum of \$20,000 by reason of the facts hereinafter stated. The trial court



instructed the jury peremptorily to return a verdict for the defendant. The plaintiff brings the case here, and this action of the court is assigned as error.

To make the point involved appear, it is necessary to state the facts, to some extent, which appear in the pleadings and in the evidence presented on the trial:

The plaintiff was engaged in the banking business in New Orleans, and A. Wettermark & Son, of Nacogdoches, Tex. (a firm composed of A. Wettermark and B. S. Wettermark), kept a deposit account with the bank previous to and during the months of December, 1902, and January, 1903. On December 23, 1902, the bank received from Wettermark & Son two warehouse receipts as collateral to secure a note for \$10,000, dated December 18, 1902, payable 30 days after date, and signed by A. Wettermark & Son. The two warehouse receipts were estimated to be worth \$18,000, and were as follows:

"Nacogdoches Compress & Warehouse Company.

"Jan'y.  
"Shipment.

Nacogdoches, Texas, Nov. 30, 1902.

"Received of D. T. Iglehardt & Co.,

"One hundred ——— bales of cotton for account of A. Wettermark & Son.  
" [Signed] Nacogd. Compress & W. H. S. Co.,

"Per Baldwin, Superintendent.

"Marks:

"L. O. U. P.

"Insured.

" [Indorsed]

A. Wettermark & Son."

And:

"Nacogdoches Compress and Warehouse Company.

"Jan'y.  
"Shipment.

Nacogdoches, Texas, Nov. 28th, 1902.

"Received of C. Volman,

"Three hundred ——— bales cotton.  
" [Signed]

Nacogd. Compress & W. H. S. Co.,

"Per Baldwin, Superintendent.

"Marks:

"C. O. D. E.

"Insured.

" [Indorsed]

A. Wettermark & Son."

They were indorsed in blank by A. Wettermark & Son. B. S. Wettermark, the junior partner of the firm of A. Wettermark & Son, was the secretary and treasurer of the defendant warehouse company. The record shows, without dispute, that these warehouse receipts were forgeries, and it tends to show that they were forged by B. S. Wettermark. After receiving these warehouse receipts the plaintiff bank, acting under the advice of its counsel, wrote the defendant warehouse company the following letter:

"The Commercial National Bank,

"New Orleans, Dec. 23, 1902.

"The Nacogdoches Compress and Warehouse Co., Nacogdoches, Texas—  
Dear Sirs: We beg to advise you that we hold compress receipts issued by your company, dated Nov. 28, 1902, for 300 bales of cotton marked 'C. O. D. E.' and dated Nov. 30, 1902, for 100 bales cotton, marked 'L. O. U. P.,' said cotton being held for account of A. Wettermark & Son, and by them blank endorsed.

"As these receipts do not state that this relative cotton is held subject to the return of the receipts, we beg to notify you that we have accepted them as covering the transfer of the cotton.

"Please advise us if we are correct, and oblige,

"Yours truly,

J. H. Fulton, Manager."

This letter was duly posted, and was received certainly not later than December 26, 1902, by E. E. Baldwin, superintendent and manager of the defendant company, who handed the letter to B. S. Wettermark. At the time

this letter was so received by the defendant company, both Baldwin and B. S. Wettermark knew that the warehouse company did not have 300 bales of cotton marked "C. O. D. E." and 100 bales marked "L. O. U. P.," as described in the warehouse receipts. B. S. Wettermark undoubtedly knew that the warehouse receipts were forgeries. On or about January 3, 1903, Wettermark & Son failed in business. Early in January, and probably on the 7th day of January, an attorney representing the plaintiff bank had an interview with E. E. Baldwin. He showed the warehouse receipts to Baldwin, and Baldwin said that they were forgeries. He then showed Baldwin a copy of the letter written by the plaintiff bank to the warehouse company on December 23, 1902, and asked Baldwin how it happened, if these warehouse receipts were forgeries, that he had not replied to this letter. Baldwin stated (this witness testified) that he wanted to answer the letter, and spoke to B. S. Wettermark, the secretary of the company, and that Wettermark told him not to do it. This witness further testified: "Mr. Baldwin admitted to me that he knew the document was a forgery, and that he was compelled by Mr. Wettermark's instructions not to notify the bank, although he (Baldwin) knew these receipts were forgeries at the time." The evidence of two other witnesses for the plaintiff, while it did not show that Baldwin admitted that he knew the warehouse receipts were forgeries at the time he received the letter of December 23d, showed that Baldwin did admit that at that time he knew that there was "something wrong" about the warehouse receipts, and that the warehouse company did not have 400 bales of cotton marked as shown by the warehouse receipts.

Neither B. S. Wettermark, the secretary, nor E. E. Baldwin, the superintendent and manager, of the warehouse company, by telegram or letter, notified the plaintiff bank that the warehouse receipts were forgeries, nor did they give it notice that the warehouse company did not have the cotton described in the receipts, nor did they answer the letter received by them from the bank, of date December 23, 1902. After the interview, however, with the attorney of the plaintiff bank, Baldwin wrote the following letter, which was received at the New Orleans post office January 10, 1903, to wit:

"Office of

"The Nacogdoches Compress and Warehouse Co.

"E. E. Baldwin, Superintendent.

"Nacogdoches, Texas 1-7, 1903.

"The Commercial Nat'l Bank, New Orleans, La.—Dear Sir: Letter you refer to was handed to B. S. Wettermark who was Secy. and Treas. of Compress as I knew nothing of this transaction, the Wettermark Bank failed in few days and it now transpires several fraudulent tickets are standing out, having some 1100 bales all ready presented and some 3350 bales reported us by wire.

"Without a doubt your tickets are forged.

"Yours truly,

"[Signed]

E. E. Baldwin, Supt."

Having stated the evidence which showed the forgery, and tended to show the time that the forgery came to the knowledge of the warehouse company, and that showed the conduct of the officers representing the company after they obtained knowledge of the forgery, we will now state the evidence which tends to show the effect that this conduct had upon the interests of the plaintiff bank: The \$10,000 note of A. Wettermark & Son held by the plaintiff bank has never been paid. At the time this suit was brought, A. Wettermark owed the bank on this note and other claims \$13,510.69, with interest to be added. The account of A. Wettermark & Son for the months of November and December, 1902, and January, 1903, as itemized, showing debits and credits, was offered in evidence. The account shows that when the \$10,000 note was discounted by the plaintiff bank, and the warehouse receipts received by it, the amount of the note was immediately placed to the credit of A. Wettermark & Son, and drawn out by their checks, and that on the 24th of December, 1902, the account showed that Wettermark & Son had overdrawn their account \$27.56. On the 26th of December, however, they made

other deposits in the bank, and their account showed a balance in their favor of more than \$7,000. Subsequently they overdraw their account again, but made other deposits, and on January 2, 1903, the balance to their credit was \$6,828.96. On January 5th the amount still remaining to their credit was \$4,269.87. This sum was drawn out of the bank by several checks, and the account shows that on the 27th of January it had been overdrawn \$54.54. Mr. Fulton, the general manager of the plaintiff bank, who produced the statement from which the foregoing figures were taken, testified: "The statement attached shows the condition of the account [meaning the account of A. Wettermark & Son with the bank], and by reference to it you will see that as late as January 2, 1903, we could have retained \$6,828.96, which amount was at their credit."

Edwin T. Merrick, Ben B. Cain, and W. Frank Knox, for plaintiff in error.

Seth W. Stewart and J. A. Templeton (Blount & Garrison, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

That it was wrong for Baldwin and B. S. Wettermark to remain silent under the circumstances, no just man can deny; and, if such wrong caused injury to the bank, a jurisprudence would be defective that afforded no remedy. If we were without precedent in cases, general principles would authorize relief, for the law can ask no better justification than the instincts of all just men. It would be a most unreasonable and unjust rule to permit the active managers and officers of a warehouse company, who knew that a bank was relying upon its forged receipts, to remain silent and not divulge the fact until the condition of the bank was altered for the worse. The law condemns not only active misrepresentation, but it imposes such activity as is requisite to reasonable social conduct; condemning negligence and requiring a measure of prudence to avoid injuring others. "A good example of duty," says the learned author of a recent work, "is to be found in cases in which a man, finding that his name has been forged, neglects to notify the victim until after his position (by the death, escape, or bankruptcy of the forger) has been changed." Ewart on Estoppel (1900) 41. The general principle that the negligent failure to act, when it causes injury to others, creates an estoppel, was announced and applied by the Supreme Court in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; and the House of Lords in *McKenzie v. British Linen Co.*, 6 App. Cas. 82—a case in which the bank's position not having been altered by the wrong prevented the estoppel—announced the rule that "a person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse." The same principle, under varying circumstances, has been often applied. Ewart on Estoppel (1900) pp. 135, 136, and cases there cited.

We do not find that the learned trial judge, in his instructions to the jury, said anything that conflicts with the principles that we have announced. He directed a verdict for the defendant, because,

in his opinion, the plaintiff "had not shown that he was injured by the silence of the defendant." The facts as they appear in the record do not, we think, authorize the court to decide, as matter of law, that the plaintiff was not damaged by the conduct of the defendant.

As the case is to be tried again it is well for us not to discuss at length the facts, but, without referring to other probable results of the failure to give notice of the forgery, it seems evident, on the evidence as it appears in the record, that, if the warehouse company had answered the letter of the plaintiff with reasonable promptness, there were such dealings between the bank and Wettermark & Son that the former might have recovered some of its loss. It is true that, if information of the forgery had reached the bank on December 24th, Wettermark & Son then had no funds in the bank; but a few days later, on January 2d, they had to their credit more than \$6,000.

The judgment must be reversed, and the cause remanded for a new trial.

McCORMICK, Circuit Judge, dissents.

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SHUGART v. ATLANTA, K. & N. RY.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1904.)

No. 1,311.

**1. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—FIREMAN.**

Where, in an action for the death of a railway fireman by the derailment of his engine while it was running backward at high speed, there was evidence that the derailment occurred at a curve near a stock gap, that many of the ties in the curve were rotten, which had permitted the outer rail to sink one-half inch lower than the inner rail when it should have been four inches higher, and that there were many low joints around the curve which included the cattle gap, some being out of surface from one to two inches, the question of defendant's negligence in the preservation of the track was for the jury.

**2. SAME—FELLOW SERVANTS.**

Since a railroad fireman and his engineer are fellow servants, no recovery could be had for the death of such fireman by the derailment of the engine, if the same was caused by the fault of the engineer.

**3. SAME—PROXIMATE CAUSE.**

Where, in an action for death of a railroad fireman by the derailment of the engine on which he was working, there was evidence justifying a finding that the derailment would not have happened but for the defective condition of the track, whether such defective condition was the proximate cause of the accident was for the jury, though the speed at which the train was operated, and the fact that the engine was being run with the tender in front, might have been contributing causes.

**4. SAME—CONTRIBUTING CAUSES.**

Where a railroad fireman was killed by the derailment of the engine on which he was working, directly caused by a defect in the track, the

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† 4. See Master and Servant, vol. 34, Cent. Dig. §§ 515, 521; Negligence, vol. 37, Cent. Dig. § 75.

railroad company was not excused from liability on the ground that the engineer was guilty of negligence contributing to the accident in running the train at an excessive rate of speed.

**In Error to the Circuit Court of the United States for the Eastern District of Tennessee.**

**G. W. Pickle (J. W. Drummond and Pickle, Turner & Kennerly, of counsel), for plaintiff in error.**

**Smith, Hammond & Smith and Cornick, Wright & Frantz (Alexander W. Smith and John H. Frantz, of counsel), for defendant in error.**

Before **LURTON, SEVERENS, and RICHARDS**, Circuit Judges.

**LURTON**, Circuit Judge. John S. Shugart, a fireman in the service of the defendant railway company, was killed by a derailment of the engine upon which he was firing. This is an action under the Tennessee statute, by his widow, to recover damages.

At the conclusion of all of the evidence, the jury was directed to find for the railway company. There was no dispute but that the deceased was killed by the derailment of his engine. Neither is it claimed that the fact of the derailment and death of the decedent establishes any presumption of negligence, as it might if he had been a passenger. The case turned, in the judgment of the trial judge, and in the judgment of the counsel who have argued the case here, upon the question of the proximate cause of the derailment.

The undisputed facts were that the engine derailed was hauling a work train of 12 cars engaged in carrying slag for ballasting purposes from one point on the road to another. As there was no turntable convenient, the engine was moved backward with tender in front. The derailment occurred when returning empty for slag at a speed not exceeding 20 miles per hour, taking that view of the evidence most favorable for the party against whom a peremptory charge is directed, a speed which does not seem to have exceeded the maximum allowed for trains of this class. The derailment occurred on a four-degree curve, and, from the indications on the ground, the fore wheel of the tender first mounted the outside rail at a point about 60 feet south of a certain stock gap. The flange rode this rail for some 10 feet, and then crossed the rail, and, after traveling on the ends of the ties, ran off the embankment and turned over. This action of the tender derailed the engine on opposite side of the track.

With reference to the condition of the roadway at place of the disaster, there was evidence that the timbers of the stock gap were rotten, particularly the stringers or sills which supported the cross-ties, and that, in consequence of the choking of the ditch under the gap, the ground had softened, and the whole structure was depressed below the surface of the track an inch or more; that the outer rail, instead of being four inches higher than the inner rail, was lower than the latter by about one-half inch. There was also evidence that there were many low joints around the curve

which included this cattle gap, some being out of surface as much as from one to two inches, and, that there were many rotten cross-ties in same curve; that in some cases the spikes were out, and in others so loose as that they could be pulled out by hand. The evidence tending to show this condition of the roadway at this curve was strongly contradicted by the witnesses for the railway company. But that there was a very material conflict in respect to the condition of the roadway at the curve where this derailment occurred is not denied, and was assumed by the trial judge when he directed the verdict.

Expert witnesses testified that the effect of rough joints, in a curve, on each side of a depressed cattle gap, with outer rail below level of inner rail, would be to cause a lurching movement, first to one side and then the other, calculated to cause a derailment. There was also expert evidence that lurching or rocking due to bad surfacing would be increased, and the danger of derailment greater, when a train is pulled at some speed with tender in front of the engine. There was also expert evidence that excessive speed in rounding a curve is one of the causes of derailment. It also appeared that the outside rail in a curve should have an elevation over the inside rail of one inch for every degree of curvature, and that the failure of the outside rail to be at its proper elevation is another cause of derailment. There was also evidence that derailments sometimes occur without any assignable cause. Defendant's roadmaster, after an examination of the place, testified that in his opinion the alleged defective stock gap had nothing to do with the wreck, as he thought the tender and engine would recover balance, if any lurching was produced by its condition, before reaching the point where it first mounted the rail; and that in his opinion the derailment was due to excessive speed. Defendant's track supervisor, after a like examination, testified that he could not say what was the cause of the derailment.

It is the duty of a trial judge, when called upon to direct a verdict, to take that view of the evidence most favorable to the side against whom a verdict is to be directed. It was therefore the duty of the trial judge to assume that the roadway of the defendant at the place of derailment was in the condition testified to by the witnesses for the plaintiff. That there was evidence contradicting this, and that the defendant's evidence upon this point may have outweighed the plaintiff's, will not justify the withdrawal of a case from the jury, although it may justify a new trial. The view which this court takes of the function of a judge in directing a verdict, as compared to his duty in passing upon a motion for a new trial, has been fully and frequently considered by this court, and we need only refer to the cases: *Mt. Adams Ry. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Standard Accident Co. v. Sale*, 121 Fed. 666, 57 C. C. A. 418, 61 L. R. A. 337. But the trial judge did not assume that the evidence was not legally sufficient to go to the jury upon the question as to whether the company had not been negligent in respect to the condition of its track. Upon the con-

trary his direction was based upon what he regarded as the insufficiency of the evidence to justify a finding that any such defective condition of the stock gap was the proximate cause of a derailment which occurred some 60 feet south of the cattle gap. On this subject he said, in explanation of his direction, "that, conceding there was a defect in this stock gap, as some of the witnesses undertake to point out, and that it may have given the engine a rolling or tilting motion as it passed over it, I conclude that it would be a mere matter of speculation for you to say that this was the proximate cause, or that there was any causal connection between that and the accident south of that; whether it was a rail and a half or two rails would be a mere matter of guess-work."

There was opinion evidence that any rocking motion given the tender and engine in running over the cattle gap would be corrected and the engine recover its balance before going as much as 60 feet, that being the point beyond the cattle guard where the first sign of climbing the rail was observable. This expert opinion would be of much greater weight but for the fact that there was evidence that the joints were out of surface at the first two or three joints after passing over the cattle guard, and that one or more of these joints were out of surface as much as from one to two inches, and also evidence that the outer rail or two beyond the guard were not at the right elevation for a four-degree curve. In other words, there was evidence of a continuance, in a lesser degree, between the gap and the place where the wheel of the tender first mounted the outer rail beyond the gap, of the same negligent condition as that claimed to exist at the cattle gap itself. There was also expert opinion that the vibratory motion given the engine and tender at the gap would be renewed at the first low joint, which was about 15 feet beyond the gap, and again repeated when the low joint on opposite rail was reached, and so on; the tender being thrown first one way and then the other.

The question of proximate cause was not therefore to be considered apart from the alleged condition of the track between the cattle gap and the first indication of mounting the outer rail. But we do not suppose the very careful trial judge intended to ignore the evidence referred to, or to limit the question of proximate cause to the alleged condition of the cattle gap alone. The aspect of the evidence which evidently moved him to stop the case was the testimony touching the speed of this train, traveling as it was with tender in front. Following the quotation from his charge above, he said:

"I am further of opinion that the weight of evidence showing that [the derailment] was probably the result of too rapid speed is more satisfactory than is the evidence that tends to show that it was caused by any trouble with that stock gap. Now, in that state of the case, as much as our sympathy may go out for the loss of a young man of good prospects, I think it would be to turn the case over to you for speculation."

At another place he said:

"It is a known fact that an engine may get off the track without any cause which can be assigned with reasonable certainty. I feel decidedly

that when you come to say in this case, with reasonable certainty, just what caused this wreck, that it can not be done on this evidence, that is, that between the two possible contentions about it, if there is a difference in the probability of how it occurred, that difference is in favor of the probability that a too rapid rate of speed, coupled with the fact that the engine and tender were running backwards, \* \* \* I think the physical circumstances show that fact, in view of the kind of wreck, and the way the cars were piled—the place at which they were thrown together—that they were running with quite an amount of force.”

To further illustrate the ground of the court's action, we quote from an earlier paragraph:

“If the evidence leaves the case in such a state as that two or more agencies may have been operative to cause the accident, for one of which the company would be liable, and for one or more of which it would not be liable, why, then, it becomes what is called a speculative question, and is not a case which, under the law, can go to the jury, it being the duty of the plaintiff to satisfy the jury that it resulted from an agency for which the company is responsible,” etc.

In short, the circuit judge, as he more than once told the jury, was of opinion that the case fell within *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361, where, in a suit by an employé for an injury resulting from a defective engine step, it was said, that in such an action, the burden being upon the employé to show that the master had been guilty of negligence, “it is not sufficient for the employé to show that the employer may have been guilty of negligence, the evidence must point to the fact that he was. And when the testimony leaves the matter uncertain, and shows that one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.” But this means nothing more than has been said many times, that the party upon whom the burden rests must adduce sufficient evidence to make out his case, and if that which he offers affords no reasonable foundation, if credited, for reasonable men to found a verdict upon in his favor, it is the duty of the court to take the case from the jury, and not permit a verdict based upon conjecture rather than evidence. But in the case on hearing there was, as we have seen, evidence legally sufficient to go to the jury upon the question of the negligence of the company in the care and preservation of the track at the place of derailment.

It may be conceded that, unless this alleged bad condition was a proximate cause of the derailment, plaintiff had no case, and the direction was right. Negligence which does not cause or contribute to an injury is nonactionable. But proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was a proximate cause of the injury complained of. *McDonald v. Toledo, etc., R. Co.*, 74 Fed. 104, 20 C. C. A. 322; *Railroad v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. It devolved, therefore, on the plaintiff in this case to show by evidence, facts, and



circumstances from it which it might be reasonably inferred that but for the bad condition of the track at the place of derailment the accident would not have occurred. It may be, if the work train upon which deceased was engaged had been moving with the engine in its usual place, and at a slow speed, that this derailment would not have occurred. The position of the tender and the backward movement of the engine may well be regarded as an incident to the character of the work and road upon which deceased was engaged. Dangers reasonably incident to such a mode of moving this work train were part of the risks assumed by the deceased. If the speed of the train was excessive, as claimed, that was a fault of the engineer, if a fault at all. For any negligence of the engineer in the running of this train the company would not be responsible to decedent, because the engineer and his fireman were fellow servants. If, therefore, the excessive speed of this train, running with tender in front, was the sole proximate cause of the wreck, the plaintiff cannot recover, and the judgment is right. But, upon the other hand, if the alleged bad condition of the track at the point of derailment contributed to the wreck, not indirectly, but proximately—that is, directly—the defendant would be liable, although the negligence of a fellow servant also contributed. The bad condition of the track may not have been the sole cause of the accident, but if it was a cause without which the derailment would not have happened, then it is a contributory cause. A cause without which the derailment would not have occurred is necessarily a proximate cause, although other causes may have co-operated in bringing it about.

In *McDonald v. Toledo Ry. Co.*, 74 Fed. 104, 109, 20 C. C. A. 322, 326, a plaintiff's buggy was overturned and plaintiff seriously injured. Plaintiff's horse was frightened by a cause for which the defendant was not liable, and ran over a pile of snow negligently made in the street by the defendant. The fright of the horse was the cause of plaintiff's buggy being carried on and over this pile of snow. But the declaration averred that but for the presence of this object plaintiff would not have been overturned or hurt. This allegation on demurrer being confessed, we said:

"Then this mass of snow, which ought not to have been where it was, and was only there through the negligent interposition of the defendant, was a cause, which, if it had not existed, the plaintiff's buggy would not have been overturned, and he would have sustained no injury. If, therefore, the negligence of the company was not the *causa causans*, it was *causa sine qua non*. Whether it was a cause without which the accident would not have happened is a question of fact, unless the circumstances appearing demonstrate that the causal connection was not proximate."

We cited, for the doctrine of that case, *Hayes v. Railroad*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, and *Railway v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. *Postal Tel. Co. v. Zoppi*, 73 Fed. 609, 614, 19 C. C. A. 605, is to same effect.

That cause is proximate without which the accident would not have happened, but which, in the probable sequence of events, and without the interposition of a new and efficient cause wholly sufficient in itself, produces the wrong complained of. *Milwaukee*

& St. P. R. Co. v. Kellogg, 94 U. S. 469, 479, 24 L. Ed. 256; Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988, 6 C. C. A. 205; Chicago Ry. Co. v. Price, 97 Fed. 424, 38 C. C. A. 239.

Even though the engineer may have contributed to the happening of the accident, that will not relieve the company if it also contributed; "that is to say, had a share in producing it." Railroad v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266; Chicago, etc., Ry. Co. v. Sutton, 63 Fed. 394, 11 C. C. A. 251; Chicago, etc., Ry. Co. v. Price, 97 Fed. 424, 38 C. C. A. 239.

In the case at bar we think the question as to whether the bad condition of the defendant's track in immediate proximity to the place of derailment did not directly contribute to the wreck, and was not a cause without which the wreck would not have occurred, should have been submitted to the jury.

That the manner in which the train was operated may have contributed to the danger of derailment is not a defense, if it appear that the fault of the company also proximately contributed. This is one aspect of the case to which the attention of the trial judge does not seem to have been directed, and is, doubtless, the source of his error.

The question as to whether the bad condition of the track was so obvious to one employed as a fireman as to support an instruction upon the ground of assumption of risk has been considered. We do not think the opportunities of deceased as a fireman were so good as to charge him, as matter of law, with knowledge of the condition of the track at the place of derailment. It was a question for the jury. Railroad v. Price, 97 Fed. 424, 431, 38 C. C. A. 239.

Reverse the judgment, and grant a new trial.

#### IN RE TAFT.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1904.)

No. 1,322.

#### 1. BANKRUPTCY—REVISION IN MATTER OF LAW—PLEADING.

A petition to the Circuit Court of Appeals to revise in matter of law the proceedings of a district court in bankruptcy, under Bankr. Act July 1, 1898, § 24b, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], should set out the facts or the findings of fact on which the matters of law sought to be reviewed arise.

#### 2. SAME—PROPERTY PASSING TO TRUSTEE—FUND HELD BY BANKRUPT AS AGENT.

Where a live stock commission merchant, in contemplation of bankruptcy, placed in the hands of his attorney checks received for stock which had been consigned to and sold by him, which were deposited by the attorney in his own name, and kept separate from the general funds of the bankrupt, a consignor who can trace the proceeds of his stock to such fund is entitled to recover the same.

#### 3. FACTORS—RELATION TO PRINCIPAL.

A custom among live stock commission men at a certain market to assume all risks of payment of the price by purchasers to whom they

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

sell does not convert them into buyers, but they remain agents for the consignors in the transaction, upon a *del credere* commission.

Petition for Review of Proceedings of the District Court of the United States for the Eastern Division of the Northern District of Ohio, in Bankruptcy.

Arnold Green, for petitioners.

Smith & Taft, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a petition to review an order made by the District Judge requiring the petitioner, as receiver in bankruptcy for the estate of W. F. Eirick, a bankrupt, to release all claim to a sum of money on deposit in a Cleveland bank to the credit of one W. H. Boyd. This fund was claimed by the receiver as a part of the general estate of the bankrupt. The question arose under a petition filed in the bankrupt proceedings by Sutliff & Gott, partners. This petition is made part of the petition filed in this court. Its substantial averments are that petitioners, who are dealers in live stock, had shipped to the bankrupt, W. F. Eirick, who was doing business in Cleveland, Ohio, as a live stock commission merchant, a car load of stock, to be sold by him as agent, and to remit proceeds of sale after deducting charges and commission. It is then averred that on the next day after the receipt of this consignment, being September 18, 1903, this stock was sold to three different purchasers; that one lot was sold to the Lake Erie Provision Company for \$839.79, and that on the same day or the next this lot was paid for by the check of the purchaser, payable to the order of Eirick, for \$1,706.04, being the price of petitioners' stock, included with the price of stock owned by other consignors, sold also by said Eirick; that another sale was made to a firm styled Swope, Hughes, Walz & Benstead for \$98.53; and that this was paid for by a similar check, which included the price of petitioners' stock with the price of stock owned by another party. A third lot was also sold to still another purchaser, and paid for by a check for \$67.42. It is averred that Eirick was insolvent when he received the stock so consigned to him, and knew it, but that petitioners did not know it. It is further averred that on the day the checks for these sales came to Eirick's hands he had determined to become a voluntary bankrupt, and that he did on September 21st file the petition upon which he was declared a bankrupt; that before filing this petition "he delivered said checks to one Wm. H. Boyd to be held by him in trust for the parties whose property he had sold, and for whom he had received said checks in payment thereof." It is then alleged that said Boyd deposited said checks to his individual credit with the Cleveland Trust Company, and that same had been collected by it. Petitioners on the 19th of September, hearing of the insolvent condition of said Eirick, demanded of both Eirick and Boyd the proceeds of said sales, less charges and expenses, but payment was refused. Petitioners claim the right to follow the proceeds arising from the sales of their stock, and therefore ask that the receiver be required to disclaim any interest in such proceeds. The receiver's

answer admitted the receipt of the stock of Sutliff & Gott by Eirick, who was an agent for the sale of live stock, but denies knowledge of the terms upon which said stock was consigned to him; admits that checks were given to Eirick for stock sold by him as alleged, but denies substantially every other allegation, and claims the proceeds of such sales as part of his general estate.

Upon the pleading and the evidence, the referee ordered the receiver to release all claim to \$980.01 of the fund deposited by W. H. Boyd with the Cleveland Trust Company as attorney for the bankrupt, and that Boyd should pay over said sum to Sutliff & Gott. Upon a review of this decision by the District Judge, it was adjudged "that all the actions, findings, rulings, decisions, and orders of said referee in the premises be, and the same are hereby, in all things approved and affirmed," etc., "and stand as the order of the court." Inasmuch as our jurisdiction to review the orders of the bankrupt courts, under section 24b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], does not extend to any review of a finding or conclusion of fact, but is limited to a review of decisions of law made by the District Court, it becomes essential that we shall have presented to us, by such a petition for review, specific decisions of law made by the lower court by which the petitioners are aggrieved. It is therefore an elementary rule of procedure that the petition for a review shall set out the matters of law which we are asked to review. *Courier-Journal Co. v. Schaefer-Meyer Co.*, 101 Fed. 700, 41 C. C. A. 614.

Having no authority to review a conclusion of fact, we must, if we can, discover the conclusions of fact upon which the District Judge made the order complained of, and review the questions of law necessarily raised and decided upon the facts so found. The District Judge, however, made no separate finding of facts, but affirmed the "findings" and "decisions" of the referee. The referee certified the whole of the evidence, instead of certifying a summary thereof, as he should have done under general order No. 27 (89 Fed. xi, 32 C. C. A. xxvii). Neither did he certify any particular facts as found by him, further than to certify that, upon the pleadings and evidence, "that the facts stated in said petition are true in part, to wit, so far as concerns the right of Sutliff & Gott to the release of all claims of the estate to the \$980.01 of certain funds on deposit in the name of the bankrupt's attorney," etc. If true to the extent named, the facts alleged in the petition of Sutliff & Gott must be true, for all the purposes of the case. Neither shall we do the applicant any injustice if we accept this as a finding of the truth of the facts alleged in the petition, for the petition to the referee for a certificate upon which his order might be reviewed assigned it as error that the referee had found the allegations of the petition to be true, and had not found the allegations of the answer to be true.

Assuming, then, that the facts alleged in the petition of Sutliff & Gott are the facts upon which the order of the District Judge is based, we have a case of simple solution. The proceeds of the sales of the property of a number of consignors were placed by the bankrupt factor, who was but an agent for sale and collection of the price,

in the hands of his attorney, on the eve of his bankruptcy, in order that the fund might be kept separate and apart from his general estate until the rights of the owners of the live stock so sold might be determined. The purchase money of the stock so owned by petitioners, and so sold for them by the bankrupt, is traced directly to this fund in the hands of Boyd. The object of the bankrupt in so placing the checks received by him for stock sold as a factor was to enable the consignors to trace the proceeds of sale made for them, and prevent, if possible, the consequences of a mingling of such proceeds with his own general estate. That the checks received by Eirick and placed in Boyd's hands included the price of stock sold for others than petitioner does not prevent the following of the fund. The whole fund is held in trust for the benefit of those who can show that the fund includes proceeds of particular sales made for them by the bankrupt as a selling agent. We need not speculate about the results if such proceeds had gone into the bankrupt's general account, for that is not the case here.

The real defense made by the bankrupt's receiver was that the contract under which this car load of stock was shipped to and received by the bankrupt was not the ordinary arrangement between an owner and a commission sales merchant. To make out this defense, it was shown that the custom of live stock commission men at Cleveland was to assume all the risks of the payment of the price by the buyer, and account to the owner, whether the price was collected or not. But such a custom would only convert the bankrupt into an agent upon a *del credere* commission. One who sells upon a *del credere* commission is supposed to receive an additional consideration for the risk incurred by guarantying the purchaser. He is at last nothing but a guarantor, and his relation as agent is not converted into that of a purchaser by the fact that his sales, under local custom, are *del credere* sales. The principal may sue the purchaser for the price, and in his own name. Story on Agency, §§ 33, 112; 2 Benj. Sales (Corbin's Ed.) § 1099, and notes; *Morris v. Cleasby*, 4 M. & S. 566.

There was no evidence tending to show that Eirick should become definitely and primarily the purchaser of this stock on arrival or upon a sale, other than is inferable from the evidence of a custom to assume liability for the price when a sale should occur. That is clearly not enough to convert such an agent into a buyer. The case is not at all like that of *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854. The contract in that case transferred the title, and required the so-called factor to pay for them within 60 days, whether sold or not. Neither will a custom to "weigh to himself" hogs not sold on day of arrival convert a *del credere* commission into a sale on arrival. Whatever the effect upon live stock thus charged to himself on failure to find an early market, the custom can have no consequence in respect to the particular shipment here involved. These hogs were sold to a stranger, and not "weighed to" the factor for want of a buyer.

Order affirmed.

## B. F. RODEN GROCERY CO. v. BACON.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1904.)

No. 1,322.

**1. BANKRUPTCY—ENJOINING PROCEEDINGS IN STATE COURT—ATTACHMENT OF EXEMPT PROPERTY.**

Where a creditor of a bankrupt holds a written waiver of exemptions, which is permitted by the law of the state, the court of bankruptcy should not, on application of the bankrupt, enjoin him from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, in any event not longer than until the property shall have been set aside as exempt by the trustee, the validity of the waiver being a matter immaterial to the court of bankruptcy, and one for the state court to determine.

Petition for Revision of Order Made in Bankruptcy of A. H. Bacon, Pending in the District Court of the United States for the Northern District of Alabama.

On the 23d day of September, 1903, the bankrupt filed his voluntary petition in bankruptcy in the District Court of the United States for the Southern Division of the Northern District of Alabama, and was on the same day duly adjudicated a bankrupt by said court, and the case was referred to Hon. N. W. Trimble, referee. The bankrupt scheduled the B. F. Roden Grocery Company as one of his creditors for the sum of \$400 due by account, and claimed as exempt to himself all of the personal property scheduled. After the petition was filed, petitioner, B. F. Roden Grocery Company, had an attachment issued against the bankrupt from the city court of Birmingham, alleging that the bankrupt had waived in writing his right to claim any of his personal property as exempt as against the debt upon which said attachment was sued out. This attachment was for the sum of \$411.65, and was issued on the 25th day of September, 1903, and the alleged fact of the waiver of exemption was indorsed upon the attachment writ. Said attachment was duly levied by the sheriff of Jefferson county upon the property claimed as exempt by the said bankrupt before any appointment of a trustee for the bankrupt's estate. On September 26, 1903, the bankrupt filed his petition in the bankruptcy court for a rule nisi to the B. F. Roden Grocery Company, and praying for a dissolution of said attachment. Upon the hearing of said petition before the referee, the said B. F. Roden Grocery Company filed an answer to the effect (1) that the court had no jurisdiction to order the said B. F. Roden Grocery Company to dismiss its attachment suit in the state court, which had been levied upon property that had been claimed as exempt by the bankrupt; (2) that the bankrupt had in writing waived his right to claim as exempt the property levied upon in said attachment suit, and claimed it as exempt in the proceeding in bankruptcy. To this answer the bankrupt replied by denying its allegations, and by filing a replication averring that said attachment suit was instituted subsequently to the adjudication of bankruptcy, and before the exemptions had been set aside to said bankrupt in said cause. The B. F. Roden Grocery Company moved to strike out the replication filed by the bankrupt upon the grounds that the same was no answer to the answer of the said B. F. Roden Grocery Company. Upon the hearing the said petitioner introduced evidence tending to show that for the goods sold to the bankrupt the Roden Grocery Company held receipts signed by the bankrupt containing the following waiver: "The right of exemption is hereby waived as provided in the Constitution and laws of the state of Alabama or any other state in the United States, and it is further agreed that the undersigned shall pay all costs of collection, including a reasonable attorney's fee."

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¶ 1. Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

The bankrupt testified that he signed the receipts, but that at the time he signed he did not read them, and that the drayman said to him that they were receipts for goods, and that he had to get these receipts signed to take back to the house to show that he (witness) had received the goods in good condition, and on this representation he signed the receipts without reading them, and he did not know they contained a waiver, etc. Upon this evidence the referee made an order requiring said B. F. Roden Grocery Company to dismiss its attachment proceedings in the city court, and cause the property therein attached to be restored to the above-named bankrupt, and to propound its claim, if any it had, in the bankruptcy court.

Petitioners filed a petition for review of the referee's said order to the judge of the court, which petition was granted, and the statement of facts certified to by the referee. Upon the hearing of the petition for review by the judge of the district court, the order of the referee was confirmed by an order as follows:

"In the Matter of A. H. Bacon, Bankrupt.

"This matter coming on to be considered upon the petition for review from the order of N. W. Trimble, referee, filed by the B. F. Roden Grocery Co.:

"Under consideration of the question at issue, the court finds from the evidence certified by the referee that the above-named bankrupt did not waive his right to claim personal property exempt to him under the Constitution and laws of Alabama, as against the debt due B. F. Roden Grocery Company, the foundation of their attachment suit in the city court of Birmingham against the above-named bankrupt, and that said attachment was sued out after the adjudication and levied upon the property then in the possession of the bankrupt.

"It is therefore ordered, adjudged, and decreed by the court that the order of the referee herein be, and the same is hereby, in all things affirmed.

"It is further ordered, adjudged, and decreed that the said B. F. Roden Grocery Co. be, and they are hereby, enjoined and restrained from proceeding further in their said attachment suit in the city court of Birmingham against the above-named bankrupt.

"It is further ordered, adjudged, and decreed that the said B. F. Roden Grocery Company pay all costs of this proceeding for which execution may issue.

"This November 19, 1903."

M. L. Ward, for petitioner.

Lee Cowart and J. J. Curtis, for respondent.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PARDEE, Circuit Judge. Comity requires that the jurisdiction of courts of bankruptcy to enjoin proceedings instituted or pending against the bankrupt in other tribunals should not be invoked, unless necessary to protect the bankrupt's estate or otherwise preserve the rights of creditors. In the present case the injunction allowed was on the application of the bankrupt to preserve the exempt property claimed by him in his schedules, the title to which was not to pass to a trustee, and which, beyond the formal setting aside by the trustee when elected, was not to be administered in the bankruptcy court. There was no claim that the actual possession of the bankruptcy court was affected or in any wise interfered with.

While the creditor holding a waiver note given by a bankrupt has no lien on specified property—in fact, no lien at all—and the debt represented by such note is one within the purview of the bankrupt law, to be discharged by proper proceedings thereunder, yet the rights of said creditor are to be so far recognized as to require the withhold-

ing of the bankrupt's discharge a reasonable time to permit the creditor to assert in the proper state tribunal his alleged right to subject the exempt property to the satisfaction of his claim. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. This being the case, it would seem that it is to the interest of the general creditors that such right should be prosecuted and enforced pending the bankruptcy, and prior to proof of debt, to prevent the creditor holding the waiver from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against the exempt property.

As the creditor holding a waiver may proceed to assert his right in a state tribunal pending the proceedings in bankruptcy, it follows that the form his action may take in the state tribunal is of no concern in the bankruptcy court, unless such writs are issued and proceedings had as directly interfere with property passing to the trustee in bankruptcy, or with exempt property not claimed by the bankrupt and in actual custody of the bankruptcy court.

The ruling of the referee and the order of the district judge complained of in the petition for revision are largely based on the finding that under the evidence in the case the petitioner here, although asserting in the state tribunal that he holds a waiver contract, in fact had no waiver. The undisputed evidence shows that the petitioner held prima facie waiver contracts as claimed. Whether the bankrupt could avoid or defeat such contracts was for the state courts to decide, and the issue seems to us to be wholly immaterial in the bankruptcy court.

If an application should be made to withhold a bankrupt's discharge, to which he would otherwise be entitled, to give time to a creditor claiming to hold a waiver note to assert his rights to proceed against exempt property in the state courts, then it would be proper for the bankruptcy court to inquire whether or not the creditor really held such waiver note; but even then it is doubtful whether the court would go beyond a prima facie case and undertake to settle the rights between the parties.

If we admit the contention that upon the adjudication all the bankrupt's estate passes constructively into the custody of the court, and that there can be no exempt property, as such, until after a trustee shall be elected, and he shall set aside the same, as required by clause 11, § 47, Bankr. Law July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], and as a corollary that the attachment suit instituted in the city court of Birmingham and the levy thereunder was an interference with property in custodia legis, even then the injunction enjoining further proceedings in attachment suit in the city court of Birmingham should have been temporary, so as to allow petitioner to proceed as soon as a trustee should be elected and the exempt property set aside.

The record here does not show the fact, but it was admitted at the bar, on the hearing, that since the injunction was granted a trustee has been chosen, and the entire personal assets scheduled by the bankrupt have been set aside to him as exempt property. If this be true, there can be no longer any reason to continue the injunction complained



of; but, whether it be true or not, the proceedings below were erroneous in the matter of trying the issue of waiver vel non, and in granting a permanent injunction, and for the reasons herein given the petition for revision must be allowed.

For the purposes of the case the order to be made in this court need go no further than to modify the order of the bankruptcy court so as to allow the B. F. Roden Grocery Company to proceed in the attachment suit in the city court of Birmingham against the exempt property of A. H. Bacon, bankrupt, so far as the same can be done without interfering with property in the actual custody of the bankruptcy court or its trustee, costs to be paid by respondent; and it is so ordered.

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RUSSIA CEMENT CO. v. FRAUENHAR et al.

(Circuit Court of Appeals, Second Circuit. October 19, 1904.)

No. 204.

1. UNFAIR COMPETITION—USE OF TRADE-NAME.

Complainant manufactured glue of different grades, which it sold under the trade-name of "Le Page." Defendants purchased certain of such glue in bulk, and bottled and sold it under the name of "Le Page's Glue," with a statement that it was manufactured by complainant and bottled by defendants. *Held*, that such use of the name by defendants was not fraudulent, and did not constitute unfair competition.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 126 Fed. 228.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York dismissing bill filed to restrain defendants' use of complainant's trade-name "Le Page" on glue sold by defendants, and for an injunction and accounting.

John Dane, Jr., for appellant.

Ralph Nathan, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. On the argument of this appeal complainant's counsel contended that it applied the name of "Le Page's" only "to a special, superior brand of glue"; that its inferior manufactures of glue are not known as "Le Page's Glue," but are otherwise designated; and that "the so-called 'Le Page's Fish Glue' and 'Le Page's Liquid Glue,' put up, labeled, advertised, and sold by defendants as products made and sold by complainant under those names, are spurious, and not genuine, and of qualities and made of materials greatly inferior to any made by the Russia Cement Company, to which the trade-name 'Le Page's' has ever been applied by complainant." Unfortunate-

¶ 1. Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

ly for complainant, the facts in the case do not support its contention. Upon the factory of complainant at Gloucester, Mass., is painted in large letters the following:

LE PAGE'S LIQUID GLUE.  
RUSSIA CEMENT CO.  
NEW YORK OFFICE 84 READE ST.  
LE PAGE'S LIQUID FISH GLUES.

Its bill heads, circulars, and other printed matter advertise its products generally as "Le Page's Glues," "Le Page's Fish Glues," and "Le Page's Liquid Fish Glues," indiscriminately, and without reference to any other kind or qualities of glue, and its president has testified that "in all cases of the sale of Le Page's Glue in bulk there have been some other marks attached or used in connection with the word 'Le Page'; as, for instance, 'Le Page's Glue No. 12,' 'Le Page's Glue No. 653,'" and that "we manufacture several grades of glue to which the word 'Le Page' has been applied." That the defendants originally bought their glue from complainant under the name "Le Page," and notified it that they purchased it for the express purpose of bottling, appears from the testimony of defendant Frauenhar and the following letter:

"Gentlemen: We accept your offer of 4th inst. for Le Page liquid fish glue. In accordance with which please send at once one barrel each 653 F. H. and 692 F. H. and one barrel thinned down for filling bottles, this we presume will be at a lower price.

"Yours,

Columbia Wax Works. L. E. K.

"P. S. Can you favor us with the addresses of a good bottle dealer as we are not yet posted.  
C. W. W. L. E. K."

Each of the barrels sent by complainant in response to this order was marked with the name "Le Page."

Complainant subsequently refused to sell its glue to defendants, and they purchased it from a third party, who obtained it from complainant, generally under the name of "fish glue," but sometimes coupled with the word "Le Page's," and sometimes further designated as "Liquid" or "Fish," with or without a qualifying number. The defendants put the glue thus made and sold by complainant into bottles with labels bearing no similarity to those of complainant, and which read as follows:

"Le Page's Fish Glue, Manufactured by Russia Cement Company, Gloucester, Mass. Bottled by Columbia Wax Works, New York."

In these circumstances we are unable to discover any ground on which complainant is entitled to the interposition of a court of equity on its behalf. The complainant originally denied defendants' right to the use of the word "Le Page" on a theory stated by it as follows:

"The dealer who handles trade-marked goods can sell them only in the original package just as it came from the manufacturer. If he has bought such goods in a large package, he has no right to affix such trade-mark to other packages, and transfer the goods thereto. Even though the statement made on the labels should all be true, as a matter of fact it is unlawful for such use to be made of a trade-mark. In other words, if you have purchased large packages of Le Page's Glue, made by the Russia Cement Company, and want to sell it in smaller packages, you have no right to use either the word 'Le Page' or the name of the Russia Cement Company on any of the labels that you may affix to such packages."

This contention appears to have been abandoned. The position of complainant on this appeal appears from the following assignment of error:

"That the court below erred in conceding that plaintiff 'uses this trade-name ("Le Page's") only upon higher grades of glue,' and at the same time admitting that defendants use the name on lower grades of glue procured from plaintiff, and, notwithstanding these facts, without granting complainant any relief, nor the public any protection against such fraudulent methods, dismissed the bill of complaint."

Counsel for complainant argues that defendants should be enjoined from applying the name "Le Page" to a glue made by complainant, which is inferior to the most expensive brands sold by complainant under that name, on the ground that this is a gross fraud and an imposition upon the public. How such conduct constitutes a fraud upon the public does not appear from the evidence. The labels on defendants' bottles contain no statement as to whether the glue put up by it is either of a superior or inferior quality, but merely that this glue is manufactured by complainant and is bottled by defendants, and that "this glue is known all over the world as the best for cementing wood, leather, glass," etc. If the public gets an inferior quality of glue when it purchases that bottled by defendants, it is because the complainant has seen fit to sell such glue under the same trade-name as it had applied to a superior article, and has chosen thus to reap the profit from the sale to the public of two qualities or grades of the same article under the same trade-name. A court of equity will not enjoin a person from affixing to goods sold by him their true name and description, in the absence of any evidence of an attempted fraud, such as by representing his goods as of a different origin or quality or manufacture from what they actually are. The case of *Gillott v. Kettle*, 3 Duer, 624, cited by complainant as "very close in point," illustrates the rule and its application. There the defendant removed the labels from an inferior quality of pens manufactured by complainant, and affixed other labels which imitated the labels on a superior quality of pens made by complainant. The court held that "by such a practice the defendant endeavors by a false representation to effect a dishonest purpose; he commits a fraud upon the public and upon the manufacturer." But here there is no false representation by spurious label or false statement. The label tells the truth, and nothing but the truth. There is no fraud upon the public, for it gets the genuine, identical thing described by the label (*Apollinaris Co. v. Scherer* [C. C.] 27 Fed. 18); there is no fraud upon the manufacturer, for its vendees resell its manufacture, to which it has applied its name (*Vitascope Co. v. United States Phonograph Co.* [C. C.] 83 Fed. 30), coupled with the statement that it (the vendee) is responsible for the bottling of the manufacture.

The decree is affirmed, with costs.

## DELTA NAT. BANK et al. v. EASTERBROOK.

(Circuit Court of Appeals, Fifth Circuit. December 3, 1904.)

No. 1,390.

## 1. BANKRUPTCY—PLENARY ACTION BY TRUSTEE—MODE OF REVIEW.

The judgment rendered in an action at law brought by a trustee in bankruptcy in a District Court of the United States to recover property, under the jurisdiction conferred by Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417], is reviewable by the Circuit Court of Appeals in the exercise of its general appellate jurisdiction on writ of error, but not by appeal.

Appeal from the District Court of the United States for the Eastern District of Texas, at Paris.

This was an action brought by J. O. Easterbrook, trustee in bankruptcy of the estate of Charles Pratt, bankrupt, against the Delta National Bank and James A. Smith, to recover a certain storehouse situated at Pacio, in Delta county, Tex., formerly owned by said Charles Pratt, and transferred to him by James A. Smith. Charles Pratt conducted a mercantile business at Pacio, and on October 13, 1902, conveyed his storehouse to said Smith for \$1,500, and the amount was credited on Pratt's indebtedness to the bank. On April 3d following, the Paris Grocer Company, Abe Goldman & Bro., the H. S. Bettles Hardware Company, the Hutcherson-Elliott Drug Company, and the Holly-Brooks Hardware Company, all of Paris, Tex., filed a petition in bankruptcy against Charles Pratt on his written statement of "his inability to pay his debts and willingness to be adjudged a bankrupt on that ground," and on April 14th he was duly adjudged a bankrupt. The appellee filed his petition in this case on "July 25, 1902," and alleged that he was the trustee of the said estate of Charles Pratt, bankrupt; and that the said storehouse had been attempted to be sold to appellants, and that there had never been any change of possession of the property; and that the bankrupt, with the knowledge of appellants, had attempted to give appellants a preference; and that the transfer of the house was while the said bankrupt was insolvent, and had been kept secret and concealed; and that the pretended transfer was made for the purpose of hindering, delaying, and defrauding creditors, and especially the five petitioning creditors, and that those creditors had no knowledge, actual or constructive, of the sale; and prayed for judgment, for title, and possession. The appellants specially excepted to it (1) because the petition disclosed no authority from the bankrupt court for appellee to bring this suit, (2) because it alleged no fact giving the trial court jurisdiction, (3) and because the petition disclosed the fact that the transaction had taken place more than four months before the filing of the petition in bankruptcy, and therefore this action was barred; and they demurred generally to the petition. The exceptions and demurrer were overruled, and exceptions were reserved. The appellants answered by general denial, and specially pleaded that the storehouse had been bought at its fair valuation, and the amount had been credited on a valid indebtedness and in the due course of business, and four or five hundred dollars of collateral notes had been released, and that the deal was fair and honest, and with no purpose of securing a preference, and that the deal had been made more than four months before bankruptcy. The case was tried by the court without a jury, the same having been waived, and resulted in a judgment for the appellee. The appellants excepted, and sued out this appeal. A motion to dismiss this appeal is here made on the ground that this is an action at law and no appeal lies.

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¶ 1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.

J. L. Young, for appellants.

A. P. Park and W. S. Moore, for appellee.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). In the lower court this was an action at law for the specific recovery of personal property, and was a controversy arising in bankruptcy proceedings, of which the lower court had jurisdiction under section 70e, Bankr. Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417]. From the final judgment rendered in the case no appeal lies under section 25 of said Bankruptcy Act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) (In re Whitener, 105 Fed. 180, 44 C. C. A. 434), and, if this court has jurisdiction to review the same, the authority must be found under section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), and in the appellate jurisdiction of the Circuit Courts of Appeals, as granted by the act of 1891, which jurisdiction is not restricted by the bankruptcy law; and therefore decrees in equity and judgments at law, although in controversies arising in bankruptcy proceedings, may be revised by this court. See Loveland on Bankruptcy, p. 790, and the cases there cited.

It is well settled that under our appellate jurisdiction, as conferred by the act of 1891, a decree in equity cannot be reviewed by writ of error, nor a judgment at law by an appeal. *Muhlenberg County v. Dyer*, 65 Fed. 634, 13 C. C. A. 64; *City of Wilmington v. Ricaud*, 90 Fed. 213, 32 C. C. A. 578; *De Lemos v. United States*, 107 Fed. 121, 46 C. C. A. 196; *Highland Boy Mining Co. v. Strickley*, 116 Fed. 855, 54 C. C. A. 186.

The motion is granted, and the appeal is dismissed

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#### LAZARUS v. STEINHARDT et al.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1904.)

No. 1,404.

##### 1. FRAUDULENT CONVEYANCES—HOMESTEAD—EXEMPTION.

Where a debtor fraudulently conveyed certain of his assets to a corporation, which assets were subsequently seized by a receiver appointed in a creditors' suit, and in equity belonged, first, to the creditors of such corporation, and, second, to certain other creditors, the debtor's wife was not entitled to the deduction of a homestead exemption from the proceeds thereof, which was insufficient to pay the debts.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The following is the opinion of the District Judge:

SPEER, District Judge. This case originated in a proceeding filed by the creditors of Max Lazarus to subject certain assets, which they claim belonged to him, which they found in the hands of an alleged corporation called the Lazarus Jewelry Company. The complainants, some of them had

judgment liens, and I believe were open-contract creditors. A bill was filed, and after a full hearing it was adjudged that the property in question was subject to the claims of the creditors. In the meantime it had been taken possession of by a receiver. The property thus adjudged to be subject is held by a receiver for the benefit of the creditors. The title to this property was a qualified title, it is true, but it was for all essential purposes a legal title in the hands of the receiver, with the obligation on his part, under the orders of the court, to distribute it to the creditors. The charter of the Lazarus Jewelry Company was not annulled. That is evident from the fact that in the order of distribution the court directed that claims held by the creditors of the Lazarus Jewelry Company and by creditors of Max Lazarus should be ratably satisfied. In the meantime counsel of Mrs. Rosalie, the wife of Max Lazarus, applied for a homestead to be set apart out of that fund. The petition is in the record, and it fully sets out the grounds, subsequently submitted to the ordinary, and on those grounds, after full argument, the court felt obliged to deny the exemption sought by Mrs. Lazarus. A decision having been made by the court (*In re Thompson* [D. C.] 115 Fed. 924) which, in the opinion of the learned counsel for Mrs. Lazarus, seemed to vary somewhat from the decision which I have just referred to, he made application to the court to withhold the distribution of the assets and to preserve the status of the property until he could go before the ordinary, who has original jurisdiction, and make application for an exemption conformably to the laws of Georgia. The chancellor, with that deference which is always due to that sex which is perhaps incorrectly termed the "weaker sex," complied with the wish of the learned counsel and held the assets, and permitted the counsel for Mrs. Lazarus to go before the ordinary, but at the same time directed the receiver to go there also and look after the interests of the trust. The hearing was had before the ordinary, and, so far as the technical requisites of the law of Georgia were involved, that official held that Mrs. Lazarus was entitled to a homestead. So she is so far as the record now submitted to the court discloses, and the decision of the ordinary therefore seems to be right. Armed and equipped with the judgment of the ordinary, the learned counsel now apply to this court with a request that a portion of the trust funds in the hands of the receiver for the benefit of the creditors shall be appropriated for the purpose of making good the decision of the ordinary. Now, if that fund was the property of Max Lazarus, unquestionably the court would comply with the wishes of counsel and of Mrs. Lazarus, but, because of the conduct of Max Lazarus as developed by the proceedings before this court, this has become a trust fund, the title to which is in the creditors. He, therefore, has no title whatever to the fund, and the court with great reluctance feels obliged to disallow the claim of Mrs. Lazarus to homestead therein. It is said that the court took a different view of this subject in *Re Thompson* (D. C.) 115 Fed. 924. The substance of that case, as disclosed in the headnote, is as follows:

"Under the provision of Code Ga. § 2830, which declares that 'a debtor guilty of wilful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption' shall lose the benefit of such exemption, a bankrupt cannot be denied the right to his homestead exemption because he once conveyed the land claimed to his wife, in a vain attempt to evade a debt, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him as his property."

The distinction between that case and this is very obvious. If Mr. Lazarus had reconveyed or secured reconveyance of the property, which he fraudulently conveyed to the Lazarus Jewelry Company, to his wife, notwithstanding the original fraud which he had committed, and she, after the reconveyance, had sought to have a homestead set apart in that property, the fraud thus being atoned, it would be competent for the court to set it apart, as it did in *Re Thompson*. But there was no such reconveyance here. The property is just where Lazarus left it, and where the decision of the court put it, and where we find it when we come to make this decision.

For these reasons, we are constrained to deny the application of Mrs. Rosalie Lazarus.

John R. L. Smith, for appellant.

Jno. P. Ross, Isaac Hardeman, Geo. S. Jones, Clem P. Steed, and A. L. Miller, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

**PER CURIAM.** According to the record, the fund in the hands of the lower court, and out of which Mrs. Max Lazarus, the appellant, claims a homestead, belongs in equity, first, to the creditors of the Lazarus Jewelry Company, and, second, to the complaining creditors in *Steinhardt v. Max Lazarus and the Lazarus Jewelry Company*. For this reason, and because there is not enough to go around and leave any fund applicable to the Lazarus homestead, the ruling of the Circuit Court was correct, and the decree appealed from is affirmed.

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**BOARD OF TRUSTEES OF MOHICAN TP., ASHLAND COUNTY, OHIO,  
v. JOHNSON.**

(Circuit Court of Appeals, Sixth Circuit. November 19, 1904.)

No. 1,333.

**1. FEDERAL COURTS—JURISDICTION—AVERMENT OF CITIZENSHIP.**

An averment in a pleading that plaintiff is a resident of a particular state is not equivalent to one that he is a citizen of that state, and is insufficient to give a federal court jurisdiction where that is dependent on diversity of citizenship.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Cummings, McBride & Wolfe, for plaintiff in error.

H. R. Smith, M. L. Smyser, and L. R. Crichfield, Sr., for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The jurisdiction of the Circuit Court depended alone upon diversity of citizenship of the parties. It is alleged in the petition that the plaintiff "is a nonresident of the state of Ohio, being a resident of the state of Illinois." The citizenship of the plaintiff is not shown by any other part of the record. According to the averments of the petition, the defendant is a civil township and a municipal corporation of the state of Ohio. It has been many times decided that an averment that one is a resident of a particular state is not equivalent to an averment that he is a citizen of that state. *Laden v. Meek* (C. C. A.) 130 Fed. 877; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623.

The judgment must therefore be reversed for want of jurisdiction

¶ 1. Averments of citizenship to show federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 261.

See Courts, vol. 13, Cent. Dig. § 878.

at the cost of the defendant in error, whose duty it was to put on record the essential jurisdictional facts.

If the requisite citizenship actually existed when the suit was started, and it is made to appear to the Circuit Court, it will be for that court to determine whether an amendment of the pleadings shall be allowed.

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**In re GENERAL AUTOMOBILE & MFG. CO.**

**THEOBALD v. HAMMOND.**

(Circuit Court of Appeals, Sixth Circuit. December 9, 1904.)

No. 1,329.

**1. BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—MONEY BORROWED TO PAY LABOR CLAIMS.**

The fact that money was borrowed by a bankrupt for the stated purpose of paying labor claims does not entitle the lender to be subrogated to the priority to which such claims would have been entitled in bankruptcy, where there was no agreement to that effect, or that the money should be so used.

Petition for Review of Proceedings of the District Court of the United States for the Eastern Division of the Northern District of Ohio, in Bankruptcy.

The following is the opinion of the District Court, by WING, District Judge:

In this case Jacob Theobald procured the loan of money to the bankrupt by furnishing the security upon which the loan was made. It was stated at the time by the agent of the bankrupt that it was the purpose of the bankrupt to use the money, or a portion thereof, in paying labor claims then due. There was no agreement between Theobald and the bankrupt that the money should be so used, nor was there an agreement between them that the security or priority incident to the labor claims should pass to Theobald and be operative in his favor. Theobald was under no obligation, in law, to advance this money, nor was it in any wise for his protection or interest that the claims were paid. I think the law is clear, under these circumstances, that Theobald cannot assert a priority, and could not have so asserted it in the receivership suit which was antecedent to the bankruptcy proceedings.

The finding of the referee is sustained and affirmed.

Smith & Taft, for appellant.

Treadway & Marlatt, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

**PER CURIAM.** The order denying a preference to the appellant is affirmed for the reasons stated in the opinion of WING, District Judge.



## PIRSCHER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1904.)

No. 1,380.

## 1. CRIMINAL LAW—EVIDENCE—CONTEMPORANEOUS ACTS.

On the trial of an indictment charging the defendant with the forgery of a bid for a mail-carrying contract, it was not error to admit in evidence another bid shown by the undisputed evidence to have been forged by the defendant at the same time as the one for which he was indicted.

In Error to the District Court of the United States for the Southern District of Alabama.

Edward P. Wilson, for plaintiff in error.

Wm. H. Armbrrecht, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On careful consideration of the record and briefs, we are of opinion:

1. That there was no error in permitting the witness Candee to testify that about the time of the alleged forgeries charged in the indictment the defendant bought a wagon from the witness, and stated at the time he so purchased it that he wanted to use it in carrying the mail from Carlton to Choctaw Bluff, as the same bore upon the criminal intent charged in the indictment.

2. That no error was committed in admitting in evidence, over the objection of the defendant, the bid of Joseph Rivers, with the oath of the bidder and bond and oath of sureties thereto attached, as the same was shown by the then undisputed evidence to have been forged by the defendant contemporaneously with the forging of the bid by Samuel Ludgood for which the defendant was indicted.

3. That the eighth count in the indictment upon which the defendant was convicted is a good and sufficient count, as charging the falsely making and forging of an instrument in writing purporting to be an affidavit, of which instrument in writing the jurat formed a part.

The judgment of the Circuit Court is affirmed.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 807, 828.

MAYO KNITTING MACHINE & NEEDLE CO. v. E. JENCKES MFG. CO.  
et al.

(Circuit Court of Appeals, First Circuit. December 16, 1904.)

No. 477.

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Mayo patent, No. 461,357, for a circular knitting machine, covers improvements in the machine of patent No. 363,528, to the same inventor, chiefly in the manner of pivoting and mode of operation of the pickers. Claims 4 and 6 construed, and *held* not infringed by a machine made in accordance with the Rowe patents, Nos. 570,059 and 581,887. Claim 11 *held* void for lack of patentable novelty.

2. SAME—WINDERS.

The Johns patent, No. 600,788, for a rotary winder for introducing an extra thread in machine knitting, is not for a generic invention, and, in view of the prior art, is not entitled to a broad construction, covering every form of rotary winders, but must be limited to the mechanism shown—at most, with a liberal application of the doctrine of equivalents. Claims 1, 2, 3, 4, and 5 are not infringed by the winder of the Rowe patent, No. 581,887, which is an essentially different structure.

3. SAME.

The Ames patent, No. 600,671, for a winder for introducing an extra thread in knitting, being an improvement on that of the Johns patent, No. 600,788, claims 8, 10, and 11, is not infringed by the winder of the Rowe patent, No. 581,887.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 121 Fed. 110.

William K. Richardson, for appellant.

Wilmarth H. Thurston, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. This is a bill for infringement of four patents for improvements in circular knitting machines: Mayo patent, No. 363,528, dated May 24, 1887; Mayo patent, No. 461,357, dated October 13, 1891; Johns patent, No. 600,788, dated March 15, 1898; Ames patent, No. 600,761, dated March 15, 1898. The complainant has not pressed the Mayo 1887 patent on this appeal, thereby limiting the alleged infringement to the three remaining patents. The two Mayo patents relate to improvements in the machine proper, and the Johns and Ames patents to improvements in an attachment to the machine for introducing a supplementary thread. The defendants' machine is constructed under two patents issued to Rowe—No. 570,059, dated October 27, 1896, and No. 581,887, dated May 4, 1897.

The Circuit Court dismissed the bill on the ground of noninfringement, except as to one claim, which was held void for want of invention.

A circular knitting machine of the Mayo type comprises a needle cylinder, an encircling rotating cam cylinder, and latched needles, with butts or lateral projections on their shanks. The needle cylin-

der has a series of longitudinal parallel grooves on its outer surface, and the cam cylinder is provided with suitable cams or inclines on its inner surface. The needles lie in the grooves of the needle cylinder, with their butts projecting outwardly. As the cam cylinder revolves, the butts come in contact with and slide up and down the inclines or cams, and so cause the requisite up-and-down movement of the needles in the operation of knitting.

In knitting the tubular portions of a stocking, all the needles are in operation, and knit one course at each revolution of the cam cylinder. In knitting the heel or toe of a stocking, only a portion of the needles are in operation, and the cam cylinder is reciprocated, or moved first in one direction and then in the opposite direction. The heel and toe are in the form of a pouch or pocket, and they are knit by what is known as the narrowing and widening operation. In this operation about one half of the needles are first raised to a higher level, or into an idle position, so that their butts will not be operated upon by the stitch cams, and the other half of the needles remain in an active position, where their butts may be operated upon by the stitch cams. In the operation of narrowing, which then takes place, one of the active needles is shifted to a higher level, or to the idle series, at each reciprocation of the cam cylinder, by raising or elevating the butt of the needle. When the narrowing is completed, the widening takes place by exactly the reverse operation; one of the idle needles is shifted to a lower level, or to the active series, at each reciprocation of the cam cylinder, by lowering or depressing the butt of the needle. This method of shifting one individual needle as the cam cylinder moves in one direction, and another individual needle as the cam cylinder moves in the opposite direction, is the generic mode of operation in knitting the heel or toe of a stocking. There is a modification of this method, which is used only in widening. This modification consists in first throwing one needle out of operation, and then throwing two needles into operation on each reciprocation of the cam cylinder. In other words, it consists in continuing the narrowing operation of carrying one needle out of operation through the widening, and in adding two needles to the active series during the widening, in place of one. The net result, of course, is the same, namely, that one needle is added to the active series at each reciprocation of the cam cylinder. This modification, from the point of view of the result accomplished, is also described as throwing two needles into operation as the cam cylinder moves in one direction, and throwing one of these needles out of operation as the cam cylinder moves in the opposite direction. To distinguish these two modes of operation, the first is called the "one-and-one method," and the second the "two-and-one method."

The two-and-one method is useful for the following reasons: In the one-and-one method the last needle to knit in the widening operation, as the cam cylinder moves in one direction, is the first needle to knit on the next course on the return reciprocation of the cam cylinder in the opposite direction. This needle therefore draws two loops, with the result that a series of small holes is left

along the line or seam where the narrowed and widened portions are joined in the heel or toe pocket. This disadvantage is overcome by the two-and-one method, by which the last needle to knit in a given course is thrown out of operation on the return reciprocation of the cam cylinder, and therefore it is not the first to knit on the next course. To express the effect in another form, in knitting each course one needle knits beyond the needle which is the first to knit in the next returning course.

It may be observed in this connection that both these methods produce commercial products, and that machines embodying each method have gone into extensive commercial use. Upon a comparison of the relative position occupied by these two methods in the art, the most that can be fairly claimed for the two-and-one method is that it is a preferred mode of operation, because it produces a somewhat better product.

In the earlier machines of the Mayo type, all the rotary knitting of the body of the stocking was automatic, while the reciprocating knitting of the heel and toe was done by hand. When the rotary knitting was partially or wholly completed, or when the heel or toe were to be knit, the machine was stopped, and about one-half the needles shifted to an idle position. In the narrowing and widening operation which followed, the individual needles were raised by a pick or hook in the hand of the operator, and depressed by the finger of the operator. As the result of this use of a pick to shift the needle, the term "picker" has come to designate the means by which the needles are shifted in an automatic machine, and the machine itself is called the "picker machine." The pickers which raise the needles are known as elevating or lifting pickers, or lifters, and the pickers which depress the needles, as the depressing pickers, or droppers. Two lifting pickers are used in automatic reciprocating knitting, one operating when the cam cylinder moves in one direction, and the other when the cam cylinder moves in the opposite direction; and the same, of course, is true of the depressing pickers. The necessity of having two lifting pickers and two depressing pickers is because there must be two stitch-cam arrangements on the cylinder in reciprocating knitting: one operating when the cylinder is moved in one direction, and the other operating when the cylinder is moved in the opposite direction.

While the old picker machine, with the needles raised and depressed by hand during reciprocating knitting, went into extensive commercial use, the efforts of inventors were naturally directed to making the whole machine automatic, by devising automatic pickers.

The first automatic arrangement of this character disclosed in the record is the Hollen patent, of October 10, 1876. This machine was limited to automatic lifting pickers. Then follows the Haddan patent, of 1881, which disclosed both automatic lifting and depressing pickers. Haddan was followed by the Branson patent, of December 29, 1885, which also covered both kinds of automatic pickers. The next in point of time is the Mayo automatic picker

machine, covered by his 1887 patent in suit, but not pressed on this appeal. There are also found in the prior art two complete automatic circular knitting machines of a different type—the Shaw machine, described in the Shaw patent of June 8, 1880, and the Aiken machine, described in the Aiken patent of August 25, 1885. In the Shaw patent there is also disclosed, for the first time, the two-and-one method.

The Mayo 1891 patent, in suit, is for specific improvements in the automatic picker machine of the Mayo 1887 patent. In order to understand the Mayo 1891 patent, and the position it occupies in the art, we must first understand the Mayo 1887 patent.

The problem Mayo sought to solve in his 1887 patent was the construction of automatic pickers in a circular knitting machine which was already automatic in respect to rotary knitting. The difficulty of the problem resided in the fact that, where any obstacle like a picker was interposed in the path of the needle butts in a moving cam cylinder, it was necessary to get that obstacle out of the way of the following needle butts. Further, since there are two lifting and two depressing pickers, the problem involved not only getting the active picker out of the way of the following needle butts, but also providing that the needle butts should not bring up against the back part of the inactive picker.

An invention is the embodiment of a conception. In order, therefore, properly to comprehend the Mayo invention, or the way in which Mayo solved this problem, we must first start with his conception of an automatic picker. The Mayo conception of an automatic picker was a picker with a single movement, as distinct from a picker with a compound movement—a picker with a sliding movement, as embodied in his 1887 patent, or with a swinging movement, as embodied in his 1891 patent. Mayo never reached the conception of an automatic picker having a compound movement—both sliding and swinging.

On the other hand, the Rowe conception of an automatic picker, which is found in the defendants' machine, was a picker with a compound movement—both sliding and swinging. In a comparison of the Mayo machine with the defendants' machine, it is necessary always to keep in mind this fundamental difference in conception between the Mayo picker and the Rowe picker, since it is this difference which accounts in large measure for the difference in the organization of the two machines.

Again, it is apparent that a Mayo picker, with only a single movement, either sliding or swinging, which is adapted to operate in the path of the needle butts, must have some positive locking device for holding the picker in an inoperative position except when it is required to perform its work. In the absence of such a device, it is obvious that the pickers would remain in the path of the needle butts, and that the needle butts would not ride over them, because the movement of the pickers is restricted to a movement in one direction.

It is also apparent that a Rowe picker, with its compound sliding and swinging movements, is adapted to operate in the path of the

needle butts without locking devices for holding the pickers in an inoperative position. Such devices are not necessary, because the pickers may remain in the path of the needle butts, and the needle butts will ride over them by reason of their compound movement.

It is thus seen that the locking devices of the Mayo 1887 patent are the essential and vital means employed in the embodiment of his conception of an operative automatic picker, and, further, that the employment of such means is not essential in the embodiment of the Rowe conception of an operative automatic picker.

We come now to the consideration of the three claims of the Mayo 1891 patent which are in issue.

Claim 4 relates to the two-and-one method; claim 6, to a pivoted picker, as distinct from the sliding picker of the 1887 patent; and claim 11, to an improved detail of construction.

Claim 4 is as follows:

"In a knitting-machine, the needle-cylinder and the needles carried thereby, combined with a cam-cylinder provided with stitch-cams and needle elevating and depressing cams [pickers] having fingers or hooks the fingers of the elevating-cams engaging but a single needle and the fingers of the depressing-cams being of such length as to engage two needles, latches to normally hold the said elevating and depressing cams in inoperative position, and devices through which the cam-cylinder may be reciprocated, whereby in the operation of the machine two needles may be returned into action at each reciprocation of the cam-cylinder and one of said needles carried out of action at the next reciprocation thereof in the opposite direction, and so on, to effect the widening of the fabric, substantially as and for the purpose specified."

This claim is for the combination for performing the widening operation by the two-and-one-method. Mayo had before him his 1887 patent, and he wished to incorporate this modification of the one-and-one method into the machine of that patent. He also, in the eye of the law, had before him the Shaw patent, wherein the two-and-one method in a different type of machine is described as the "preferred" form. The two-and-one method involved the throwing of one needle out of operation and two needles into operation on each reciprocation of the cam cylinder during the widening. To accomplish this, Mayo continued the narrowing operation by keeping the narrowing tripping cams in operation during the widening, and by lengthening the fingers of the two depressing pickers so they would depress two needles instead of one. It may be that this change would not have suggested itself to the skilled mechanic, with knowledge of the two-and-one method as described in the Shaw patent, and with the Mayo 1887 patent before him. In other words, this way of solving the problem may have involved invention. That question, however, is not before us. Claim 4 is a claim for a combination of certain elements, and the question of infringement turns upon whether the defendants' machine contains this combination.

Shaw accomplished the two-an-one method in one way, and Mayo in another way. Of course, Mayo, in view of Shaw, could not claim broadly the two-and-one method, nor does claim 4 purport to be for a method. It is for a combination to accomplish exactly what Mayo undertook to accomplish—the introduction into

the latched picker machine of his 1887 patent of the two-and-one method.

Except as to the changes already mentioned, all the elements of claim 4 appear in the Mayo 1887 patent, and are therefore a part of the prior art. The question of the infringement of this claim is narrowed to the inquiry whether the defendants' machine contains the element, "latches to normally hold the said elevating and depressing cams [pickers] in inoperative position." We have already referred to the circumstance that latches or locking devices of some kind were essential in the embodiment of the Mayo conception of a single-movement picker, and that latches or locking devices were not necessary in the embodiment of the Rowe conception of a compound-movement picker. It is necessary now to be more specific. Do we find in the defendants' machine any locking devices which correspond to the Mayo spring-actuated arms pivoted to the outside of the cam cylinder, and provided with suitable shoulders against which the pickers rest and are positively held in a locked position, or any devices which perform substantially the same function? Let us turn first to the defendants' depressing pickers. These pickers slide in carriers which are pivoted to the outside of the cam cylinder. The result is that they have a compound movement, a sliding diagonal movement, and a vertical movement, owing to the carrier being pivoted. The effect of having this compound movement is that the needle butts, following the butt which is operated upon, ride over the picker, and there is consequently no necessity for any latch or locking device to hold it in an inoperative position. This also applies to the inactive picker, against the back of which the needle butts may strike. The needle butts will also ride over these pickers, although, in order to avoid the wearing of the butts, there is in defendants' machine mechanism for holding down these pickers. It thus appears that latches or locking devices for the depressing pickers, in the sense of the Mayo invention, are absent from the defendants' organization.

We come next to the lifting pickers. The two lifting pickers in defendants' machine are carried by a T-shaped carrier pivoted on the outside of the cam cylinder, and their hooked ends project through diagonal slots in the cylinder. The pickers move up and down in these slots. They have consequently a sliding movement, and also a swinging movement upon the pivoted T piece. Both pickers move with the carrier, and both swing about the same pivot. It follows that, as one picker operates, and is thus carried into an inoperative position, the other picker is carried into an operative position. Neither picker is at any time latched or locked in an inoperative position, and one is always in an operative position. The spring attached to the carrier is in no sense a locking device, within the meaning of the Mayo patents. Further, the defendants' lifting pickers are located above the stitch cams, instead of at the sides, as in the Mayo. In consequence of this, the needle butts are never brought up against the back of the inactive lifting picker, but are carried under and around it.

It is clear that the construction and arrangement in defendants'

machine avoids the necessity of any locking devices for the pickers. That machine does not embody "latches to normally hold the said elevating and depressing cams [pickers] in inoperative position," or any equivalent thereof, and consequently does not infringe claim 4 of the Mayo patent. Starting with a fundamentally different conception of an automatic picker, we find in defendants' machine a different organization of pickers and cams, and a different mode of operation.

The next claim of the Mayo 1891 patent in issue is claim 6:

"In a knitting-machine, a needle-cylinder and needles carried thereby, and cam-cylinder provided with a slot, combined with a needle-operating cam [picker] pivoted outside of the said cam-cylinder and extended through the said slot to operate upon the said needles and be operated thereby, substantially as described."

This claim covers an improved form of the Mayo conception of a picker with a single movement. Mayo first embodied that conception in his 1887 patent, in a sliding picker on the inside of the cam cylinder, while here it is embodied in a swinging or pivoted picker on the outside of the cam cylinder, and extending through a slot in the cylinder. The same fundamental distinction, however, still exists between this picker and the compound-movement picker of the defendants' machine.

Respecting the infringement of this claim, it may first be observed that the Mayo 1887 patent was in issue in the court below. It was there contended that the depressing pickers in defendants' machine infringed claim 2 of that patent. This was upon the theory, of course, that these pickers were sliding, and not pivoted. Upon this issue the Circuit Court held there was no infringement, because the Mayo picker moved in a fixed plate, while the picker in defendants' machine had a swinging movement on a pivoted carrier. There is no contention, therefore, that the depressing pickers infringe claim 6 of the 1891 patent, but the charge of infringement is limited to the lifting pickers.

The lifting pickers in defendants' machine manifestly come within the broad language of claim 6. The first question, therefore, to be determined on reading this claim, is whether Mayo is entitled to the broad invention covering all pickers which are pivoted outside the cam cylinder and extending through slots in the cylinder, or whether the claim must be restricted to substantially his way of pivoting.

A brief examination of the organization of a circular knitting machine will throw light on this question. In such a machine, as already described, we have a needle cylinder in which the shanks of the needles lie in grooves, with their butts projecting outwardly, an encircling revolving cam cylinder in which the needle butts ride up and down on the cams in the operation of knitting, and notched cams or pins, called "pickers," which are interposed in the path of the needle butts to shift the individual needles in making the heel and toe of a stocking.

Now, in the first place, it is evident that these pickers must either have a sliding movement or a swinging movement in order



to do their work and get out of the way of the following needle butts. In other words, they must either slide in guideways or swing on pivots. Neither of these general conceptions would be patentable, for they are manifest to any mechanic. The inventive faculty would be exercised, and only exercised, in finding out a practical operative way in which to embody either of these conceptions, for therein lies the difficulty, and consequently the solution of the problem.

Again, it is manifest that the picker must be mounted somewhere—that is, either on the inside of the cam cylinder, or on the outside of the cam cylinder, or above the cam cylinder; and it is clear that no one can patent the broad idea of mounting a picker in either of these positions.

The conception that it would be better to mount a pivoted picker on the outside instead of the inside of the cylinder would not involve the exercise of invention, first, because it is a most common thing in the mechanic arts to mount a mechanical part on the outside instead of the inside of the cylinder of a machine; and, secondly, because it would occur to any one familiar with the organization of cam cylinders and needle cylinders in these machines that it would be better to mount the pickers on the outside of the cam-cylinder, in order to get them out of the way of other working parts, if this could be done. The real difficulty lies in doing it, and invention lies in the conception of the means for doing it, or in the special mode of pivoting. We cannot say, therefore, that there was anything patentable in the broad idea of pivoting a picker on the outside of the cam cylinder, and cutting a slot in the cylinder to afford an opening for the working end of the picker. The mounting of a picker on the outside of the cam cylinder necessarily involved either cutting a hole in the cylinder, or an arm extending over the top of the cylinder, as would appear to any mechanic.

As it would certainly be an extreme position for any court to hold that the first person who mounted a sliding or a pivoted picker on the inside of the cam cylinder was entitled to a monopoly of all pickers which slide or are pivoted on the inside of the cylinder, so, with equal truth, it would be an extreme position for the court to hold that the first person who mounted a pivoted picker on the outside of the cam cylinder, with a slot in the cylinder, or an arm extending over the top of the cylinder, was entitled to a monopoly of all pickers mounted in that way.

At this time Mayo was devising improvements in the automatic machine covered by his 1887 patent, and, admittedly, there existed in the art both sliding and pivoted pickers, which were located on the inside of the cam cylinder. In his 1887 patent there were sliding pickers on the inside of the cam cylinder, and it occurred to him it would be better to have the pickers pivoted on the outside of the cam cylinder and extend through slots in the cylinder. At this stage of his mental conception he had made no invention, for this would have suggested itself to any skilled mechanic. The important and difficult question, however, remained, how can this change be made? In successfully solving that question, Mayo

made his real and only invention. It follows that claim 6 must be limited to the mode of pivoting invented by Mayo, or to what may be fairly held to be the equivalent of his mode of pivoting.

Holding that this is a valid claim when so limited, the question of infringement turns upon whether the lifting pickers in defendants' machine contain the Mayo mode of pivoting, or a mode of pivoting which performs the same function in substantially the same way.

In the Mayo construction, both the pivoted support for the picker and the pivot are located outside the cam cylinder. The slots through which the pickers extend are inclined slots, and the pivotal axis about which the picker swings extends in an inclined direction on the outside of the cylinder. The result is that the picker, in operating, swings radially in and out of the cylinder in an inclined direction. The pivoting of the picker is such that there is no other movement, except a swinging movement, to cause the end of the picker to travel in the proper path to shift the needles.

In the defendants' machine the two lifting pickers are not separately pivoted to the cam cylinder, but both slide in a T-shaped carrier which is pivoted to the outside of the cam cylinder. The pivot itself extends through the wall of the cam cylinder, and is arranged radially to it. The defendants' pickers swing upon a radial axis. They do not move radially, however, by reason of their swinging movement. In order to give them a radial movement, it is necessary to give them a sliding movement as well as a swinging movement about the radial axis. In a word, the Mayo picker operates by a simple radial or swinging movement, and the defendants' picker by a compound movement—both swinging and sliding.

The defendants' pickers do not infringe claim 6 of the Mayo patent, because, starting with a different conception, they are different in construction, arrangement, and mode of operation. Mayo solved the problem of pivoting a picker on the outside of the cam cylinder in one way, and Rowe in a radically different way.

We come next to Claim 11—the remaining claim of the Mayo 1891 patent in issue:

"In a knitting-machine, the needle-cylinder grooved for the reception of jacks, a series of jacks, a surrounding ring correspondingly grooved for the reception of jacks, and a cam-ring, as a<sup>14</sup>, to act upon and move the said jacks, combined with an independent ring, b, overlapping the inner ends of the jacks, the hooks or portions of the jacks engaging the yarn being at the proper space thereof between their ends, substantially as described."

This claim relates to thin blades of metal, called sinkers or jacks or web holders, which extend inward between the needles, and which co-operate with the needles to hold down and press forward the fabric during the knitting operation. These sinkers are provided with hooks to engage the fabric. They are located on the top of the needle cylinder, and are arranged to slide radially between the needles. They are actuated by the cam ring, which also serves to hold down their outer ends against any upward pull. There is also a second ring, which overlies, and thus serves to hold

down, the inner ends of the sinkers. The improvement covered by this claim is for this additional ring described in the claim as "an independent ring, b, overlapping the inner ends of the jacks." The problem is here simply to hold down the sinkers, and the essence of the Mayo improvement lies in the location of the second ring to hold down their inner ends.

It is not every minor change or improvement in construction in a machine composed of many different parts, like a circular knitting machine, that rises to the dignity of invention. The work of holding down the sinkers had been previously done by two rings, both located on the outer side of the hooks of the sinkers. In view of what already existed in the art, and the nature and character of this improvement, there was no invention or patentable novelty in simply changing the location of one of the rings to the other side of the hooks, or to the extreme inner ends of the sinkers.

We come now to the second branch of the case at bar, which relates to an attachment to the machine for the purpose of introducing an extra thread during certain portions of the knitting, especially the heel and toe. This mechanism is the subject-matter of the Johns patent and of the Ames patent. The latter is for an improvement on the Johns patent. These patents are known as the "winder patents," since their main feature is a rotary winder for winding the end of the extra thread several times about the main thread.

The general problem of automatically inserting an extra thread in a circular knitting machine has been solved in two ways, which are represented by two distinct types of mechanism: (1) The extra thread may be carried forward to the needles by frictional engagement with the main thread by means of a carriage containing a guide through which the threads passes. The carriage is moved forward to bring the extra thread into engagement with the main thread, and, when the extra thread is to be withdrawn, the carriage is moved back, and the extra thread drawn to one side, and between the blades of a cutting device which severs it. This is the frictional type of extra thread-inserting mechanism illustrated in the Shaw and other patents. (2) Instead of depending on frictional contact, the extra thread may be carried around the main thread by a winding device, the purpose being to make a more secure engagement of the threads than is made by frictional contact. This is the winder type of extra-thread-inserting mechanism illustrated by the patents in suit.

The rotary winder method may be properly called a preferred method, since it would apparently operate with more certainty in the case of fine threads with a smooth surface.

Both the automatic frictional contact devices, as well as the rotary winder, have gone into extensive commercial use.

There are also two distinct types of rotary winding devices. In one type, the clamping mechanism which clamps and holds the free end of the extra thread during the winding operation rotates with the winding mechanism, or winder proper. In the other type, only the winder proper rotates. While the clamping mechanism coacts with the winder, it is separate from it, and does not rotate with it.

The Johns and the Ames patents belong to the first rotary winder type, and the defendants' machine, constructed under one of the Rowe patents, to the second rotary winder type. The mechanism which embodies these distinct conceptions of a rotary winder is necessarily different in construction and mode of operation.

On this branch of the case, the important question on the issue of infringement is whether the Johns patent should be limited to cover the particular type of winder in which both the winder and the clamping mechanism revolve, or whether, in accordance with the broad language of the claims relied upon, it should be construed to cover both forms of rotary winder.

At the time of the Johns invention, the conception of a rotary winder was not new in the art. The prior British patent to Marshall & Hewitt, and the prior American patent to Swinglehurst, certainly disclosed rotary winders. While a strong case has been made out against the operativeness of the Marshall & Hewitt mechanism, and while, in the Swinglehurst device, the entire bobbin of extra thread rotates around the main thread, still it is manifest that the broad idea of the rotary winder is present in these mechanisms. Further, automatic devices for the insertion of an extra thread were in common use, although of a different type. Again, the Johns patent is not for a generic invention, in which the device of the patent is only one form in which the invention may be embodied. These considerations are sufficient to show that Johns is not entitled to a broad patent covering every kind of rotary winder in a circular knitting machine. The most that the patentee can ask, under the circumstances, is a liberal application of the doctrine of equivalents in the construction of his patent. There is no warrant for holding that the invention can be so enlarged as to include all forms of rotary winder.

The fundamental and characteristic feature of the Johns conception of a rotary winder is a clamping device for the free end of the thread which is attached to the winder and rotates with it. This is apparent upon an inspection of the device. There is a stationary boss, with two holes—one in the center, for the passage of the main thread, and the other at one side, for the passage of the supplementary thread. Mounted on the stationary boss, and capable of rotation thereon, is a hollow ring or shell, which forms the rotary winder. To this winder is rigidly fixed a curved arm with a projecting finger; also a pivoted lever operated by a spring. The arm, in conjunction with the lever, forms a clamp, which is opened or closed to grasp the additional thread. When this thread is not in use, its free end is held by the clamp. When the time arises for the introduction of this thread into the knitting, the winder is rapidly rotated, with the result that the free end of the thread is carried several times around the main thread. Before the revolution of the winder ceases, the outer edge of the revolving lever is struck by a projection on the lever which operates to open the clamp and release the free end of the thread, so that it may pass to the needles with the main thread.

The Rowe winder used in defendants' machine is different in construction and mode of operation. Its important parts consist of a cylinder or winder mounted upon a boss. This cylinder is provided

with a large opening in its side, which acts as a thread eye for the extra thread when it is wound around the main thread. The thread lies loosely in this opening, and the vertical wall of the slot, when the cylinder is rotated, acts to throw the end of this thread about the main thread. The clamp or gripper comprises a fixed jaw and a movable jaw, which are moved in and out through the opening in the cylinder or winder. A cutting plate is secured to the fixed jaw, and, when this jaw is moved to clamp the end of the extra thread, it cuts the thread. When the extra thread is not passing to the needles, the gripper extends through the opening in the cylinder or winder, and the end of the extra thread is clamped and held therein. When the extra thread is to be inserted, the gripper swings upon its pivot, and draws the extra thread through the opening in the cylinder. The cylinder is then rotated. During the greater part of the first revolution of the cylinder the gripper retains its hold upon the end of the extra thread, thus causing it to be wrapped around the cylinder. The jaws of the gripper are then opened to release the end of the thread, and the continued revolution of the cylinder causes the projecting end of the thread to be thrown around the main thread by the engagement of the extra thread with the vertical wall of the opening in the cylinder. When the extra thread is to be withdrawn, the gripper is moved inward through this opening. The extra thread comes between the jaws of the gripper, and is severed by the closing of the movable jaw at the same time that the free end is clamped between the jaws.

The claims of the Johns patent in issue are as follows:

"(1) In a knitting-machine, the combination with a source of plural thread-supply, of a rotary winder for carrying the free end of one thread one or more times about another.

"(2) In a knitting-machine, the combination with a source of plural thread-supply, of a rotary winder for carrying the free end of one thread one or more times about another, and means for severing said thread.

"(3) In a knitting-machine, the combination with a guide device for a plurality of threads, of a rotary winder for carrying the free extremity of one thread one or more times about another.

"(4) In a knitting-machine, the combination with a guide device for a plurality of threads, of a rotary winder for carrying the free end of one thread one or more times about another, and means for holding said thread end previous to winding.

"(5) In a knitting-machine, the combination with a guide device for a plurality of threads, of a rotary winder for carrying the free extremity of one thread one or more times about another, means for holding said thread end previous to winding, and means for severing one end of said thread."

These claims must be limited to a rotary winder, which contains the characteristic feature of the Johns patent, namely, a winder in which the clamping mechanism rotates with the winder; and they cannot be enlarged to include the mechanism employed in the defendants' machine, in which the gripper does not rotate, and which requires an essentially different structure and organization of parts. It is clear that, when the claims are limited to the actual invention of the Johns patent, they are not infringed.

It may be noticed in this connection that these broad claims are not found in the original application for the Johns patent. They were not inserted until five years after that application, and subsequent to the

date of the Rowe patent, and to the time when the Rowe device was put upon the market.

It is unnecessary to consider the Ames patent in great detail. It is for an improvement on the Johns type of rotary winder. In Ames, we find a rotary winder and gripping mechanism in the form of a sleeve with a series of wire projections like a brush. These wires or projections extend parallel with the axis of the winder. The end of the extra thread is engaged between two of the wires of the brush, and when the brush rotates it carries the extra thread several times around the main thread. In the subsequent movement of the extra thread with the main thread towards the needles, the extra thread is drawn from between the two wires of the brush or holder. A finger with a hooked end then engages the extra thread, and pulls it to one side between the blades of the cutting device. In the movement of this finger in drawing the extra thread to one side, it is again drawn between two of the brush-like wires, and, after the thread is cut, its free end is left between the wires in readiness for another winding. It will be noted that in this arrangement the clamp or holder does not move to the extra thread and grasp it, but the extra thread, in the operation of cutting, is moved into engagement with the clamp, or between the opening of two of the wire projections. This is the fundamental distinction between the Ames and Johns devices.

The claims in issue are as follows:

"(8) In a knitting machine, the combination with a guide device for a plurality of threads, of a rotary winder through which said threads are passed, one or more projections on said winder, and means to draw one of said threads to one side and leave its end in the path of movement of said projection or projections, to be rotated thereby."

"(10) In a feed mechanism for a knitting machine, the combination of a tubular twister slotted at one end, means for rotating said twister, and means for throwing a thread into engagement with the slotted end of said twister.

"(11) In a feed mechanism for a knitting-machine, the combination of a tubular twister slotted at one end, means for throwing a yarn into engagement with the slotted end of said twister, means for rotating said twister, and means for cutting off said yarn."

These claims cannot be construed to cover every winder in which the thread is drawn to one side, and into a position to be engaged by the winder. This is a patent for an improvement in a highly advanced art, in which not only the Johns patent, but the Williams patent of February 7, 1893, must be included. These claims must therefore be limited to the specific combinations of devices set forth in the claims; in other words, to the Ames organization of twister or holder and winder. From the description already given of the defendants' winder, it is manifest that it differs in structure, arrangement, and mode of operation. For these reasons, as in the case of the Johns patent, the defendants' winder does not embody the invention covered by these claims of the Ames patent.

Upon the argument on both branches of this case, we were impressed with the wide difference in the mechanism of the complainant's and defendants' machines. That impression has only been confirmed by a more careful and thorough examination of the exhibits, the record, and the briefs. The machine of the Rowe patents, which is the defendants' machine, has not borrowed, nor is it built upon, the specific

inventions, which are actually covered by the several claims in issue of the patents in suit. The most Rowe has done has been to solve, in an advanced art, the same specific problems, along substantially different lines.

In the argument on this appeal, and especially in its supplemental brief, the complainant has laid special emphasis on the point that Mayo, in his 1891 patent, was the first to produce a successful commercial automatic picker machine. The difficulty with this argument, conceding that such an argument has weight in some cases, is its indefiniteness. The complainant manufactures the Acme machine, which has gone into extensive commercial use. But in certain particulars, including the arrangement of stitch cams and pickers, the Acme machine differs from the Mayo 1891 patent, in suit. Mayo himself testifies that this machine is more automatic than the machine of that patent. Then, again, the 1891 patent covers other inventions than those which are found in the claims in issue. There may also have been other things which have helped to give the Acme machine its commercial success. There is no satisfactory proof in the record that the introduction of the two-and-one method into the picker machine, supplemented by pickers pivoted on the outside of the cylinder, differentiates a successful commercial machine from an unsuccessful noncommercial machine. Mayo's testimony is only to the effect that these features were improvements, and made the machine work satisfactorily.

The two-and-one method is simply an improvement in the circular knitting-machine art, and nothing more. It has nothing to do with the automatic character of the machine, its only office being to produce a somewhat better product. It does not separate success from failure in the art. Machines with the one-and-one method are successful commercial machines, producing commercial products. The following excerpts from Mayo's testimony fully corroborate this position:

"Int. 23. To what extent, generally speaking, is what you have called the 'two-and-one arrangement' employed in the circular, seamless knitting machines now on the market?"

"Ans. Nearly all the machines now on the market, either full automatic or partially so, are using a two-and-one method of knitting the heel and toe."

"Cross-Int. 25. How many circular, seamless knitting machines are now on the market or in use? I mean, how many different makes?"

"Ans. Those that I recall at this moment are the Standard, the Invincible, the Excelsior, the Boss, the Keystone, the Paxton & O'Neill, one made by H. Brinton & Co., the Acme, the Branson, the Victor, the Scott & Williams, the Hepworth (which I think has, however, lately been withdrawn from the market), and the National; the last named being a spring-needle machine."

"Cross-Int. 30. And in how many, or what ones, of the machines you have mentioned, is the two-and-one method of knitting the heel and toe employed?"

"Ans. It is employed on the Standard, Invincible, Excelsior, Boss, Paxton & O'Neill, Acme, Victor, and, I think, on some of the others, but cannot state positively."

The history of this art discloses that neither a fully automatic machine, as distinct from a partially automatic machine, a pivoted picker on the outside of the cylinder, as distinct from a sliding picker on the inside, nor the two-and-one method, as distinct from the one-and-one method, are essential to a successful commercial machine producing a commercial product.

For these reasons the case at bar does not come within the principle laid down in *Consolidated Valve Company v. Crosby Valve Company*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Keystone Manufacturing Company v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, and other cases in which an inventor has added to previous failures just what was necessary to make a practical commercial machine.

The main grievance of the complainant respecting the decision below is that the Circuit Court failed to recognize the doctrine of equivalents in its application to the Mayo inventions. In view of the scope and character of these inventions, we know of no doctrine of equivalents which would permit us to hold that the butts of the following needles, or the spring of the T-shaped carrier, in the defendants' machine, are the equivalents of the positive locking devices conceived by Mayo, and embodied in his automatic picker.

By reason of the nature of the machine and the number of patents involved, this case has called for an unusual amount of time and labor. Upon full consideration, we have reached the conclusion that the decree of the Circuit Court must be affirmed.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

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CHICAGO WOODEN WARE CO. et al. v. MILLER LADDER CO.

MILLER LADDER CO. v. CHICAGO WOODEN WARE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 12, 1904.)

Nos. 1,070, 1,074.

**1. APPEAL—FINALITY OF DECREE IN INFRINGEMENT SUIT—CROSS-APPEAL BY COMPLAINANT.**

A decree in a suit for infringement, entered after full hearing on pleadings and proofs, which adjudges title to the patent, the validity of certain claims, and the invalidity of others, the infringement of the valid claims, and awards a perpetual injunction and damages, to be determined on an accounting, is not merely an interlocutory decree awarding an injunction, but is so far a final decree that, where an appeal has been taken by defendant, who has brought up the record, complainant may prosecute a cross-appeal for the review of that part which adjudges certain of the claims invalid.

**2. PATENTS—VALIDITY OF CLAIM.**

The fact that a patentee described and claimed "a trestle consisting of two pairs of legs" pivoted as shown, whereas by the accepted definition a top piece is essential to constitute a trestle, does not render the claim invalid where the meaning is plain, and the legs as shown are adapted to be used with any kind of a top piece to complete the trestle, as intended.

**3. SAME—INFRINGEMENT—FOLDING TRESTLE.**

The Miller patents, No. 343,829, for a folding trestle, claims 1 and 2, and No. 401,848, for an improvement thereon, held valid and infringed.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The Miller Ladder Company brought this suit on account of an alleged infringement of letters patent No. 343,829, June 15, 1886, and No. 401,848, April 23, 1889, to Miller, complainant's assignor, for improvements in folding trestles.



The description and claims of the first Miller patent are as follows: "The object of the present invention is to provide a simple and effective trestle for scaffolding for the use of paper hangers to support their boards on, or as a table-support, and other uses to which a trestle may be adapted; and it consists in the details of construction, substantially as shown in the drawings, and hereinafter described and claimed.

"In the accompanying drawings, A B and C D represent two pairs of legs, of any suitable length and thickness, and pivoted together at (their mid-length by pivot) a. The legs or standards A C are connected together near their lower ends by braces, b, c, which are pivoted to the legs or standards, and also pivoted together, as shown at d, the legs or standards B D being in like manner connected together.

"Any desirable and well-known form of braces may be used as found most preferable, which change I reserve the right to make without departing from the principle of my invention, and the same right I reserve as to the form and construction of the plates, e, which connect together the legs or standards, A C and B D, at their upper ends, the plates being connected or pivotally attached to each other at f.

"The pivots, a, and pivots, f, are at right angles to each other. Thus the legs or standards of each pair can be folded down upon each other, while the legs or standards A C and B D are brought together, thereby folding the trestle in a compact form, as shown in Fig. 4.

"In setting up the trestle for use the legs or standards are brought into position, as shown in Fig. 1, the braces and a support, E, hereinafter described, keeping them extended.

"When the legs or standards A C and B D are partially extended with relation to each other, a space is left between the upper ends, in which is inserted the ends of the support E. This support has mortises, g, in its sides, as shown, which fit the sides of the legs or standards, and by spreading each pair of legs apart at their lower ends the support will be held firmly between them.

"Having now fully described my invention, what I claim as new, and desire to secure by letters patent, is—

"1. A trestle consisting of two pairs of legs or standards, pivoted together at or near their center and near their upper ends, and connected together near their lower ends by pivoted braces, whereby they are adapted to fold together, substantially as and for the purpose set forth.

"2. The combination, with a trestle consisting of two pairs of legs or standards pivoted together, as shown, of a support having mortises on its sides and near its ends, and adapted to be held between the upper ends of said legs or standards, substantially as and for the purpose specified."

The description and claims of the second Miller patent are as follows: "This invention relates to certain improvements in the type of folding trestles that forms the subject-matter of letters patent No. 343,829, issued to me June 15, 1886, for improvement in trestles; and the present improvements have for their object to provide a simple, cheap, and durable trestle construction embodying the features of cheapness and durability in construction, ease in folding and unfolding the trestle, and permanent pivotal connection of the trestle parts together. I attain such object by the construction and arrangement of parts illustrated in the accompanying drawings, in which—

"Figure 1 is a perspective view illustrating the trestle in its unfolded condition ready for use; Fig. 2, a similar view of the trestle in its folded condition; Fig. 3, a detail side view of the upper end of the trestle in the folded condition; Fig. 4, a detail section illustrating the connection of the legs or standards to the free end of the horizontal top bar of the trestle; and Fig. 5 a similar view of a modified form of the same.

"Similar letters of reference indicate like parts in the several views.

"As represented in the drawings, my improved trestle consists of four legs or standards, A A', B B', pivoted together in pairs at or near their mid-length by means of screws, a, b, or other equivalent means.

"C is the horizontal top bar of the trestle, pivoted at one end between the upper ends of the legs A B by a suitable pivot-bolt, c, so as to have pivotal movement between the same, its free end being engaged, when the trestle is

unfolded, by the upper ends of the legs A' B', which engage in beveled recesses, c, in the sides of such bar, as shown in Fig. 4, to effect a firm and substantial connection; such legs A' B' being pivoted together by pivot plates or hinges, D, at a point immediately below the bar C, as clearly indicated in Figs. 1, 3, and 4.

"As shown in the drawings, the corresponding legs A B of each pair of legs, between which the horizontal bar C is pivotally attached, are arranged adjacent to each other and between the legs A' B', that engage the free end of the horizontal bar C. With this construction the four legs can be made of equal lengths to avoid all after fitting and cutting, which was a serious defect in the construction shown in my former patent, in which the legs were required to have different lengths in order to attain a perfect rest or footing.

"As a modification of the mode of attachment of the free ends of the horizontal top bar, C, to the upper ends of the legs A' B', as illustrated in Figs. 1 and 4, an open-bottomed recess, c<sup>2</sup>, may be formed in the bar C, preferably by metal side plates, C', to receive and confine the upper ends of the legs A' B', as shown in Fig. 5.

"E is a strut or brace pivoted to one of the legs, and adapted to engage against the inner side of the opposite leg to hold the trestle parts in their extended condition. This strut may be located at any other suitable position from that shown without departing from the spirit of my invention, and in some cases entirely omitted or replaced by the hinged brace shown in my former patent, No. 343,829.

"The top bar, C, is shown in the drawings of a length greater than the space between the upper ends of the legs or standards. The purpose of such construction is to form a convenient rest for a paper-hanger's straight-edge, widening-board, etc., when the trestles are to be used for such work; otherwise the bar need not have such extra length, and the parts can be increased or diminished in size and proportions as the particular uses to which the trestle is to be applied or the judgment of the maker may suggest without departing from the spirit of my invention.

"Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is—

"1. A trestle consisting in the combination of a horizontal top bar, C, and four legs or standards, A A', B B', pivoted together in pairs at or near their mid-length by pivots a, b, the legs A' B' being pivoted together at or near their upper ends by pivot D, the axis of which is at right angles to the axis of the pivots a, b, and the corresponding legs A B being arranged adjacent to each other and between the corresponding legs A' B', the parts being adapted to fold together into a compact form, in the manner and for the purpose set forth.

"2. A trestle consisting of four legs or standards A A', B B', pivoted together in pairs at or near their mid-length by pivots a, b, the legs A' B' being pivoted together at or near their upper ends by pivot D, the axis of which is at right angles to the axis of the pivots a, b, in combination with the horizontal top bar, C, pivotally secured between the upper ends of the legs or standards, whereby the trestle parts are permanently connected together and adapted to fold into a compact form, substantially as herein described, and for the purpose set forth.

"3. The combination of the legs or standards A A', B B', pivoted together in pairs and connected together by hinge D, with the correspondings legs A B arranged adjacent to each other and between the corresponding legs A' B', top bar, C, having a recess, essentially as described, for receiving the upper ends of the legs A' B', and pivot-bolt, c, substantially as described, and for the purpose set forth.

"4. The combination of the legs or standards A A', B B', pivoted together in pairs and connected together by hinge D, with the corresponding legs A B arranged adjacent to each other and between the corresponding legs A' B', top bar, C, having a recess, essentially as described, for receiving the upper ends of the legs A' B', pivot-bolt c, connecting the end of bar C with the tops of the legs A B, and strut or brace E, substantially as described, and for the purpose set forth."

The court, after issues joined, and on full proof, held the first claim of the first patent to be void, the second claim of the first patent and the four claims of the second patent to be valid and infringed, awarded a perpetual injunction against infringement of the second patent (the first having expired shortly before the decree was entered), and decreed an accounting with respect to infringement of the five claims held valid. Defendants appeal and attack the decree in every respect in which it is against them, and complainant presents a cross-appeal challenging the correctness of the decree in so far as it adjudges the invalidity of the first claim of the first patent. Defendants move to dismiss the cross-appeal.

The record exhibits the following patents as illustrative of the prior art: 19,107, January 12, 1858, to Stone; 27,277, February 28, 1860, to Dodge; 72,562, December 24, 1867, to Sutter; 100,430, March 1, 1870, to Mallory; 128,332, June 25, 1872, to Smith; 129,978, July 30, 1872, to Noggle; 166,874, August 17, 1875, to Hood; 232,100, September 7, 1880, to Zwiebel; 262,206, August 8, 1882, to Carr; 295,269, March 18, 1884, to Miller; 304,357, September 2, 1884, to Powell; 318,896, May 26, 1886, to Hanssen.

Defendants' device is built in accordance with letters patent No. 702,431, June 17, 1902, to Howard.

Thomas A. Banning and Frederick Benjamin, for Chicago Wooden Ware Co.

James B. Raymond and Otto Barnett, for Miller Ladder Co.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Motion to dismiss the cross-appeal. A year before the decree now appealed from was entered, the court enjoined defendants *pendente lite* from continuing to infringe the second claim of the first patent and the four claims of the second patent. From that temporary injunction, indisputably interlocutory, defendants might have prosecuted an appeal under section 7 of the Court of Appeals act; and on such an appeal the sole question would have been whether the court had improvidently entered the injunctive order. *Adam v. Folger*, 120 Fed. 260, 56 C. C. A. 540. But since the act of June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], repealed the amendment of 1895 (2 Supp. Rev. St. p. 376), complainant could not have taken an appeal or a cross-appeal from the court's refusal to enter a *pendente lite* injunction with respect to claim 1 of the first patent. *Columbia Wire Co. v. Boyce*, 104 Fed. 172, 44 C. C. A. 588. The decree now under consideration was entered after both parties had taken and submitted full proofs on the issues joined (and there is no suggestion from either side that anything further in the way of pleading or proof could be added). It adjudged that complainant's title was good, that claim 1 of the first patent was void, that claim 2 of the first patent and the four claims of the second patent were valid, and that defendants' device infringed all the valid claims; and it decreed that defendants, as to the future, should perpetually refrain from infringing the second patent, and as to the past should pay complainant all damages suffered by reason of the infringement of the claims held valid in both patents, the amount of such damages to be determined thereafter on a master's report. A decree of this character in a patent suit is customarily called interlocutory. If it were in truth final, as was the decree in the land suit of *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, complainant's right to a cross-appeal could not be

successfully questioned. If it were in truth interlocutory in the sense and to the extent that the decree awarding the temporary injunction was interlocutory, complainant's lack of right to a cross-appeal would be indisputable. But whether the calling of a decree that adjudges title, validity and invalidity of claims, infringement, and liability therefor, and awards a perpetual injunction, a temporary decree that is to stand only until a final decree on the merits can be rendered, is or is not a misnomer, a virtual contradiction involving both inaccuracy of terminology and misapprehension of substance (as was debated at large by Judges Showalter and Woods pro and con in *Standard Elevator Co. v. Crane Elevator Co.*, 76 Fed. 767, 22 C. C. A. 549), is a question that became moot, we think, by the Supreme Court's decision in *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, wherein it was held that on an appeal from a decree like this the appellate tribunal, with all the pleadings and all the evidence before it for an independent hearing, had "authority to consider and decide the case upon its merits," to the end that the parties might be saved the time, trouble, and expense that would be involved in carrying on further litigation in the Circuit Court in a way that was contrary to the views of the Court of Appeals on the ultimate merits. Here defendants present a complete record, containing all the pleadings and proofs. They do not attack merely the injunction respecting the second patent, and that on the ground that it was temporary and improvidently issued; but they contend that, as to the five claims of the two patents held valid, the ultimate merits of the questions of validity and infringement are in their favor. If we were not authorized now to consider and decide the merits with respect to claim 1 of the first patent, which was included in the pleadings and proofs and held invalid, the result would be that the Circuit Court would proceed with the accounting on a basis that does not accord with our views of the ultimate merits, and a new accounting would have to be taken after a subsequent appeal to this court. Motion overruled.

The first Miller patent. Miller's idea was this: It would be a good thing to have a trestle whose four legs are inseparably pivoted and coupled in such a manner that they may be folded into a compact form, convenient for a workman to carry from place to place. The prior art discloses quite a variety of trestles and tables. Some have the legs separately attached to the top; some have two of the legs attached to the top and coupled to each other in a way to permit the pair to be folded under the top; some have detachable legs coupled in independent pairs. None has the four legs detachable from the top and pivotally coupled in such a way that the closing together of one pair closes the other and brings the four into one compact, connected bundle. Nor was Miller's result accomplished by substituting one man's thought as a part in another man's scheme. The device was wholly novel, performing a function never before performed, achieving at once an extensive demand and a successful use; and the invention, small in character though it seem, is therefore entitled to a primary rank. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 561, 18 Sup. Ct. 707, 42 L. Ed. 1136.

The argument against the validity of claim 1 is this, as we understand it: A trestle, according to the lexicographers, is a support "consisting of three or four legs secured to a top piece." The claim calls for "a trestle consisting of four legs coupled and pivoted as shown." This is not a trestle; the legs cannot be used as a trestle without a top piece; the claim, by defining a trestle as consisting of four legs, expressly excludes a top piece, and is therefore void, because it calls for an inoperative device. But if, by any possibility, a top piece can be inferred, it is only the one shown in the drawing and description and covered by claim 2; and claim 1 is therefore void as a duplication.

It will be observed that claim 2 calls for the combination of "a trestle consisting of two pairs of legs pivoted together as shown," and "a support having mortises on its sides and near its ends," being the support shown in the drawing and description. In both claims it is evident that Miller differed with Webster and others as to the definition of a trestle. But for all that he should not be deprived of protection in his invention, any more than for mistakes in orthography provided he did not misspell beyond recognition of the sense. In these claims we think the meaning is as recognizable as if they had read: (1) In a trestle, four legs pivoted and coupled as shown; (2) a trestle consisting of the combination of the four legs of claim 1 and the particular top piece as shown.

Thus construed, and in the light of the prior art as stated, claim 2 is unquestionably good. Claim 1 is also good, unless it would be impossible for a skilled mechanic to use the four legs in connection with any known top piece except Miller's. The legs will not stand alone and support any considerable weight. The crossed legs will spread unless (to revert to Webster) they be "secured to a top piece." A skilled mechanic could certainly secure the legs to any kind of a top piece by nails or screws, and, if the top piece were not then detachable with sufficient readiness to suit him, he might use holes in or stops upon the top piece. In this aspect of it, the validity of claim 1 is fully sustained, we believe, by the decisions in Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Deering v. Winona Harvester Works, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153; Hancock Inspirator Co. v. Jenks (C. C.) 21 Fed. 911; Rapid Service Store Ry. Co. v. Taylor (C. C.) 43 Fed. 251; Western Telephone Mfg. Co. v. American Electric Telephone Co. (C. C. A.) 131 Fed. 75.

The second Miller patent is for improvements upon the first. The new idea was to adopt a top piece of such a form, with relation to the legs of the first patent, that it could be permanently and pivotally secured to the legs in a way that would make the whole trestle a unit foldable into a compact, connected bundle. In carrying out the idea it was found necessary to modify the coupling of the legs of the first patent. Just as the first patent showed a new and distinct step beyond anything in the prior art, so the second, we think, evinced progress beyond the first. And in view of the utility and success of the improvement we are unwilling to deny to it the quality of invention.

Infringement. The similarities are so obtrusive that it is difficult to see and appreciate the alleged differences. The purpose is the same.

The result is the same. To obtain the result (so far as Miller went), defendants employ Miller's means identically in the main, substantially in minors. The differences that are appreciable relate to improvements upon Miller's device, which are claimed in Howard's patent. Improvement, of course, is no justification of a trespass.

On the appeal the decree is affirmed; on the cross-appeal the decree is reversed, with instructions to proceed consentaneously hereto.

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WESTERN ELECTRIC CO. v. ANTHRACITE TELEPHONE CO. et al.

(Circuit Court of Appeals, Third Circuit. December 9, 1904.)

No. 1.

1. PATENTS—INVENTION—TELEPHONE APPARATUS.

The Carty patent, No. 449,106, for improvements in telephone circuits and apparatus, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Middle District of Pennsylvania.

Edward Rector and George P. Barton, for appellant.

R. S. Taylor and Chas. C. Bulkley, for appellees.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. This was a suit in equity for alleged infringement by the defendants below (appellees here) of patent No. 449,106, dated March 31, 1891, issued to John J. Carty for telephone circuit and apparatus. The court below decided that this patent is invalid for lack of patentable invention, and, in our opinion, that decision was correct. This conclusion has been reached by all of us after careful examination of the record, and attentive consideration of the arguments of counsel. But they need not be referred to, for the opinion which was filed by the learned judges of the Circuit Court adequately deals with the case. Upon that opinion (113 Fed. 834), the decree dismissing the bill of complaint is affirmed.

## ORMSBY v. CONNORS et al.

(Circuit Court, D. Massachusetts. November 10, 1904.)

No. 1,459.

## 1. PATENTS—ACTION FOR INFRINGEMENT—TITLE TO SUPPORT.

The owner of a patent made an absolute assignment of the same, which was duly recorded. At the same time the assignee executed a paper showing that the assignment was as collateral security for a debt, and agreeing that the assignor should retain the exclusive right to manufacture and sell under the patent, and to license others thereunder. This agreement was not recorded. Subsequently the debt was paid, and a reassignment made, which expressly covered the sole and exclusive right to all causes of action for past infringements. *Held*, that the original assignment and the paper executed at the same time constituted a single contract, under which the assignor retained the right to sue at law for infringement of the patent; the fact that the agreement was not recorded being immaterial as against this infringer.

At Law.

Norman F. Hesseltine and Amos W. Shepard, for complainant.

Bernard D. O'Connell, George H. Maxwell, and H. P. Harriman, for defendants.

PUTNAM, Circuit Judge. This is a suit at common law, alleging infringement of a patent issued for an invention. The question now before the court is whether the plaintiff has made sufficient title to justify his proceeding by a common-law suit. This rests upon three papers: First, there is an absolute assignment from the plaintiff to a stranger to this litigation, bearing date of June 2, 1902, which was duly and seasonably recorded. Another paper is an agreement given back to the plaintiff, dated May 29, 1902, showing that the assignment was taken merely as collateral security for an indebtedness. This paper was executed at the same time as the assignment, but was not recorded. It contained an agreement that the plaintiff should have the sole and exclusive right to manufacture and sell under the letters patent while held as collateral security, and that, while so held, no one was to make use of the patented invention except under a license given by him. Subsequently, on May 28, 1903, and before this suit was commenced, the plaintiff discharged his indebtedness, and a reassignment was made to him, which reassignment expressly covered the sole and exclusive right to all causes of action for past infringements, and for the damages and profits arising therefrom.

As the paper of May 29, 1902, was executed simultaneously with the assignment of June, 1902, notwithstanding the discrepancy in dates, the two make one contract, and constitute one transaction. On examination of the statute, we are satisfied that the fact that the paper of May 29, 1902, was not recorded is of no consequence in this case. This defendant does not come within the provisions of the statute affecting those who are intended to be protected thereby. On the other hand, it is clearly settled, in view of the statute provisions in regard to the assignment of patents, that any transfer of an interest which is to be regarded in a court of common law must be in writing. A mere verbal

transfer may be good in a court of equity; an agreement for transfer may be good in such a court; but in a suit at common law any transfer must be by writing, though it need not be recorded as against an alleged infringement. Therefore we have here two papers which are complete so far as the defendant is concerned. The result of these two papers is that Ormsby transferred the patent as collateral security, or as in the way of a mortgage; it makes no difference which, so far as we are concerned. The rights of parties are exactly the same in one aspect as the other. But the transfer was not in any sense a clean transfer, because Ormsby reserved the rents and profits, so to speak. The income thus reserved, if this had been ordinary personal property or real estate, would have given him possession for the time being; that is, a right to the rents and profits, the income, the use—the present use, whatever it might have been. We begin with *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, especially pages 258, 260, 261, 138 U. S., pages 336, 337, 11 Sup. Ct., 34 L. Ed. 923, which was a case of an assignment of a patent as security for a debt. On page 258, 138 U. S., page 336, 11 Sup. Ct., 34 L. Ed. 923, the opinion states that a mortgage of personal property differs from a sale, which is undoubtedly correct. It also says that by a mortgage the whole title is transferred to the mortgagee as security for debt. On page 260, 138 U. S., page 337, 11 Sup. Ct., 34 L. Ed. 923, it makes a further observation:

"And when the right of possession, as well as the general right of property, is in the mortgagee, the suit must be brought by the mortgagee, and not by the mortgagor, or any one claiming under a subsequent conveyance from him."

Yet usually, when a mortgage of personal property has been made, and injury is done the property, either the mortgagor or the mortgagee may sue in trover, trespass, replevin, or any other form necessary to recover the property or its value. If the possession is actually left with the mortgagor, he may sue for a mere trespass against the possession, as well as bring a suit for the corpus of the property; and, where the suit is for the corpus, the mortgagor may recover the entire value of the property unless the mortgagee intervenes. The law is the same as in the case of a common carrier or pledgee, or under any other condition where the possession of property is held by the equitable owner thereof. It is the undoubted rule of law, and it is so stated by Jones on *Chattel Mortgages* (4th Ed.) § 440.

On page 261 of *Waterman v. Mackenzie*, 138 U. S., 11 Sup. Ct. 337, 34 L. Ed. 923, there appears the following:

"The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this."

But emphasis must be laid upon the words "whole title," and these words must be understood with what we have referred to, appearing on page 260, where the opinion says that the right of suit is in the mortgagee alone when he, the mortgagee, has the right of possession as well as a general right of property. Connecting the two together, there is no difficulty in understanding what the opinion intends. In the case of a mortgage of a stock of goods, or cattle on a farm, the mort-



gagor generally remains in possession. Therefore the expression cited from page 260 would not then apply, because, in that case, the mortgagee does not have the whole title, but has the mere fee, and the mortgagor retains the profits. As the mortgagee does not then have possession of the mortgaged property, the mortgagor is not barred from bringing or maintaining a suit in reference thereto. Ordinarily, however, the assignment of a patent, or of any other thing which lies in paper, and of which there can be no physical possession, carries the "whole title," as stated in the opinion which we have in hand. It ordinarily leaves no possession, or possible possession, in the mortgagor, when, according to the understanding between the parties, the assignor is in fact a mortgagor. But here, in express terms, there is left to the mortgagor, and the mortgagor retains, the right to the income, the rents, and profits. Therefore this case is distinguished from the line of reasoning in *Waterman v. Mackenzie*, and is not controlled by the conclusion therein reached. Consequently it falls within the common rule as to rights of action in behalf of a mortgagor which we have explained.

We must add that the possible embarrassment which might arise from any intervention of the mortgagee, or assignee, or from any suit brought by the mortgagee, or assignee, is removed in this case, because, by the instrument of May, 1903, all rights of the mortgagee in that particular are waived. This is the only consideration we give to that paper for present purposes. It is as if the mortgagee had said: "You may recover in your suit all that anybody can recover; you may recover the rents, incomes, profits, damages, which you would be entitled to recover in the event I did not bring any suit in my own behalf, and I assure you that I will not intervene, nor bring any suit in my own behalf." That, of course, makes the defendant safe with reference to any judgment which may be obtained in the present suit.

We hold, therefore, that, so far as the question of title is concerned, this suit may be maintained.

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#### LATTIMORE MFG. CO. v. JONES et al.

(Circuit Court, M. D. Pennsylvania. October 12, 1904.)

1. PATENTS—INFRINGEMENT—MINER'S LAMP HOLDER.

The Lattimore patent, No. 415,720, for a lantern holder, to be attached to a miner's cap, claim 2, which is general in terms, is void for lack of invention, in view of the prior art. Claim 1 is valid and entitled to a limited range of equivalents. Such claim also *held* infringed.

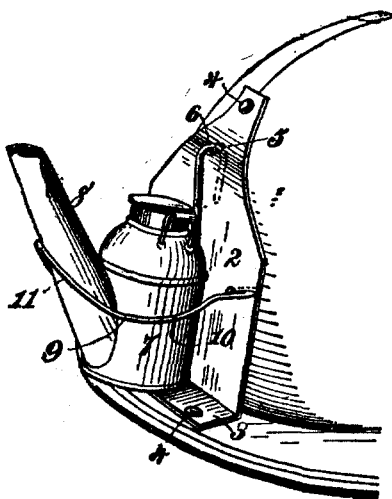
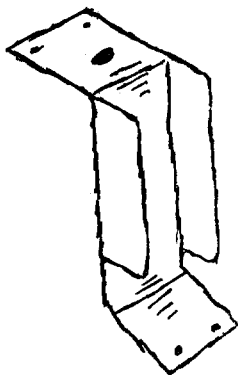
2. SAME.

One who furnishes money to be employed in the manufacture of an infringing article, and acts as agent for its sale, may be joined with the manufacturer as a defendant in a suit for the infringement.

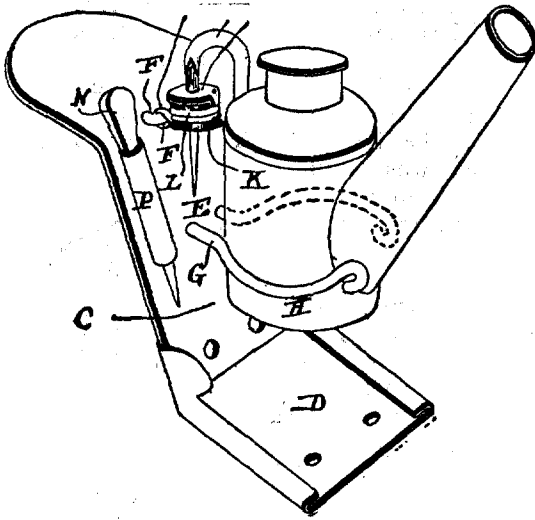
In Equity. Suit for infringement of letters patent No. 415,720 for a lantern holder, granted to Walter A. Lattimore, November 26, 1889. On final hearing.

E. Hayward Fairbanks and Charles E. Breckons, for complainant.  
Robert Watson and Beers & Grambs, for defendants.

ARCHBALD, District Judge. The patent held by the complainants was issued to W. A. Lattimore, November 26, 1889, and while it is one of limited range, and not very great invention, it does not seem to have been directly anticipated by anything found in the prior art. It covers a device to be attached to the caps of those who work in the mines, to hold their lamps. These lamps are small tin receptacles, shaped like diminutive coffee pots, in which oil is burned, the wick coming out of the spout, and the handle being a stout recurved hook by means of which when the men are at work the lamps are fastened for convenience on their caps or other headgear. The crudest and one of the earliest forms of holders was a tapering piece of leather extending from near the peak of the hat or cap to the rim or visor, and swelling outwardly between these points, with a hole about midway to receive the hook of the lamp. Following this was one cut out of a single piece of tin, the foot of which extended out over the visor, and the top of which was bent back towards the cap; while the intermediate front piece against which the body of the lamp hung had wings or side pieces projecting forward to prevent the lamp from shifting sideways, the whole device being so fashioned that it stood out from the front of the cap when in place. This form of holder is shown to have been in use as early as 1883, and, according to the evidence, has continued in service more or less ever since. The Lorsch patent (1885) was next, and is patterned not a little after these preceding devices. It consisted of a plate of metal curving outwardly and downwards, over the front of the hat or cap, with a flange or foot piece resting on the rim or visor, the handle of the lamp being hooked into a perforation at the top, and the lamp itself being set in an encircling wire frame, projecting forward from the plate, which prevented it from jarring loose or swaying from side to side. The Rockwell (September, 1889) followed next, with an attachment the upper part of which was of rigid leather, secured to the top of the cap, and the lower part a metal plate, resting upon and fastened to the visor; forward from the



leather and hinged upon it, being a rubber or leather block, carrying an eye, into which the lamp was hooked, the body of the lamp being engaged by wire arms extending forward, below. The declared purpose of the



purpose of the hinge was to let the lamp swing outwardly when the miner stooped, and of the arms to prevent lateral movement, while allowing sufficient forward movement to the lamp to accommodate it at all times to the position of the wearer. It is charged that this, like the Lorsch, was a mere paper patent, never having gone into practical use, and, if the arms encircled the lamp in the way depicted in the drawings, the operation assigned to them is so doubtful

that such may well have been the case. But it is not important; for, without stopping to discuss or distinguish this or either of the references, it is sufficient to say of them that, along with the device in suit, they simply represent different attempted methods of accomplishing the same result. The defendants' device is another, and the only question in the case is whether, having regard to the limited range of equivalents to which the patent in suit is entitled as shown by this review of the art, the particular form covered by it has been appropriated by them as charged.

The first two claims are relied upon to make out infringement, as follows:

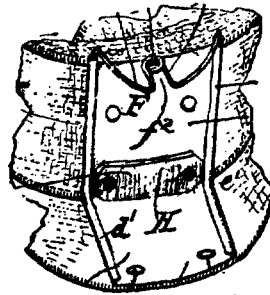
"(1) A lantern holder consisting of the metallic base piece, the front piece, and the forwardly projecting top piece, having an eye for the inner end of the lantern hook, and a slot or socket for the upper part or shank of the lantern hook. (2) The combination, substantially as hereinbefore set forth, in a lantern holder of the metallic front piece, the metallic base piece, the strip of soft material secured to the front piece near the bottom thereof, and the top piece to which the lantern hook is attached."

The only thing which there is to distinguish the generalities of the second claim from preceding devices is the strip of soft material secured to the front piece near the bottom, the purpose of which, according to the specifications, is to hold the lamp away from the metal, and thus prevent the rattling which would otherwise occur. This is too ordinary and obvious an expedient, however, to be accepted as inventive, and, in addition, is so entirely to one side of the general scheme of the bracket as to stand like the wick-pick holder in the third claim, as a

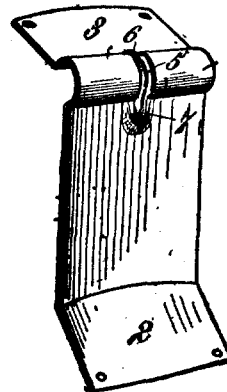
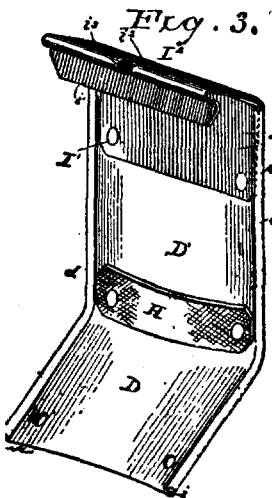
mere aggregated convenience. It is also a question whether the fibrous material with which the defendants' holder is faced can be regarded as soft, within the meaning of the patent, even though it has a deadening effect. But without passing upon that, for the reasons given I am satisfied that the claim cannot be sustained.

The complainants' case, therefore, depends on the other claim, the predominant and distinguishing feature of which is the forwardly projecting top piece, having an eye for the inner end of the lamp hook, and a slot or socket for the upper part or shank of the same. This claim was considered and sustained by Judge Woolson in the Southern District of Iowa, in the unreported case of *Lattimore v. Hardsocg*, the infringing holder there passed upon having been manufactured under the *Eisenbeis & Simmons* patent. As a decision in favor of the invention, it has its value; but its only importance on the question of infringement is to show, if that, indeed, is necessary, that the device is entitled to a certain range of equivalents.

There are several forms, as indicated by the specifications, into which the complainants' holder may be cast. In one of these, the forwardly projecting top piece consists of a wire frame having a central loop or eye, with arms or brackets extending beyond it on either side, so as to make a socket or slot to receive and guide the shank of the lamp

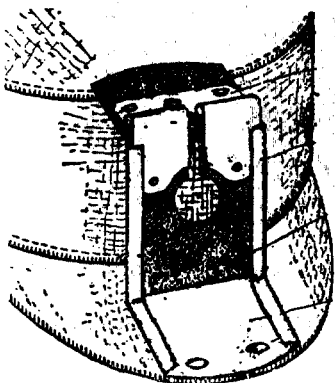
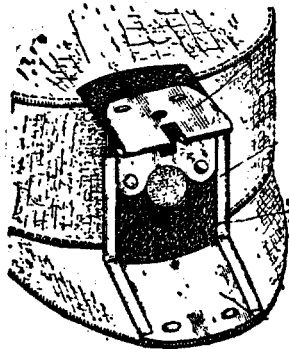


hook; while in another [Fig. 3] it is composed of a solid plate of metal carrying an eye, and having a slit cut in its front edge. The *Hardsocg* Case may be regarded as showing another possibility, the



[Hardsocg]

projection there being a transverse roll or bead, intersected by a groove, having a perforation at its inner end, adapted to receive the hook of the lamp and hold it steady. In the course of their experience the complainants have evolved another, shown opposite. The top piece here is jointly made up of sheet metal and fibrous material, the former being so bent at the front edge as to make a forwardly projecting ledge, in the center of which is a slit, and directly back of that an eye, thus in express terms realizing the claim. It is this particular form that the defendants are charged with having imitated, as shown by the accompanying diagram. With



Defendants' device.

one possible exception, this has all the features of the complainants' holder, and so closely copies it in unpatented details as to warrant the charge that there has been a direct attempt to steal the complainants' trade. The distinction contended for by the defendants is that the top piece in their holder projects upwardly and not forwardly, and the question is whether this is sufficient to relieve. Functionally considered, the top piece in each is the same, the difference being merely one of form and possible degree of effectiveness. The slot in the upwardly projecting edge of the defendants' top piece may accommodate itself more completely to the various positions of the miner's head, but in mode of operation it does not differ from that of the complainants'. The contention that the top piece merely supports the lamp, lateral movement being prevented by the front plate, cannot be sustained. Not only is this shown by practical demonstration not to be the case, but it is not the position taken in the patent to the defendant Jones, under which it is supposed to be constructed. Speaking of the action when the cap of the miner is tilted forward it is said in the specifications: "The lamp being suspended between the narrow bridge piece, \*, between the slot and the perforation, \*\*\*, the walls of the slot on either side of the bend, \*, prevent the hook from swinging or turning sideways." The purpose and effect of the slot and its protruding edges being the same in both devices, they must be held to be the legal as they are the mechanical equivalents of each other, regardless of the fact that the one is bent up and the other out. It would be absurd if the patent could be evaded by any such simple variance.

In this comparison it is assumed that, in describing the top piece as projecting forward, it was meant that it should project forward from the front piece to which it is attached. But except in the special form shown in Fig. 3, covered by the fourth claim (in which, by the way, the top piece, according to the specifications, is to project upwardly as well as forwardly), the terms of the patent are equally met by a top piece projecting forward from the front of the cap. The cap, like the lamp, is an implied element, both uniting to form the situation which is to be met. And except where the shank of the handle is given some such absurd, or, as Mr. Jones calls it, inadvertent, form, shown in the drawings of his patent, the cup of the lamp being larger at the bottom than the top, the eye or socket in which it swings on its hook must be forward of the cap, in order that it shall be held in an upright position and the oil not spilled when the head of the miner is erect. This is observed in the original strap and tin holders, described above, after which in a measure all that have followed are patterned, and is an essential condition of every such device. In that of the complainants', when the front piece and base piece are set close against the cap, the top piece projects outwardly from both. But, as it is stated in the specifications, the top piece, as an alternative, may be attached directly to the cap, or to the old-fashioned leather holder, without any front piece or base; in which case, when spoken of as projecting forward, this can only be true of it with relation to the cap front from which it protrudes. So in the form of holder constructed by the defendants, the front piece sets out, away from the face of the cap, which the top piece is extended back to meet. With reference to the cap, therefore, the top piece, the same as in other holders, projects forwardly, as it must to make an effective holder, and thus fulfills the patent literally. That there is in addition an upwardly bent edge, in line with the front piece, does not change the character of the top piece as outwardly projecting from the front of the cap. Either taking the patent, therefore, as the defendants would have it read, or construing it in the way which is now suggested, infringement is made out.

It is conceded that the bill should be dismissed as to the defendant Adolph Blau, who has no connection with the principal defendant Jones—trading as the Luzerne Cap Company—although he at one time had it in contemplation. It is contended that it should be also as to Casper, of which the same is true as with regard to Blau. But while Casper did not go into the company, he advanced money to Jones to start it, the known object of which was to manufacture and sell these holders, and the firm of Charles Casper's Sons, of which he is a member, have acted as agents of Jones for the sale of holders and caps from the outstart. While, therefore, his responsibility may differ in extent from that of Jones, he cannot escape liability altogether, as he asks.

Let a decree be entered sustaining the first claim of the patent, and finding it infringed by the defendants Jones and Casper, with the usual reference to a master to take an account.

**LATTIMORE MFG. CO. v. C. & T. SUPPLY CO. et al.**

(Circuit Court, W. D. Pennsylvania. September 20, 1904.)

No. 34.

**1. PATENTS—INFRINGEMENT.**

Patent No. 415,720, for a lantern holder, considered, and *held infringed*, as to claim 1 thereof, previously held valid.

Sur Application for Preliminary Injunction.

E. Hayward Fairbanks and J. M. Nesbitt, for complainant.

C. M. Clarke, for respondents.

BUFFINGTON, District Judge. This is an application for a preliminary injunction sur claims 1 and 2 of patent No. 415,720, of November 26, 1889, for a lantern holder, issued to Walter A. Lattimore. The first claim of the patent was held valid by the Circuit Court for the Southern District of Iowa in the case of *Lattimore v. Hardsocg.* See case in 121 Fed. 986, 58 C. C. A. 327, for a report of one feature of the 'cause. The only question before us is that of infringement. This, to our minds, is clear as to the first claim. We find all the elements thereof present in the infringing device. The respondents have added some possibly improved additional elements, but their device clearly embodies each member of claim 1, and they co-operate in substantially the same way to accomplish the same result. As claim 2 has never been adjudged valid, and as the prayer for present relief is sufficiently answered by an injunction on claim 1, we will express at the present time no opinion as to claim 2.

Let an injunction order sur claim 1 be drawn.

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**In re A. L. ROBERTSHAW MFG. CO.**

(District Court, E. D. Pennsylvania. December 5, 1904.)

No. 1,444.

**1. FRAUDULENT CONVEYANCES—TRANSFER OF PROPERTY—PREFERENCE.**

Where a debtor conveyed his property to certain creditors, with intent to pay debts owing to them, the fact that such transfer postponed other creditors, as the debtor intended, and that the creditor aided in such intent as well as to protect himself, did not invalidate the transaction, in the absence of a fraudulent design.

**2. SAME—EVIDENCE.**

A debtor being in failing circumstances, his creditors called a meeting, and agreed on a plan for the organization of a corporation to be managed by a committee of the creditors for the purpose of paying the claims. The debtor transferred all his assets, which were appraised at only one-half the amount of the debts, to such corporation; it being agreed that all the debts under \$100 should be first paid in full, and that the balance should be paid from the earnings of the corporation. The debtor was employed to manage the business of the corporation on a salary, and it was agreed that, in case the corporation should be wound up, any surplus of assets should be paid to him. *Held*, that such transfer was not fraudulent as against the debtor's nonparticipating creditors.

**3. SAME--BANKRUPTCY.**

Where a debtor in failing circumstances transferred his property to a corporation formed for the purpose of operating the same at the instance of the creditors, and thereafter such corporation was declared a bankrupt, but no proceedings in bankruptcy were ever instituted against the debtor individually, the transfer was not in fraud of the bankrupt law.

**4. SAME--SUBSEQUENT AGREEMENTS.**

An agreement between debtor and creditor, made after the assignment, that, if the debtor could sell the property for more than a certain amount, he could have the difference, did not invalidate the transfer as against creditors.

On Motion to Confirm Referee's Report.

John Dickey, Jr., for trustee.

Alexander Simpson, Jr., for attaching creditor.

HOLLAND, District Judge. This is a motion by petitioner for the confirmation of the report of a referee in bankruptcy, in which report the referee recommends that a rule for judgment against the bankrupt's estate, garnishee, be made absolute, and the trustee in bankruptcy, Smith Longbottom, be directed to pay out of the fund in his hands arising from the sale of property attached the full amount of the debt, interest, and costs of said attachment.

The material facts involved in a proper disposition of this motion are as follows:

A. L. Robertshaw, a manufacturer, became embarrassed in 1901, and in consequence there was a meeting of a number of his creditors, at which meeting a committee was chosen, consisting of Louis A. Levin, Smith Longbottom, A. T. Eastwick, Henry T. Kent, and Charles H. Salmon. This committee of five, together with others of the creditors, devised a plan of settlement with A. L. Robertshaw, to which he assented, and which was embodied in an agreement dated September 11, 1901, by which he was to turn over all his property to a corporation to be formed; amounting, according to the appraised value, to \$20,000 in machinery and \$20,000 in other assets, making a total of \$40,000. Under the provisions of this agreement, all the creditors of A. L. Robertshaw having claims less than \$100 were to be paid in full. All the other creditors having claims exceeding \$100, amounting to a total of about \$80,000, excepting the Imperial Woolen Company, signed this agreement, and the payment of their claims was provided for as follows: All the creditors with claims over \$100, unsecured, are parties of the first part; other creditors with claims over \$100, partly secured, are parties of the second part; A. L. Robertshaw, party of the third part; and the committee of five, above named, party of the fourth part. Following this is a recital that the "third party is not able to pay his debts in full to the parties of the first and second parts at the present time, and the parties to the agreement being desirous of adjusting their claims against the third party, this agreement is made." Under its terms Robertshaw agrees to transfer to the committee of creditors "all cash, book debts, stock in hand, merchandise, machinery and fixtures, actions, right of action, claims and demands, and all other personal and real property which



he, the said third party, now possesses or to which he may be entitled," who in turn agree to organize a corporation, to be known as the A. L. Robertshaw Manufacturing Company, and transfer this property to this corporation for the purpose of conducting the same business in which Robertshaw was engaged. This corporation was organized under the laws of Delaware on October 3, 1901, with a capital stock of \$40,000, and the property of Robertshaw, valued at \$40,000, was transferred to it. The stock of the corporation was issued to the committee of creditors, who issued certificates to the creditors for the amount of their indebtedness. These certificates were to be paid out of the dividends as earned—first, to those who would take the smallest percentage for their claim, and, failing any offers of a reduction in the claim of any creditor, the dividends to be divided pro rata until the payment of the claim in full, without interest, was made. In case the committee concluded to wind up the concern, the assets were to be distributed to the creditors to the full amount of their respective claims, if sufficient assets existed; the surplus to be paid to Robertshaw.

At the request of the creditors, Robertshaw agreed to conduct the business under the supervision of the committee, at a reasonable salary to be fixed by them, and it was stipulated that he at any time should be permitted to purchase the entire plant at a price "not less than forty per cent. of the face value of his whole indebtedness." This plan of payment was devised by the creditors and the committee, and subsequently agreed to by Robertshaw, upon its being represented to him that it was the most feasible way of paying his obligations and protecting his creditors; and it is conceded that it was the intention that all creditors should be included, as the petitioner's name appeared in the agreement as one of the parties of the first part, although it did not sign, for the reason stated by the president, James Dobson, when Mr. Joseph H. Truitt called upon him, prior to the transfer of the property, that "he would have nothing to do with a joint-stock company, as Mr. Robertshaw had already failed previously, and he proposed to take just what there was in it, whatever it would be." The creditors and their committee proceeded with the execution of the agreement and their plan of payment under the impression that there would be no objection on the part of the Imperial Woolen Company, petitioner. The A. L. Robertshaw Manufacturing Company began business in October of 1901, with Robertshaw as manager.

On January 23, 1902, the Imperial Woolen Company brought suit in the common pleas of Philadelphia county against A. L. Robertshaw for the amount of their claim against him, and judgment was obtained March 21, 1902, for want of an affidavit of defense. On April 12, 1902, damages were assessed in the amount of \$1,723.16, and on the same day an attachment sur judgment was issued, and served upon the A. L. Robertshaw Manufacturing Company, as garnishee, April 14, 1902. Interrogatories were filed in the attachment proceedings, and proceedings were in progress for the purpose of obtaining judgment. In the meantime the business conducted by the A. L. Robertshaw Manufacturing Company was unsuccessful, and on September 12, 1902, an involuntary petition in bankruptcy was filed. Smith Longbottom was appointed receiver on September 22, 1902, and, on the

same day this court entered a restraining order against the Imperial Woolen Company, this petitioner, restraining it from proceeding further with the attachment proceedings in the common pleas court of Philadelphia against the A. L. Robertshaw Manufacturing Company, garnishee. October 9, 1902, A. L. Robertshaw Manufacturing Company was adjudicated a bankrupt; and on November 14, 1902, Smith Longbottom was appointed trustee, who on the 24th of the same month was ordered by this court to sell all the property of the bankrupt, "discharged from all liens, attachments, and incumbrances," and "directing that these liens be charged upon the fund until their validity is determined." The property was sold by the trustee on the 9th day of December, 1902, and \$15,000 realized, which is now in the hands of the trustee.

On April 15, 1903, after argument, Judge McPherson, of this court, refused to vacate the restraining order made September 22, 1902, and on May 25, 1903, this petitioner presented a petition to this court, upon which a rule was granted on the trustee to show cause why the claim of the petitioner, to wit, \$1,723.16, should not be paid out of the fund in the hands of the trustee in bankruptcy. The matter was referred to a referee, who filed a report in this court May 20, 1904, wherein he holds, first, that the transfer of property by A. L. Robertshaw to the A. L. Robertshaw Manufacturing Company in payment of his debts under the agreement was fraudulent as to the petitioning creditor; that the attachment sur judgment, having been issued against the A. L. Robertshaw Manufacturing Company more than four months prior to the filing of the involuntary petition in bankruptcy, is a valid lien upon the bankrupt's assets, and should be paid in full out of the proceeds in the hands of the trustee, and recommends the payment of the claim out of the bankrupt's estate.

The first question to be considered is whether or not the position taken by the referee, that the transfer of the property of A. L. Robertshaw to the A. L. Robertshaw Manufacturing Company, under the circumstances, is a fraud, in law, as to the petitioner, a creditor not assenting to this transfer.

It is well settled in Pennsylvania that an insolvent debtor may prefer one or more creditors, either by judgment, deed, or in any mode, except by assignment in trust, if his motive be an honest intent to pay the preferred debts, though the unpreferred creditors be delayed or wholly prevented from obtaining payment; and, where the proceeds of the property were intended by both parties to be applied to the payment of particular debts of the transferor or vendor, there could be no inference from such sale or transfer that it was intended to delay or defraud unpreferred creditors. Though they were excluded by the preference of those particular creditors, so long as it is done without fraudulent design, and is a present application of the transferor's property to the payment of his debts, it is lawful. *York County Bank v. Carter*, 38 Pa. 446, 80 Am. Dec. 494. The Supreme Court of Pennsylvania, since the decision in *York County Bank v. Carter*, *supra*, has held that, where a creditor gives a judgment or makes a conveyance or payment in any form to secure an actual debt, the transaction will be valid against

other creditors, although he knew (1) that the effect would be to postpone others; (2) that the debtor intended it to have that effect; and (3) although the creditor did it to aid that intent, as well as to protect himself. The criterion is not the effect, but the fraudulent intent. Without that the transaction cannot be impeached. *Shibler v. Hartley*, 201 Pa. 286, 50 Atl. 950, 88 Am. St. Rep. 811; *Werner v. Zierfuss*, 162 Pa. 360, 29 Atl. 737. This principle is upheld by the United States Supreme Court in *Clarke v. White*, 37 U. S. 178, 9 L. Ed. 1046.

There can be no question but that this transfer was made for the payment of existing indebtedness, and honestly made for that purpose; nor is there any evidence of fraud or fraudulent intent arising from inadequacy in price of the property, because the indebtedness of those joining in the agreement, and exclusive of those claims under \$100, amounts to twice the appraised value of the property transferred, and the property transferred consists partly of machinery, which has been in use, and book accounts.

I am unable to assent to the propositions contended for on the part of the petitioner, that the transfer is void as to the nonassenting creditors, for the reasons (1) that it is not in the interest of the creditors, but an agreement in the interest of the debtor; (2) that it provides for the return of property to Robertshaw before his debts shall have been paid in full; (3) that it is in fraud of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

The whole transaction, from its inception, shows that the transfer was in the interest of creditors. Robertshaw did not devise it or suggest it, but assented to it as the best method of paying his honest indebtedness. His employment was for the advantage of the creditors, whose claims he was honestly endeavoring to liquidate, and he contracted to work for them for three years. There was a present appropriation of all his property for the payment of the creditors he preferred. The amount of property he transferred was much less than their claim, and the only hope that he could have for any advantage was what he would contribute in the future toward the development of that property, first, for the further enhancement of it, in order that the deficiency in his indebtedness might be liquidated; and then all over and above that which his industry could produce, it was agreed, should be returned to him. Certainly this is an honest effort to pay an honest indebtedness.

It is evident that the property transferred could only pay a small percentage of his indebtedness, and it was the purpose of the creditors, no doubt, in employing Robertshaw, and giving him an option to purchase the property, and offering to return it, should he, through his industry and effort, succeed in making the enterprise a success, and thereby paying off his creditors, to stimulate him to extra exertion and industry in the conduct of the business committed to his management.

It is plain that the interest Robertshaw has in any surplus is of no value unless he makes the enterprise a success. There can be no surplus in the property transferred, as that was only about one-half of the amount of the indebtedness for which it was transferred, so that

any advantage or interest he could claim therein would be only such as he would create in the future in connection with them through his industry; and a part of this was to be appropriated to these creditors, as the agreement called for a payment of a greater per cent. of their claims than the appraised value of the property transferred would make, so that the increased value could only result from Robertshaw's labor. This he was induced to contract for with the evident hope that he could further aid his creditors, and probably earn something for himself. Is there any fact or circumstance in all this from which an inference of fraud can be drawn? It cannot arise from the fact of his employment as manager of the Robertshaw Manufacturing Company, for this was done for the benefit of the creditors, in order that they might be able to conduct the business successfully. *Cameron v. Montgomery*, 15 Serg. & R. 128; *Smith v. Craft* (C. C.) 17 Fed. 705; *Id.*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267. This question is elaborately considered in a note to *Feder v. Ervin*, 36 L. R. A. 356. See, also, note to *Rice v. Wood*, 31 L. R. A. 633. Nor is there anything inconsistent with an honest purpose, either in the debtor or creditors, in the fact that Robertshaw may purchase the property in the future, or that he was to have a return of any surplus remaining after payment of indebtedness without interest. The facts and circumstances in the case show all this was done for the benefit of the creditors, as it is plain that the price at which he was allowed to purchase was in excess of the value at the time of the transfer, and there could be no surplus returned after payment of claims without interest, unless Robertshaw, as manager of the business, created that surplus by a successful conduct of the plant after the transfer, as the property transferred was only about 50 per cent. of the claims. Nor can it be said that the transfer and agreement are in fraud of the bankruptcy law, as no proceedings in bankruptcy have ever been instituted against Robertshaw individually.

This case is entirely free from any secret or avowed reservations by which the transferor retains some benefit for himself other than the payment of his debt, found in connection with that class of cases where a transfer of property is held to be a fraud in law, because of such reservation. Where the transaction, as in this case, was open and above board, without any secret reservation, it is not contrary to law. As was said by the court in *McCulloch v. Hutchinson*, 7 Watts, 435, 32 Am. Dec. 776:

"It is the secrecy of this trust—a trust incompatible with that which appears on the face of the transaction—that constitutes its illegality. When the trust openly constitutes a part of a verbal assignment, or is apparent on the face of a written instrument, no harm is done. The creditor is informed of the nature of the conveyance and of the destination of the property, so that he can, with full information, avail himself of his legal remedies for a resort to that surplus. No more is effected by conveyance with such a stipulation on the face of it than the law would annex without it."

In this case the transfer of the goods was held fraudulent and void because of the secret agreement, and for the same reason it was held in the following cases that the transfer of property was fraudulent and void: *Passmore v. Eldridge*, 12 Serg. & R. 198; *Shaffer v. Watkins*, 7 Watts & S. 219; *Bentz v. Rockey*, 69 Pa. 71.

In the case of *Connelly v. Walker*, 45 Pa. 454, a sale of property was held fraudulent because of a secret trust, and in passing upon the question the court used this language:

"This was the question in the cause, and the only fact on which it depended was the secret trust. This being found—and, if proved, it should have been found—it was the duty of the judge to pronounce the transfer fraudulent as to creditors, however fair in itself. And the character of the transfer was determinable altogether by the fact of trust or no trust, and not by the circumstance of Benford's indebtedness to Knable and Sanner, nor by the eventual profits or losses."

The federal courts hold the same view. *Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540.

A stipulation in an agreement for the transfer of property to secure payment of a debt due the transferee that any balance remaining after the payment of the debt shall be paid as the transferror may direct does not render the agreement void as against creditors of the transferror. *Vallance v. Miners' Life Insurance & Trust Co.*, 42 Pa. 441; *Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540. Nor does an agreement between debtor and creditor, made after the assignment, that, if the debtor could sell the property for more than a certain amount, the debtor could have the difference. *Davis v. Hukill*, 173 Pa. 138, 33 Atl. 882. Nor will a parol agreement, made at the time of assignment of property for the payment of debts, that the residue of the proceeds after payment of the debt shall be returned to the assignor, of itself render the transfer fraudulent, so long as the property transferred bears a reasonable proportion to the debt provided for. *Rahn v. McElrath*, 6 Watts, 153.

As this transaction, upon the face of it, convinces me of its fairness, and as this view is sustained by the evidence, the transfer must be sustained, and, as a consequence, the other question involved need not be considered.

The motion to make the recommendation of the referee absolute is refused, and the petition is dismissed.

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#### In re SAMUEL WILDE'S SONS.

(District Court, S. D. New York. December 5, 1904.)

##### 1. INTEREST—USURY—STATE LAWS.

Under the laws of New York, the fact that a larger amount has been paid for the use of money than the legal rate of interest does not establish usury, in the absence of proof of a usurious contract pursuant to which the interest was paid, though the excess was paid as interest.

##### 2. SAME—BANKRUPTCY—CLAIMS—ALLOWANCE—BURDEN OF PROOF.

Where a trustee in bankruptcy contested a claim on the ground of usury, the burden of proof thereof was on him.

##### 3. SAME—EVIDENCE.

In a proceeding for the allowance of a claim against a bankrupt's estate, evidence reviewed, and held insufficient to establish a defense of usury.

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† 2. See *Usury*, vol. 47, Cent. Dig. § 308.

**4. SAME—BROKERS—SERVICES—COMPENSATION.**

Where claimants were note brokers, and, as such, had been engaged for a long period in selling the notes of a bankrupt firm, and loaning money on such notes as collateral before they could be sold, the compensation paid by the firm for such services could not be treated as interest to sustain a defense of usury.

**5. SAME—STATUTES—LOANS OF MONEY—ORAL CONTRACTS.**

Laws N. Y. 1882, p. 290, c. 237, abolishing the usury law in respect to advances of money payable on demand to an amount not less than \$5,000, made on negotiable instruments pledged as collateral security, makes such loans providing for a payment of interest in excess of the legal rate nonusurious, though the agreement is oral.

**6. SAME—COLLATERALS.**

Where note brokers had been engaged in selling notes of a bankrupt firm to a large amount, and on several occasions had made advancements to the firm on such notes before they could be sold, intending to secure reimbursement from such sale, the notes should be treated as collaterals to such advances, within Laws N. Y. 1882, p. 290, c. 237, abolishing the usury law with respect to advances of money payable on demand to an amount not less than \$5,000, made on negotiable instruments pledged as collateral.

**7. SAME—BANKS.**

The national bank act [3 U. S. Comp. St. 1901, pp. 3454-3493] provides that usurious interest cannot be collected, but does not impose a forfeiture of the principal as a penalty for usury. Laws N. Y. 1870, p. 437, c. 163, subjected state bank associations to the same liability in respect to usury as national banks, and Laws 1880, p. 823, c. 567, declares that the former acts should apply to private or individual bankers. *Held*, that the effect of such legislation was to abolish the statutory forfeiture of the principal of usurious loans made by all persons engaged in the business of banking in New York.

**8. SAME.**

Where note brokers adopted as a branch of their business the making of loans to their customers on security of the notes held for sale, they thereby became engaged in the banking business, within Laws N. Y. 1870, p. 437, c. 163, as amended by Laws 1880, p. 823, c. 567, under which bankers are exempt from liability for forfeiture of the principal of usurious loans.

In Bankruptcy.

See 131 Fed. 142.

Morris J. Hirsch (Herbert H. Maass and Charles Grossman, of counsel), for claimants H. C. Bennett & Co.

Smith & Bowman (Henry H. Bowman and Harold H. Bowman, of counsel), for trustee.

HOLT, District Judge. This is a proceeding to review an order of the referee expunging the claim of H. C. Bennett & Co. against the bankrupt estate for \$102,564.59 for money loaned. The trustee contested it on the ground of usury, and the referee sustained the contention. The claimants contend that usury cannot be pleaded in bankruptcy, but it appears to be settled by a decision of the Circuit Court of Appeals that a trustee in bankruptcy can interpose the defense of usury in opposition to a claim filed against the bankrupt estate. *Matter of Kellogg*, 10 Am. Bankr. Rep. 7, 121 Fed. 333, 57 C. C. A. 547. By the decisions in the courts of New York, the fact that a larger amount has been paid for the use of money

than the legal rate of interest, even if the excess is paid as interest, does not establish usury. There must be proof of a usurious contract pursuant to which the interest was paid. *White v. Benjamin*, 138 N. Y. 623, 33 N. E. 1037; *Rosenstein v. Fox*, 150 N. Y. 363, 44 N. E. 1027; *Bosworth v. Kinghorn*, 94 App. Div. 187, 87 N. Y. Supp. 983. The party pleading usury has the burden of proof. The trustee in this case, therefore, in order to maintain his objection, must establish by a preponderance of proof that there was a contract made to take usury. The facts bearing on this question are that prior to 1899 the firm of H. C. Bennett & Co. was composed of Daniel H. Bennett and Hiram C. Bennett; that in 1899 Daniel H. Bennett died, and a new firm was formed, composed of Hiram C. Bennett and Edward H. Bennett, who under the same name have continued the business to the present time. The original business of the firm was that of note brokers. Prior to 1899 transactions began between them and Samuel Wilde's Sons, the bankrupts. They at first acted simply as note brokers to sell the bankrupts' notes. After a while the practice arose, when the bankrupts needed money upon notes before Bennett & Co. could sell them, that Bennett & Co. would advance money to the bankrupts until the notes could be sold, and when sold Bennett & Co. reimbursed themselves from the proceeds. As soon as these advances became large, Bennett & Co. were obliged to borrow money from banks in order to be able to make them. The money borrowed from banks was not turned over in specie to the bankrupts, but the making of such loans to the bankrupts made it necessary, in frequent instances, to borrow the money. Bennett & Co. originally charged various amounts for obtaining this money, varying from 7 per cent. to 13½ per cent., according to the varying conditions of the money market. After a certain period it was agreed between the parties that there should be a uniform charge of 12 per cent.; that when notes were sold the whole amount should be collectible, but, when money was advanced on account, 6 per cent. should be paid at the time, and a further sum of 6 per cent. at the end of the year. This was the manner in which business was being carried on between the parties at the time that Daniel H. Bennett died and the new firm was formed. Obviously, if the old firm had made a usurious contract, that would not establish that the new firm had entered into a similar usurious contract. The trustee is therefore bound to show that after the new firm was organized a usurious contract was made. It is admitted that there never was any written contract on the subject, but it is claimed that at a conversation in March, 1901, between Mr. Harris, a gentleman who represented the bankrupts' firm, and Mr. Hiram C. Bennett, such an agreement was made. At the time of this conversation the balance on the loan account had reached a figure of over \$100,000. Bennett & Co. had demanded a reduction in the amount of the loan, and the object of this interview was to discuss that subject. Bennett & Co. had not, before the interview, made any demand for an increase of the rate of interest, or said anything on the subject, but Mr. Bennett demanded at the interview that the amount of loans should

be reduced to \$75,000. After this subject had been discussed, and the proposed reduction assented to, Mr. Harris says:

"I then said to Mr. Bennett: 'And now, as to all the loans and notes in the future, the rate of interest shall be the same in the future as it has been heretofore; that is, 12 per cent. upon the notes at the time of sale and settlement, and 6 per cent. upon the loans at the time the loans are settled—each loan—and at the end of the year the additional 6 per cent., making 12 per cent. upon the loans and upon the notes.' He said that was satisfactory. That was as we had been doing, and it was to be continued."

This is substantially the sole proof of the alleged contract of usury. Mr. Harris states this conversation again on cross-examination several times, but substantially in the same way. Both Hiram Bennett and Edward Bennett testify that they were present at the conversation; that the subject of it was exclusively the reduction of the loan account; and both deny that anything was said at that time or any other time about the rate of interest. Mr. Harris admits that the Messrs. Bennett did not introduce the subject, and never then or at any other time demanded any increase of the rate. The 6 per cent. which was to be paid at the end of the year was not paid regularly or in exact amounts, and never appears to have been demanded by Bennett & Co. Whenever the bankrupts found it convenient they paid it—sometimes in full and sometimes in sums on account. Upon this evidence it does not seem to me that the trustee has proved by a preponderance of testimony that there was a specific contract made about interest. Harris says there was, and the two Bennetts say there was not. There appears to be no reason for anything being said at that interview on the subject. Bennett & Co. did not ask for any change in the rate of compensation, and no change was made. If such a conversation took place, the result was just the same as though nothing had been said. At the same time, if there were nothing else in the case, I should hesitate to interfere with the decision of the referee on a question so purely one of fact.

But it seems to me that the evidence establishes that the excess of money paid over the legal rate of interest, even if it was sometimes termed interest by the parties, was not interest, and was not understood to be interest. Bennett & Co. rendered services as note brokers to the bankrupts, for which they were entitled to compensation, and they gave the bankrupts the benefit of their credit at the bank, for which they were entitled to compensation. It is perfectly well settled that parties rendering such services are entitled to compensation for them. Claims of such services may be made a cloak for usury, but, if they were rendered in point of fact, the compensation for them is not usury. In this case Bennett & Co. raised for the bankrupts, by the sale of their notes or by advances, between March, 1901, and July, 1902, nearly \$2,000,000. The loan account during all that period was substantially about \$100,000, and Mr. Bennett testifies that, had it not been for the loans to the bankrupts, they would not have been obliged to borrow money from banks in their business. When they borrowed money from banks, the banks presumably took off the legal discount, and the trustee's proposition is that this money should have been turned



over to the bankrupts without any further deduction. If the bankrupts could have borrowed the money from the banks on their credit, they would probably have done so; but, if they needed, in order to obtain it, to have the benefit of the credit of Bennett & Co., there is no reason why they should not make a valid contract to pay for it.

Moreover, I do not see why the defense of usury to this claim is not barred by the act of 1882 (Laws 1882, p. 290, c. 237), which, in substance, abolishes the usury law in respect to advances of money payable on demand, to an amount not less than \$5,000, made upon negotiable instruments pledged as collateral security. The counsel for the trustee asserts that under that act the contract must be in writing. But it has been held that the only necessity of a writing under that act is in order to enable the lender to collect more than 6 per cent. The statute makes such a loan nonusurious even if the agreement is oral. *Hawley v. Kountze*, 6 App. Div. 217, 39 N. Y. Supp. 897. The trustee's counsel asserts that the negotiable paper of the bankrupts in the hands of Bennett & Co. for sale was not collateral security. I cannot see why it was not. Bennett & Co. held at the time of the failure 32 notes, for \$5,000 each, amounting to \$160,000, made by the bankrupts, payable to the order of themselves, and indorsed by them. These notes had been sent to Bennett & Co. for sale. Bennett & Co. had advanced to the bankrupts about \$102,000 in anticipation of the sale of these notes, and in reliance upon reimbursing themselves out of the proceeds of the sale. It is true that they were made by the bankrupts, but they were not given for the advances. Their amounts did not correspond with any advances, and no particular note was held as a particular security for any particular advance. Of course, so long as they remained in the hands of Bennett & Co. unnegotiated, they had no validity; but the power which their negotiability conferred upon Bennett & Co. to use them for the protection of their own advances made them, it seems to me, clearly collateral security. I therefore cannot see why, even if this was a usurious contract, the act of 1882 does not apply.

I also think that the provision of the usury law forfeiting the principal of a usurious loan does not apply to Bennett & Co., because in that part of their business in which this claim was incurred they were private bankers. The national bank act [3 U. S. Comp. St. 1901, pp. 3454-3493] provides that usurious interest cannot be collected, but it does not impose as a penalty for usury the forfeiture of the principal. In 1870 the Legislature of New York passed an act (Laws 1870, p. 437, c. 163) subjecting state banking associations to the same liability in respect to usury that the national banks were under. In 1880, by chapter 567 (page 823), this act was amended so that it should apply to private or individual bankers doing business in this state. This amendment, in substance, was incorporated in the banking act of 1882, being sections 68 and 69 (Laws 1882, pp. 607, 608, c. 409). Under this legislation the Court of Appeals held that the effect of the amendment of 1880 was to abolish the forfeiture of the principal of usurious loans made

by all persons engaged in the business of banking, including not only those doing business under the authority of the Superintendent of Banking, sometimes termed "individual bankers," but all other persons engaged in the banking business. *Perkins v. Smith*, 116 N. Y. 444, 23 N. E. 21. The making of loans on collateral security is part of the business of banking. In this case *Bennett & Co.* not only made advances to the bankrupts, but they had 25 or 30 similar accounts. Undoubtedly their original business was that of note brokers, but, in my opinion, when, instead of confining their business to selling notes of their customers, they adopted as a branch of their business the making of loans to their customers on the security of the notes held for sale, they became engaged in the banking business. In *Linde v. Grant* (Sup.) 13 N. Y. Supp. 533, the plaintiffs were warehousemen; but, as a part of their business, they made advances on the security of warehouse receipts, and the court held that in respect to such advances they were engaged in a banking business. The trustee's counsel argues that it is necessary, in order that a man should be a banker, that he should receive deposits subject to check. That was originally undoubtedly a common branch of a private banker's business, and the defendants in *Perkins v. Smith* did receive such deposits. But in *Carley v. Tod*, 83 Hun, 53, 31 N. Y. Supp. 635, the defendants did not receive deposits subject to check. Their business was that of ordinary private bankers in this city, very few of whom, as a part of their business, receive deposits subject to check. Their business consisted in making loans on collateral, dealing in bonds, stock, and negotiable securities, and financing general business enterprises. I was counsel in that case, and urged strenuously that the decision in *Perkins v. Smith* did not apply; that the rule there laid down, if applied to ordinary private bankers who receive no deposits, practically nullified the usury laws of the state, and enabled any man to make usurious loans provided he did it as a regular business; but the court disregarded the argument, and held that, under the authority of *Perkins v. Smith*, loans which the court held to be unquestionably usurious were entirely valid as to the principal sum loaned, because the defendants were private bankers.

The simple fact is that the provision of the usury laws of New York which imposes as a penalty for usury the forfeiture of the principal of the loan is so harsh that the courts of New York have in some cases given a strict construction to the law, in order to avoid injustice. It is, of course, the duty of this court to follow the rules laid down by the state courts in the interpretation of state statutes.

My conclusion is that the order of the referee expunging this claim should be reversed, and the claim allowed as filed.

## In re SOUTHWESTERN BRIDGE &amp; IRON CO.

(District Court, D. Kansas, Second Division. November 29, 1904.)

No. 268.

## 1. BANKRUPTCY—JURISDICTION OF PROCEEDINGS—ASSOCIATED CORPORATIONS OF DIFFERENT STATES.

Two manufacturing corporations engaged in the same business, one organized in Kansas, and having its place of business there, and one in Oklahoma, having its principal place of business there, and also an office in Kansas, where meetings of directors and stockholders were held, were owned and managed by the same persons, practically all of the stock of the Kansas company being owned by the other. Their business was conducted together, and so intermingled that it was impossible to separate it. They became insolvent, and a petition in bankruptcy was filed against each in Kansas, where a receiver was appointed for their property. Subsequently a petition was filed against the Oklahoma company in that territory, where a receiver was also appointed. *Held* that, it being necessary to protect the interests of creditors that the two estates should be administered together, the Kansas court, having first acquired jurisdiction, would retain it, and proceed to a final adjudication and determination of the rights of the creditors in the joint property.

In Bankruptcy. On plea to the jurisdiction of the court.

Robberts & Curran and J. M. Dodson, for the plea.

Joseph A. Brubaker, Amidon & Dyer, Houston & Brooks, Kos & V. Harris, J. N. Haymaker, Stanley, Vermilion & Evans, and Dedrick & Dedrick, opposed.

PER CURIAM. Prior to the 11th day of September, 1902, there existed the Wichita Bridge & Iron Company, duly incorporated under the laws of the state of Kansas, with a capital stock of \$25,000, divided into 250 shares of \$100 each, with its principal place of business at the city of Wichita, Kan. (hereinafter called the "Kansas company"). There also existed a corporation known as "The Oklahoma Bridge & Structural Steel Works Company," duly incorporated under the laws of the territory of Oklahoma, with its principal place of business at Enid, in the territory of Oklahoma. On the date mentioned, in pursuance of an arrangement theretofore entered into between the managing officers of the two corporations, a new corporation was formed under the laws of the territory of Oklahoma, called "The Southwestern Bridge & Iron Company" (hereinafter called the "Oklahoma company"), with a capital stock of \$100,000, its principal place of business, as stated in its charter, as follows:

"The place where its principal business is to be transacted is at Enid, Garfield county, in Oklahoma Territory; that also a business office is to be at Wichita, Sedgwick county, Kansas, where also meetings of the stockholders and directors of said company may be held. That the main office is to be at Enid in Oklahoma Territory."

No subscription to the capital stock of the Oklahoma company was made, but \$50,000 of its stock was issued to the managing officers of the Oklahoma Bridge & Structural Steel Works Company, and that company conveyed all its property to the Oklahoma company, and ceased doing business. The remaining \$50,000 of its stock was issued

to the managing officers of the Kansas company. At the first meeting of the board of directors of the Oklahoma company, the record made is as follows:

"On motion it was decided not to discontinue the corporation of the Wichita Bridge & Iron Company, but that two hundred and forty-five shares of the stock of said Wichita Bridge & Iron Company be issued to the Southwestern Bridge & Iron Company, and that one share of the stock in the Wichita Bridge & Iron Company be issued to each of the following named persons: George H. Bradford, E. D. Mills, H. Anthony, J. F. Warren, and J. P. Renshaw"—which was done.

The managing officers and directors of the Kansas company, residents of the city of Wichita, became the principal officers and directors of the Oklahoma company, continuing to reside in the city of Wichita. All meetings of the stockholders and board of directors of the Oklahoma company were thereafter held in the city of Wichita. The plant at Wichita, employing a large number of men, was operated as before the formation of the Oklahoma company; also the plant at Enid, in the territory, employing many persons, was there operated,—the two corporations in all things working together for a common purpose. Contracts for the construction of bridges entered into by the Kansas company were filled and performed in part by the Kansas company and in part by the Oklahoma company, in the same manner as were contracts for the construction of bridges entered into by the Oklahoma company. The employes working at the Wichita plant, the men employed in the building of the bridges at the place where they were constructed, and the managing officers of both corporations contracted with the Kansas company for their employment, and were paid in the name of that company. The contract price paid for the work and material furnished, outside of that done in Garfield county, in the territory, whether performed and furnished by the Kansas company and its employes, or the Oklahoma company and its employes, was remitted to the Kansas company. The contract price for local work done in Garfield county was collected by the Oklahoma company. The materials for all wooden bridges were furnished by the Kansas company. Bills payable by the Oklahoma company were paid or renewed by the Kansas company. Books showing the materials received by the Oklahoma company at its plant in Oklahoma from the Kansas company, and the local affairs of that company, were kept by the Oklahoma company, but that company kept no books from which it could be determined what either its profits or losses were, or the extent or nature of its liabilities or assets. In short, as shown by the evidence in the case, and as admitted by counsel for the plea in oral argument before the court, the business of the two corporations is so intermingled and interwoven as to be absolutely inseparable.

In this condition of affairs, the business done by the companies being unprofitable and the companies insolvent, on the 13th day of October, 1904, a petition in involuntary bankruptcy was filed in this court against the Kansas company, and on the 17th day of October a supplemental petition was filed in that case, and also a petition in involuntary bankruptcy was filed in this court against the Oklahoma company, which petition is in due form, containing proper averments as

to jurisdiction, and duly verified. On that day an appearance was entered by the Kansas company in the one case and the Oklahoma company in the other, by resolution of the board of directors of both companies, admitting insolvency and the commission of acts of bankruptcy. Upon the same day, upon application made, a temporary receiver was appointed in each of said cases. The receiver duly qualified and took possession of the property of both companies in this state and in the territory. On the day following, a petition in involuntary bankruptcy, containing the necessary averments and in due form, was filed in the District Court of the Territory of Oklahoma in and for the Fifth Judicial District against the Oklahoma company, and upon application to that court a temporary receiver for all the property of the Oklahoma company in the territory was appointed, and the receiver thereof theretofore appointed by this court, and in possession of the property of the Oklahoma company in the territory, was dispossessed by the receiver appointed by the territorial court. Upon order made by this court for a rule upon the receiver appointed by the territorial court, and his solicitors, and the creditors applying to the Oklahoma court for the appointment of such receiver, and their solicitors, to show cause why they should not be punished for contempt of the order of this court, such receiver and his solicitors, and the solicitors of the creditors applying to the Oklahoma court, appeared, disclaimed any knowledge of or intention of violating the order of this court theretofore made, were purged of contempt, and, by stipulation herein filed, agreed to submit the question of jurisdiction of this court over the Oklahoma company and its property to the decision of this court, and to abide by such decision unless reversed or set aside by proper appellate proceedings. A plea to the jurisdiction of this court has been interposed and submitted to the court in oral argument and upon briefs filed.

Whether solicitors contending for the jurisdiction of this court over the Oklahoma company and its property are correct in their assertion that all creditors of the Kansas company are also creditors of the Oklahoma company, and vice versa, it is neither necessary nor proper to now decide. It is sufficient for the purpose of decision of this plea to hold, on account of the admitted impossibility of separating the business transactions of the territorial company from those of the Kansas company, and vice versa, that one court must control the settlement and distribution of the joint property of both companies, to the end that one court may properly determine whether all claims are claims against the joint company or against the separate companies. To my mind, the very exigencies of the case create an imperative necessity that the entire estate of both companies shall be brought within one jurisdiction and there administered. Whether this ruling shall be placed upon the ground that the two companies are in legal effect in this bankruptcy proceeding to be treated the same as partners, or two separate corporations employed in the accomplishment of a common purpose, need not be determined. The fact that a just settlement of the estate, and a proper distribution of the proceeds arising therefrom among the creditors, requires it, is sufficient. In the case of In

re Boston, Hartford & Erie Railroad Company, 9 Blatchf. 101, Fed. Cas. No. 1,677, it is said:

"The petition shows that the debtor is either a single corporation, exercising corporate powers by authority of Massachusetts, having its principal office and place of business in Boston, in the District of Massachusetts, and therefore within the jurisdiction of the bankrupt court there, or two corporations united, owning all their property in common, conducting their business for the joint benefit, exercising like powers, having in all respects a common interest, performing all their functions to compass one object, for the benefit of the same corporators and stockholders, and having one set of creditors. In this aspect they may be something more than partners, but they are so united that they are plainly within the section of the bankrupt act relating to partnerships, as well as within that relating to joint-stock companies, and are therefore liable to be proceeded against in the District of Massachusetts. It is no less true that, in either view of the character of the company, it was equally liable to be proceeded against in the District of Connecticut. The District Courts of both districts had jurisdiction over the debtor as a bankrupt."

Conceding, therefore, that jurisdiction existed in the first instance both in the proper bankruptcy court of the territory and this state to administer the bankrupt estate of the two corporations, the question remains, which court shall now administer the estate? The contention made by solicitors for the plea is that, as the Oklahoma company is a citizen of the territory of Oklahoma, with its principal place of business at the city of Enid, in that territory, the bankruptcy court for the proper district of the territory should retain jurisdiction over the property of that company in the territory, and there administer it. The contention made by solicitors in opposition to the plea is that, the Kansas company having its principal place of business at the city of Wichita, within the jurisdiction of this court, and the Oklahoma company having a place of business within the jurisdiction of this court at which its directors' meetings were held, and the business of the two corporations being so intermingled that a separation cannot be had, and this court having first acquired jurisdiction of the joint property, it may proceed to a final adjudication and determination of the rights of the creditors in the joint property, and a distribution of the proceeds pro rata among the creditors, and a determination of all questions that may arise with relation thereto. As has been seen under the evidence, the business transactions of the two corporations cannot be separated. This is admitted by solicitors for the plea. As has been further seen from the condition of the affairs of the two corporations, one court, of necessity, must control the disposition of the joint property. Therefore the usually controlling feature relied upon to confer jurisdiction in cases of this character—the principal place of business of the corporation—must give way to the necessities of the case. It is a familiar rule of law, of universal application, essential to the orderly administration of justice, that, in order to avoid a conflict between tribunals of coequal authority, the court first acquiring jurisdiction must be allowed to pursue it to the end to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal. *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287; *Sharon v. Terry* (C. C.) 36 Fed. 337, 1 L. R. A. 572; *Gaylord v. Ft. W., M. & S. R. R. Co.*, 6 Biss. 286, Fed.

Cas. No. 5,284; *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299, and cases therein cited. This rule is of peculiar force in cases arising under the act of Congress creating a uniform system of bankruptcy throughout the United States, and it has ever been the rule in bankruptcy courts that the court which first acquires jurisdiction has jurisdiction over the debtor's entire estate, the title to all property wherever situate passing to the trustee in bankruptcy. *Black on Bankruptcy*, p. 8; *Foundry Co. v. Car & Foundry Co.* (D. C.) 10 Am. Bankr. R. 624, 124 Fed. 403. In this case the business transactions of the two companies, under the testimony as admitted by counsel, being impossible of separation, and the necessities of the case requiring the entire joint estate be brought into one jurisdiction that the same may be properly and justly distributed among the creditors pro rata, and for the purpose of determining the rights of all parties therein, and this court having first, under proper pleadings and by proper process, acquired jurisdiction of the persons and possession of the property, it follows, as the only logical conclusion, the plea to the jurisdiction in this case must be overruled and denied. The receiver appointed by the territorial court, unless the judgment herein rendered is, in accordance with the stipulation, superseded, must surrender possession of the property now in his control to the receiver appointed by this court, and the joint estate be administered herein. It is so ordered.

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In re LEVEY.

(District Court, N. D. New York. November 30, 1904.)

1. **BANKRUPTCY—DISCHARGE—RIGHT OF TRUSTEE TO OPPOSE.**

A trustee in bankruptcy, so long as the estate is unsettled, and so long as he is claiming and seeking to recover property or money from the bankrupt alleged to belong to the estate and to be wrongfully withheld or concealed, is a "party in interest," within the meaning of Bankr. Act July 1, 1898, § 14b, as amended Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], and may file and prosecute specifications of objection to the bankrupt's discharge.

2. **SAME—SPECIFICATIONS OF OBJECTIONS—REQUISITES.**

Specifications of objection to the discharge of a bankrupt, where they attempt to charge the commission of a crime, must state the facts constituting such crime with substantially the same particularity and exactness required in an indictment, and the acts set out must be charged as having been knowingly and fraudulently done.

3. **SAME.**

Where specifications of objection to a discharge allege that the bankrupt has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, they must not only set out the false representations, but the name of the person so alleged to have been defrauded must be given.

4. **SAME.**

Specifications of objection to a discharge filed by one not shown to be a creditor should state the facts showing how and why he is a party in interest.

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¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 714.

In Bankruptcy. Exceptions and demurrer to the specifications of objection filed to the discharge of the bankrupt Leo B. Levey.

Edward G. Herendeen and George F. Andrews, for trustee.  
Frederick E. Hawkes, for bankrupt.

RAY, District Judge. The bankrupt, Leo B. Levey, having been duly adjudicated a bankrupt, has, as he asserts, turned over to his trustee in bankruptcy, William A. Smyth, all of his property not exempt. One dividend has been made and paid, but property for distribution still remains in the hands of said trustee, who asserts that the bankrupt has in his possession and under his control other property or money to the amount of several thousand dollars, not exempt, and which he is fraudulently and wrongfully concealing and withholding from his trustee. The trustee also asserts that he has taken and is prosecuting proceedings to recover or compel the payment or delivery to him of such property or money. It is conceded that the trustee is not a creditor of the bankrupt.

One ground of exception and demurrer to the specifications of objection is that they are not made or filed by a "party in interest"—that is, that the trustee is not "a party in interest" within the meaning of the bankruptcy law, and hence not entitled to file such objections—and that, therefore, same should be dismissed. This court is not aware that this precise question has been passed upon, and therefore has given it careful examination and consideration. Subdivision "b" of section 14 of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended by the act approved February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], provides:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

By implication parties in interest only may oppose the discharge of the bankrupt. There is no express provision declaring who may oppose. The Supreme Court, in making general orders in bankruptcy, by order No. 32 (18 Sup. Ct. ix) provided as follows:

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."



It is claimed that here is a construction of section 14, above quoted, in effect declaring that only creditors may oppose the discharge of the bankrupt. Collier on Bankruptcy (4th Ed.) p. 161, says:

"They [the specifications of objection] must be in writing, and verified, and may be filed by any person having a pecuniary interest in resisting the discharge of the bankrupt, as one owning an unliquidated claim, even though such person has not proven a debt."

See *Ex parte Traphagen*, Fed. Cas. No. 14,140; *In re Frice* (D. C.) 2 Am. Bankr. R. 674, 96 Fed. 611.

Loveland, in his work on the Law and Proceedings in Bankruptcy, pages 738, 739, says:

"An application for a discharge may be opposed by any of the 'parties in interest.' To entitle a party to oppose a discharge he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown. A person has been held to have an interest sufficient to entitle him to oppose a discharge where his claim was contingent and unliquidated, so as not to be capable of being proved as a debt, or where he held an equitable claim only against the estate, or where his claim was being contested, although his claim has not been proved, or is no longer provable. But where a debt is barred by a lapse of time the creditor has no interest, and therefore cannot oppose the discharge."

Brandenburg, in his work on Bankruptcy, says (section 347):

"Parties in interest, which would include creditors scheduled by the bankrupt, without regard to whether or not they had proved their claims, may oppose a discharge."

He cites *In re Frice* (D. C.) 2 Am. Bankr. R. 674, 96 Fed. 611.

The act of March 2, 1867, c. 176, 14 Stat. 517, by express provisions confined the opposition to the granting of discharges to creditors, and hence decisions under that act are of little weight in ascertaining who are "parties in interest." Section 29 of the act of 1867 provided for notice to creditors, and no one else, of the application for a discharge, requiring them to appear and show cause why a discharge should not be granted. The language was:

"The court shall thereupon order notice to be given by mail to all creditors who have proved their debts \* \* \* to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt."

Section 31 of that act provided:

"That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition," etc.

Section 15 of the act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], relating to the revocation of discharges, says:

"The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if," etc.

The use in sections 14 and 15 of the words "parties in interest" instead of the word "creditors" was, of course, intentional, and, as it is presumed the legislators who framed the act of 1898 had some familiarity with the act of 1867, it is fair to assume that they intended to make the act of 1898 broader than that of 1867; that is, to give

the right to object to a discharge to others than creditors of the bankrupt. This court is of the opinion that it was the purpose of Congress to enable any person having a personal pecuniary interest, or a representative pecuniary interest, in preventing a discharge, to oppose the discharge of the bankrupt. The executor or administrator of a deceased creditor of the bankrupt, who had proved his claim, would have no direct personal pecuniary interest in opposing the discharge of a bankrupt, but who will seriously contend he may not file specification of objection? In a sense he has a direct personal pecuniary interest, for, should the discharge be refused, and the whole debt collected, his commissions would be increased accordingly. But in the case of such officers of the court it is made their duty to enforce the collection of the debts due their testators or intestates, as the case may be. The trustee of the estate of a bankrupt has imposed on him by section 47 of the act (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) the duty to "(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the (not creditors, but) parties in interest; \* \* \* (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest," etc. Later on in the same section, as in other parts of the act, the word "creditors" is used in places where the words "parties in interest" might and probably would have been used had Congress intended to give the same meaning to both expressions. The terms are not intended to be made synonymous. By section 48 of the act the trustee is given a percentage on all moneys disbursed by him as such trustee, and hence, the more money collected, the more he will disburse, and the larger his commissions. This court is of the opinion that so long as the estate of the bankrupt is unsettled, and so long as the trustee is claiming and seeking to recover property or money from the bankrupt alleged to belong to the estate, and claimed to be wrongfully withheld or concealed from the trustee, such trustee is a party in interest within the true meaning of section 14, subd. "b," and may file and prosecute specifications of objection to the discharge of the bankrupt. Under such conditions the trustee is pecuniarily interested, for, if the property or money is recovered from the bankrupt, the commissions of the trustee will be increased. So long as the pending bankruptcy proceeding is in this condition, the trustee is a party in interest. Certainly, so long as such trustee asserts that the bankrupt is guilty of the offense of knowingly and fraudulently concealing from him property belonging to the estate in bankruptcy, and is seeking to recover it and restore it to the estate for the creditors (and such is this case), so long such trustee remains a party in interest, and he would hardly perform his duty should he permit a discharge to be granted without opposition. Such a controversy should be determined before the granting of a discharge to the bankrupt. The trustee would hardly act consistently should he permit a discharge without objection while prosecuting a claim that, if sustained, would bar a discharge. See subdivision "b," § 29, Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433].

In *Re Sykes* (D. C.) 106 Fed. 670, Hammond, District Judge, seems to have entertained the opinion that a trustee may file specifications of objection to the discharge of the bankrupt, for he says:

"It does not appear that the trustee or any creditor has raised an objection to the discharge, or filed any specification in opposition thereto, as required by the practice of the court."

This ground of demurrer is therefore overruled. The specification that the bankrupt failed to keep books of account is deemed sufficient, but might be in better form. The other specifications of objection are faulty and defective, and the exceptions and demurrer thereto are sustained. So far as they charge or attempt to charge the commission of a crime, they must state facts showing the commission of the crime with substantially the same particularity and exactness required in an indictment. See *Collier on Bankruptcy* (4th Ed.) p. 161, and cases cited; *Brandenburg on Bankruptcy* (3d Ed.) § 348; 2 *Foster's Fed. Pr.* (3d Ed.), p. 1144; *In re Hirsch* (D. C.) 96 Fed. 468; *In re Kaiser* (D. C.) 99 Fed. 689; *In re Mudd* (D. C.) 105 Fed. 348; *In re Adams* (D. C.) 104 Fed. 72; *In re Pierce* (D. C.) 103 Fed. 64. The acts set out must be charged to have been knowingly and fraudulently done. *In re Patterson* (D. C.) 10 Am. Bankr. R. 371, 121 Fed. 921; *In re Blalock* (D. C.) 9 Am. Bankr. R. 266, 118 Fed. 679. When it is alleged that the bankrupt has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, not only must the false representations be set out, but the name or names of the person or persons so alleged to have been defrauded must be given. It is quite true that the proceeding is not a criminal one (*In re Dauchy* [D. C.] 10 Am. Bankr. R. 527, 122 Fed. 688), and that, while the objecting party has the burden of proof, he is not required to prove the commission of the offense alleged beyond a reasonable doubt, a fair preponderance of evidence being sufficient (*In re Leslie* [D. C.] 9 Am. Bankr. R. 561, 119 Fed. 406; *In re Dauchy* [D. C.] 10 Am. Bankr. R. 527, 122 Fed. 688), still the bankrupt is entitled to have the specifications of objection made so explicit and definite that he may have notice of the exact charge made and which he is to meet. The specifications of objection should show how the objecting party is interested. In this case the objections made by the trustee should show how and why the trustee is a party in interest, for ordinarily, perhaps, or at least in very many cases, the trustee is not a party in interest. The mere fact that a person is the trustee of the estate of a bankrupt may not entitle him to file specifications of objection. The specifications filed do state that the trustee is a party in interest, but fail to state how or why. It would be sufficient for a creditor to state that mere fact as every creditor *prima facie* has the right to object, but not so with the trustee, as we have seen.

The objecting party may file and serve amended and corrected specifications of objection within 10 days after service of a copy of the order to be entered in accordance with this opinion on payment of \$10 costs of this demurrer.

## In re MICHIGAN S. S. CO.

(District Court, N. D. California. November 21, 1904.)

No. 12,820.

**1. SHIPPING—LIMITATION OF LIABILITY—CONSTRUCTION OF STATUTE.**

The right of the owner of a vessel to a limitation of liability under the provisions of Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, pp. 2943, 2944], does not depend upon the fact that the vessel is actually engaged upon a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his liability, but the statute applies equally to a vessel at a dock in her home port, where she is being altered and refitted, and where she has remained for several months.

**2. NEGLIGENCE—LIABILITY FOR INJURY—PROXIMATE CAUSE.**

A steamer was lying at the dock of a contractor, which was refitting her to burn oil instead of coal. After a tank had been completed, but before it had been equipped with ventilators, the owner of the vessel caused it to be partially filled with crude petroleum of a low and inflammable grade. While a workman in the employ of the contractor was drilling a hole in the top of the tank he placed a lighted candle within 2½ inches of where he was drilling, and the result was an explosion of the tank, by which a number of such workmen were killed. *Held*, that while the owner of the vessel may have been negligent in filling the tank at the time and in using an inferior and dangerous grade of oil, the workman was clearly negligent, it being a matter of common knowledge that petroleum will give off gas which will explode under certain conditions when brought in contact with a flame, and that his carelessness was the proximate cause of the explosion, for the consequences of which to the contractor's employes the vessel owner was not liable.

**3. MASTER AND SERVANT—INJURY TO SEAMAN THROUGH NEGLIGENCE OF WORKMAN—LIABILITY OF SHIPOWNER.**

A shipowner which contracts for repairs owes an active duty to the seamen on board to use reasonable diligence to see that they are not subjected to danger by reason of the negligent manner in which the work is done, and is liable for their death or injury resulting from its failure to perform such duty.

In Admiralty. Proceeding for limitation of liability.

Nathan H. Frank, for petitioner.

William Denman, for claimants.

DE HAVEN, District Judge. This is a petition filed by the Michigan Steamship Company, a corporation, owner of the steamer *Progreso*, praying for a decree exempting it from liability for any loss or damage resulting from an explosion which occurred on that steamer on December 3, 1902, or, in the event that it shall be adjudged liable for such damages, that its liability be limited as provided in sections 4283-4285, Rev. St. [U. S. Comp. St. 1901, pp. 2943, 2944]. Many claims have been filed. The claimants have filed answers, in which they contest the right of the petitioner to a decree exempting it from liability on account of the matters set forth in the petition, or to any limitation of its liability. These claims may be divided into two classes:

¶ 1. Limitation of liability of vessel owner, see note to *The Longfellow*, 45 C. C. A. 387.

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First, the claims of employes of the Fulton Ironworks for damages on account of personal injuries sustained by them as a result of the explosion, and the claims of heirs of other employes of the Fulton Ironworks who were killed by the explosion; and, second, the claims of heirs for damages on account of the death of certain seamen who were on board of the *Progresso* at the time of the explosion, and killed. These seamen were employes of the petitioner. There is no substantial conflict in the evidence, and it appears therefrom that on December 3, 1902, the *Progresso* was lying at the dock of the Fulton Ironworks, in the harbor of San Francisco, and had been for some months undergoing certain alterations in her hold, made necessary by reason of the construction therein of tanks for the carriage of oil to be used as fuel. This work was being done by the Fulton Ironworks under contract, and had so far progressed that the fuel tank had been tested and accepted. This tank had a capacity of about 900 barrels of oil, and at the time of the explosion contained between 300 and 400 barrels of oil. The tank was perfectly tight, no ventilators having been installed therein. At the time of the explosion certain employes of the Fulton Ironworks were engaged in putting up stanchions for the purpose of supporting the upper deck. These stanchions, according to the construction plans, were to rest on top of the fuel tank, and it was necessary, and the plans contemplated, that holes should be drilled in the tank in order to properly secure them. At the time of the explosion one McGinley, an employe of the Fulton Ironworks, was engaged in drilling these holes, and while thus engaged he had a lighted candle which was placed within about  $2\frac{1}{2}$  inches of the hole he was drilling. There was an electric light used by another employe nearby, and McGinley could have had such a light if he had applied to the electrician of the Fulton Ironworks. The electric lights as well as the candles used were supplied by the Fulton Ironworks, and both electric lights and candles had been previously used by the men during the progress of the work. The oil was placed in the tank on Monday, and on the morning of the Wednesday following the explosion occurred.

The most reasonable conclusion to be drawn from the evidence is that the real cause of the explosion was that gas escaped from the hole drilled into the tank by McGinley and came in contact with the lighted candle used by him. The oil was crude petroleum; was very light, and flashed at a temperature of 85 degrees—that is, at that temperature it would give off gas so readily as to form an explosive mixture, which would flash or explode when brought in contact with a flame. Crude petroleum which will flash at so low a temperature is not regarded as safe as petroleum oil having a higher flash test; and there was at the date of the explosion an ordinance of the city and county of San Francisco making it a misdemeanor "to use petroleum oil for fuel, heating, lighting, or illumination purposes, within the city and county of San Francisco, unless the same will stand a fire test of 110 degrees Fahrenheit, before it will flash or emit an inflammable vapor."

1. It is contended by the claimants that the sections of the Revised Statutes providing for the limitation of the liability of the owners of vessels is not applicable in this case, because the *Progresso* at the time of the explosion was not engaged in making a voyage, but was in

the custody of her owners at her home port, and had been for several months undergoing the extensive repairs necessary to change her from a burner of coal to a burner of oil. I do not think this contention can be sustained. Section 4283 of the Revised Statutes [U. S. Comp. St. 1901, p. 2943] provides:

"The liability of the owner of any vessel \* \* \* for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The *Progresso* was certainly a vessel within the meaning of this statute. She was about to proceed upon her trial trip, and the fact that she was then, and for some time had been, lying at a dock, while her hold was being divided into compartments and tanks installed therein for the carriage of fuel oil, did not deprive her of her character as a vessel; nor does the statute make the right to a limitation depend upon the fact that the vessel is actually engaged in the prosecution of a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his liability. In this case the alleged wrong of the libelant and the damages resulting therefrom occurred on the *Progresso* while she was on the navigable waters of the Bay of San Francisco.

2. The next question to consider is whether the employés and heirs of employés of the Fulton Ironworks have any cause of action against the libelant for the damages sustained by them. The grounds upon which such liability is asserted are the alleged negligence of the libelant in these respects: First, in placing oil in the fuel tank before any ventilators were installed therein; second, in placing therein crude petroleum oil, which would flash at a temperature of 85 degrees, and in not warning the men who were working on the steamer of the dangerous condition thus created. It may be conceded that the libelant was guilty of negligence in placing oil which would flash at the low temperature of 85 degrees in a tank not properly equipped with ventilators; but still, unless such negligence was the proximate cause of the explosion, it would seem, under all of the authorities, that it is not liable to third persons for damages resulting to them from such explosion. It is not sufficient to render the libelant responsible in damages that its negligence was only the antecedent cause of the explosion, but it must also have been the proximate cause. It is sufficiently accurate for the purposes of this case to say that negligence "cannot ordinarily be said to be the proximate cause of an injury when the negligence of another independent human agency has intervened and directly inflicted the injury." 16 Am. & Eng. Ency. (1st Ed.) p. 446. This rule is nowhere more clearly stated than by Judge Cooley in his work on Torts. That author says:

"It is not only requisite that damage, actual or inferential, should be suffered; but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote, cause.

The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Cooley on Torts (1st Ed.) p. 68.

Now, in this case the evidence points with great certainty to the fact that the cause of the explosion was the act of McGinley in drilling a hole into the tank by means of which gas escaping therefrom came in contact with a lighted candle used by him at that time and placed in close proximity to the hole which he was drilling; and that this was an act of great carelessness in him does not seem to me to admit of doubt. I think it may be fairly inferred from the evidence that he and all of his fellow workmen knew there was oil in the tank, and, although he was not specially warned of the danger of using a lighted candle in such close proximity to the hole drilled by him, it must be presumed that, if he had stopped to consider for a moment, he would have known of such danger. That petroleum will give off gas, and that under certain conditions that gas will explode when brought in contact with a flame, is matter of common knowledge. There can be no presumption that McGinley did not have this knowledge. It is true the evidence does not show that he was informed that the oil in the tank would flash at 85 degrees, but he must have known there was fuel oil in the tank, and, no matter what might have been its flashing point, he was guilty of negligence in placing a lighted candle within  $2\frac{1}{2}$  inches of the hole he was drilling, and from which the gas escaped. The libellant did not owe any duty to the employes of the Fulton Ironworks to keep watch over them, and see that they did not render the place in which they were working unsafe by reason of the negligent manner in which they might prosecute such work.

3. In regard to the claims of the heirs of those employed as seamen on the Progresso, my conclusion is that the libellant owed to such seamen the active duty of providing for them a safe place in which to work. Of course, its obligation was only to use reasonable diligence in this respect, but, having contracted with the Fulton Ironworks to work on the Progresso, it was a duty which the libellant owed its own employes to see that they were not subjected to risks unknown to them, and which placed their lives in danger. It was the duty of the libellant to know whether its own servants were placed in danger by the manner in which the work contracted for by it was being performed. It follows from these views that the petitioner is liable for the damages claimed by the heirs of the seamen employed by it, and also entitled to a decree limiting its liability as to such damage, but is not responsible for the damages claimed by the employes and heirs of the employes of the Fulton Ironworks.

Let a decree be entered in accordance with this opinion, and the case placed upon the calendar for hearing upon the question of damages.

## ANDERSON LAND &amp; STOCK CO. v. McCONNELL et al.

(Circuit Court, D. Nevada. December 5, 1904.)

No. 783.

## 1. WATER COURSES—BILL TO ENJOIN DIVERSION—SUFFICIENCY.

A bill by an owner of land to enjoin the diversion of water from a stream is sufficient to entitle complainant to such relief if it clearly shows that he is entitled by right of prior appropriation to a certain quantity of water from the stream for purposes of irrigation, and that defendants, under claim of right, have diverted, and are continuing to divert, water from the stream above, with the result of depriving complainant of the quantity to which he is so entitled, which tends to depreciate the value of his lands. Averments of evidential matter are not essential, and defects therein do not affect the sufficiency of the bill.

## 2. SAME.

An allegation, in a bill to enjoin diversion of water from a stream, that on a certain date complainant's grantors appropriated, and have since used, sufficient water to irrigate the lands described, "to wit, more than one hundred cubic feet of water per second," will be treated as asserting a prior claim to 100 feet of water per second only, and, as so construed, is sufficiently definite as to quantity.

## 3. SAME.

An allegation that, in a certain year, complainant's grantor, by means of dams, diverted from a river and its tributary a stated quantity of water, which was and is still applied to beneficial use on the lands described, is sufficient in a bill to enjoin the diversion of water from the two streams by a subsequent appropriator, although it does not allege the quantity appropriated from each stream by complainant, nor the precise date of each appropriation, which are merely matters of evidence.

In Equity. On demurrer to bill.

This is a suit in equity to enjoin the diversion of water by defendants from Quin river and Twelve Mile creek, in Humboldt county, Nev. The complaint, among other averments, alleges: That complainant is, and that its grantors ever since 1869 have been, the owners of certain agricultural lands, known as the "Anderson Ranch," particularly describing it by metes and bounds. "(5) That Quin river and Twelve Mile creek (the latter being a tributary of the former) are natural surface streams of water, which have, save when wrongfully diverted, from time immemorial constantly flowed over, through, and upon the above described lands, and of right ought still to flow over, through, and upon the same. (6) That said lands embrace the natural banks, bed, and channel of said Quin river, and also of said Twelve Mile creek. (7) That on or about the ——— day of ———, 1869, the grantors and predecessors in interest of complainant first constructed certain dams in the channel of said Quin river, and also other dams in the channel of said Twelve Mile creek, and ditches leading therefrom and from said dams, by means of which they appropriated and diverted and turned out of and from said creek and from said river, and onto the above described lands, sufficient water for the proper irrigation of the same, to wit, more than one hundred cubic feet of water per second. \* \* \* (10) \* \* \* That on or about the ——— day of May, 1902, the said defendants wrongfully and unlawfully entered upon said Quin river and said Twelve Mile creek at points above the said lands, dams, and ditches of this complainant, and diverted all of the waters of said river and said creek away from the channels of said streams, and away from complainant's said lands, dams, and ditches; and ever since said ——— day of May, 1902, defendants have continued to so divert said water, and the whole thereof, away from the said lands, and away from the above-mentioned crops growing thereon, and away from complainant's said dams and ditches.



\* \* \* (13) That defendants claim some interest in the waters of said Quin river and Twelve Mile creek adversely to complainant, and under such claim are now wrongfully and unlawfully taking such water, and are diverting said waters, and the whole thereof, away from said streams, and the lands, crops, and stock of complainant, and threaten and intend to divert and take, and will continue to so divert and take, the same away from complainant's said lands and crops, and deprive complainant of the use of said waters, and render said lands unproductive and valueless, to complainant's great and irreparable injury and damage, unless restrained by the order of this court."

A demurrer was interposed to this bill upon the ground that it does not appear that the defendants "have wrongfully diverted or deprived the complainant of any of the water or waters of said Quin river or Twelve Mile creek at any period when complainant was entitled to the same"; that it does not appear that any diversion alleged to have been made by defendants "has injured or damaged said complainant"; that it does not appear that complainant, "at any time before the commencement of this suit, diverted, appropriated, used, or applied any of the waters of said Quin river or of said Twelve Mile creek for any or all of the purposes therein mentioned." It is also claimed that the bill is indefinite and uncertain, especially paragraph 7 thereof, "in that it does not show what part or portion of the one hundred cubic feet of water the grantors and predecessors in interest of said complainant diverted from said Quin river by the dams and ditches therein mentioned, or what part or portion of said one hundred cubic feet of water was diverted or appropriated by certain dams and ditches therein mentioned of the waters of Twelve Mile creek; \* \* \* that it does not show to or upon what lands in said complaint described the waters of Quin river so described were used, or to or upon what lands the waters of Twelve Mile creek were used, by the predecessors and grantors of said complainant; \* \* \* that it does not show that said complainant has ever diverted, used, or applied any of the waters of said Quin river or said Twelve Mile creek for any of the purposes therein alleged, or has ever irrigated by said waters, or any part thereof, any of the lands described in said bill of complaint."

Mack & Farrington (Geo. D. Pyne, of counsel), for complainant.  
H. Warren and Cheney, Massey & Smith, for defendants.

HAWLEY, District Judge (orally). Nearly all the points raised by the demurrer herein are controlled by the principles announced by this court in *Miller & Lux v. Rickey*, 127 Fed. 573, 581, et seq. The complaint in this case is the opposite of the complaint in that case, in this: that in that case the pleader sought to make his averments as brief as possible, and left out certain allegations that would have been proper—in order to have avoided the points raised by the demurrer—while here the pleader elaborated his averments to an unnecessary extent, and inserted more than was necessary. Notwithstanding these extremes, the court must confine itself to the question, as stated in the *Miller & Lux Case*:

"Whether or not the bill states facts in such a manner as will enable complainant to maintain the suit and obtain the relief asked for by a decree. No fact need be alleged which is not essential for the court to find in order to sustain a decree. The evidence need not be pleaded. It is only necessary for the bill to contain within itself sufficient matters of fact per se to maintain the case of complainant, so that the same may be put in issue by the answer, and the facts thus stated may be established by the proofs."

Objections are made to certain averments: "That during the years 1901 and 1902 the grantor of complainant had large and valuable crops, to wit, more than four thousand acres of hay, grass,

and other crops growing on said lands. In order to properly irrigate and mature said crops, it was necessary to use all of said one hundred cubic feet of water per second of the waters of said Quin river and Twelve Mile creek;" and that defendants had diverted the water to such an extent as to injure the crops of complainant's grantors, and they had suffered damage therefrom, etc.

This is not a suit to recover damages for the injuries committed by defendants against complainant's grantors, but for the purpose of protecting the rights of the complainant to the free and unobstructed flow of 100 cubic feet of water per second from Quin river and Twelve Mile creek, appropriated by its grantors and predecessors in interest in 1869. All of the various allegations concerning the damages which the grantors suffered by reason of the wrongful acts of the defendants in diverting the water from the land are alleged, as tending to show that the whole of such waters had been used for a beneficial purpose, and the irreparable nature of the defendants' trespass, and the injury and damage that would result to complainant's land unless such acts on the part of the defendants be restrained by this court. After these allegations comes averment 13, quoted in the statement of facts, which is clear, direct, and positive as to the diversion of the water by defendants from complainant, and their threats to continue such diversion under a claim of right so to do.

The bill, fairly construed, shows a single object, and seeks only to enforce the complainant's rights to the use of the water for a beneficial purpose, and to have an injunction to prevent defendants from interfering with its alleged rights in the premises. The allegations of the bill of complaint, referred to in the foregoing statement, clearly show a damage and injury to complainant's rights as the owner of the lands in question, and are sufficient in their character to sustain the right of complainant to obtain final relief by injunction. Complainant not only shows that defendants were diverting the water from it, but that they also claim to have the right to divert it, and threaten to divert it, from complainant.

In *Brown v. Ashley*, 16 Nev. 311, 315, the Supreme Court of this state, following the principles announced in *Barnes v. Sabron*, 10 Nev. 217, 247, said:

"Where the act complained of is committed by the defendant under a claim of right which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, the plaintiff is not only entitled to an action for the vindication of his right, but also for its preservation. This is especially true of actions for the diversion of water, where there is, as in the present case, a clear violation of an established right, and a threatened continuance of such violation. \* \* \* In such cases it is not necessary to show actual damages, or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual."

Numerous authorities are there cited in support of the views expressed by the court.

In *Miller & Lux v. Rickey*, *supra*, page 586, specific objection was made to the bill of complaint upon the ground that it did not

aver: "that defendants intend to, threaten to, or will continue their alleged diversion if not restrained." The court said:

"The words 'threaten to continue' are often used, and in many cases are certainly appropriate, but no set form of words is essential. Technical forms are not always necessary. In determining the rights of the parties the court looks to the nature of the acts."

And, after quoting from *Kerr on Inj.* 15, said:

"The sum and substance of the authorities are to the effect that complainant must state in its bill sufficient facts to satisfy the court that the issuance of an injunction is necessary in order to give the complainant the relief to which it is entitled in a court of equity. The averments of the bill, taken in their entirety, clearly state facts sufficient to entitle complainant to the equitable relief prayed for. The rule is well settled that a bill which discloses, as this does, a continuing trespass on the lands of complainant, \* \* \* and a constant and wrongful diversion of water from a stream thereon, which tends to depreciate the value of the land, is sufficient to entitle the complainant to an injunction against such trespass. *King v. Stuart* (C. C.) 84 Fed. 546, 549, and authorities there cited; *U. S. F. L. & E. Co. v. Gallegos*, 89 Fed. 769, 773, 32 C. C. A. 470; *Gould on Waters* (3d Ed.) § 236, p. 469; *Kinney on Irrigation*, § 332."

Paragraph 7 of the bill must be construed as asserting a right by appropriation to only "one hundred cubic feet of water per second." The words "more than" will be treated as having been inadvertently used. If complainant claims more than 100 cubic feet of water per second, it should ask leave to amend the complaint so as to make the amount claimed specific and certain. As thus construed, paragraph 7 of the bill is sufficiently definite and certain as to the appropriation and diversion of 100 cubic feet of water per second from Quin river and Twelve Mile creek.

But it is earnestly argued that, as against a specific demurrer, the bill of complaint is uncertain in not stating the amount of water appropriated from each stream, and the time when the appropriation was made; the contention being that, under the language of the bill, two separate and distinct appropriations were made—one from the river and the other from the creek. Complainant claims that under the averments there was but one appropriation made, to wit, from the river and the creek. Cases may undoubtedly arise, or may readily be imagined, where it might be necessary for the pleader to be more specific as to the time, amount of water appropriated, and the use made thereof, with reference to each stream; but, so far as the present case is concerned, the question whether there was more than one appropriation made is immaterial. The point raised by the demurrer is more to the form than to the substance. The averment, in substance, is that the grantors of complainant in 1869 made an appropriation, and under it diverted water from Quin river and its tributary, Twelve Mile creek, to the extent stated. The averments in the bill are sufficiently certain and definite to advise the defendants of what they are called upon to answer.

In *Long on Irrigation*, § 60, the author says:

"Where an irrigator, by prior appropriation, has acquired the right to the flow of a stream, or to a certain quantity of the water, it follows necessarily that his appropriation is, in effect, an appropriation also of all the tributaries

and other sources of supply of the stream, so far as this may be necessary to insure to him the quantity of water covered by his appropriation. Hence other appropriators or persons will not be permitted to so divert or control the water of tributary streams as to cut off the sources of supply, and prevent the prior appropriator from receiving the full amount of water to which he is entitled."

It is claimed by the defendants that this statement, with the authorities cited in support thereof, does not reach the precise objection here urged. Be that as it may, it certainly marches up very close to it, and clearly shows the trend of judicial minds in relation thereto. The particular manner in which this appropriation was made is a mere matter of evidence, and was not required to be stated with greater particularity.

In *Miller & Lux v. Rickey*, supra, page 584, this court said:

"The law is well settled that a right to the waters of a stream may be acquired by appropriation and actual diversion and application to a beneficial use. The particular point of diversion, and the means and method used in diverting it, need not be alleged. They are at most mere matters of evidence in establishing the right to the amount of water claimed to have been appropriated, diverted, and beneficially used."

The averments of the bill are sufficiently specific as to the lands upon which complainant and its grantors used the water.

The demurrer is overruled.

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### IN RE REYNOLDS.

(District Court, D. Montana. October 24, 1904.)

No. 211.

#### 1. BANKRUPTCY—ACTION BY TRUSTEE IN STATE COURT—EFFECT OF JUDGMENT.

Where, after an adjudication in bankruptcy, certain property of the bankrupt was taken from his possession by a mortgagee under a chattel mortgage given more than four months prior to the filing of the petition, it was competent for the trustee subsequently appointed, under the provision of Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], to maintain an action against the mortgagee in a state court to recover the value of the property as on an implied assumpsit, and, having invoked the jurisdiction of such court, he is bound by its judgment rendered on the merits, and cannot thereafter institute summary proceedings in the bankruptcy court to recover the property on the ground that it was wrongfully taken from the custody of such court.

#### 2. RES JUDICATA—JUDGMENT ON MERITS.

Under Code Civ. Proc. Mont. § 1005, a judgment of a state court dismissing the petition of a trustee in bankruptcy to recover the value of property of the bankrupt taken by defendant by virtue of a chattel mortgage, where the pleadings put in issue the validity of the mortgage and the question whether or not defendant wrongfully converted the property, is a judgment on the merits, which renders such questions *res judicata* between the parties.

In Bankruptcy. On demurrer to answer to petition of trustee.

Green & Cockrill and P. H. Leslie, for trustee.

A. C. Gormley and W. T. Pigott, for respondent W. J. Strain.

HUNT, District Judge. Thomas Reynolds filed his voluntary petition in bankruptcy on March 15, 1902, and on March 17, 1902, was duly adjudged a bankrupt. On April 5, 1902, John Denham, the petitioner herein, was duly appointed trustee of the bankrupt's estate. The petitioner herein, as trustee, filed his petition, alleging, among other things, that on September 6, 1901, Reynolds, the bankrupt, executed and delivered to W. J. Strain a chattel mortgage on certain personal property, then in his possession and situated in a hotel at Great Falls, Mont., to secure payment of a certain promissory note of that date for \$1,000, payable to said Strain; that the aforesaid chattel mortgage was filed in the office of the county clerk and recorder on March 13, 1902; that on March 22, 1902, and after the adjudication of bankruptcy, Strain, not then being in possession of the said property, did take the property described in the mortgage, and on said date, claiming under said mortgage, took the same away from the place where it was, and while the property was in the actual possession of the bankrupt. It was further alleged that Denham, trustee, prior to the filing of the petition herein, demanded of Strain the possession of the property mortgaged, which was refused. By answer, Strain appeared and averred that this court had no jurisdiction, and that under the facts pleaded the petitioner failed to state a cause of action. Strain then admitted filing the petition in bankruptcy and adjudication, and admitted execution and delivery of the mortgage, the taking of the goods from the possession of the bankrupt, Reynolds, demand, and refusal of delivery. He then alleged that the taking was rightful and under the terms of the mortgage, and pleaded that the petitioner, as trustee, had instituted suit in the state court against him, the said Strain; that such proceedings were had in the said state court that judgment was rendered on the merits in favor of Strain and against the petitioner, Denham. Laches were also charged against the petitioner. A general demurrer was interposed to the answer.

Judge Knowles held, in effect, that under the pleadings, after the adjudication of bankruptcy, the possession of all property then in the peaceful possession of the bankrupt vested in the court of bankruptcy, and that seizure of the property thereafter was an unlawful interference with the possession of the court, which might compel restoration by an order. It was also determined that the state court was without jurisdiction to determine the right of possession of the bankrupt's property in the suit instituted after the adjudication in bankruptcy. A full report of the matter will be found in (D. C.) 127 Fed. 760. After Judge Knowles' decision sustaining the demurrer of the petitioner to the answer of the respondent, Strain, leave was given by him to said respondent to file an amended answer. This amended answer admits the execution and delivery of the chattel mortgage to Strain; admits demand; denies that the value of the goods was greater than \$1,000; pleads a rightful, peaceable taking under the chattel mortgage, and the terms thereof, which authorized a sale of the mortgaged chattels in case of default, and that Reynolds, the mortgagor, consented to the taking. Respondent also sets up that in April, 1902, upon demand by the trustee, he refused to surrender the possession of the property except upon the condition that the note and mortgage be satisfied; that

thereupon the trustee informed respondent that the mortgage was void, and would not be paid, and that it would be agreeable to him, the trustee, for respondent to keep the chattels so that the trustee might recover from respondent the value thereof as upon a sale by the trustee to the respondent. Respondent then pleads the institution of an action by the trustee against respondent in the state court, alleging that the pleadings in said action presented the issues which the trustee now, by his petition, seeks again to raise. Respondent alleges that a judgment upon the merits was rendered in his favor by the state court, wherein the action was dismissed, and it was ordered that respondent recover his costs. It is alleged that respondent relied upon the representations made to him by the trustee electing to waive the supposed tort, wrongful taking and unlawful detention, and sue upon an implied contract for the value of the goods, and that respondent, in reliance upon said representation and said election, sold the chattels to a third party after due notice, and that the amount realized from the sale was only enough to pay the note and mortgage and costs and expenses of sale. Respondent also pleads that the trustee, by his prosecution of the action in the state court, and by his acts as alleged in the complaint filed in the state court, waived the supposed tort, and is estopped from obtaining the relief by him now sought. Respondent sets up laches by the trustee, as he did in his original pleading. The trustee demurs to the amended answer, and moves to strike the same from the files.

The first question to determine is whether the state court had jurisdiction to hear and determine the action instituted by the trustee. On March 15, 1902, when Reynolds filed his petition in bankruptcy, and on March 17th, when he was adjudged a bankrupt, the actual possession of the property mortgaged was in the mortgagor, Reynolds. The trustee never had an actual possession thereof. Strain, as mortgagee, took possession under the terms of a chattel mortgage conceded to be valid in form under the laws of the state of Montana, and thereafter the trustee brought suit in the state court to recover the value of the property as upon an implied assumpsit by the mortgagee, Strain, to pay for it. The trustee, therefore, having voluntarily submitted himself and his rights to the jurisdiction of the state court, if he had authority to do this, will be bound by the adjudication, whether or not the decision of the state court was favorable or unfavorable to him. *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389. The powers and limitations granted and imposed by section 2 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], describing the jurisdiction of the courts, are simplified by observing the distinction declared between the proceedings in bankruptcy and civil actions at law or plenary suits in equity. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. The bankruptcy act of 1898 does not vest jurisdiction in the United States District Court, as a court of bankruptcy, to hear and determine civil actions not summary proceedings in bankruptcy. The Circuit Courts have jurisdiction in such actions in certain instances where there is a diverse citizenship, where the value exceeds \$2,000, or where defendant may consent as defined by the act; but, as was held in the *Bardes Case*, one of the reasons for inserting the second clause of section 23 of the bankrupt

act of 1898, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], may well have been to leave controversies "not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustees in bankruptcy to assert a title to money or property as assets of the bankrupt against a stranger in these proceedings, \* \* \* to be tried and determined for the most part in the local courts of the state, to the greater economy and convenience of litigants and witnesses." In the case before me there is no diverse citizenship. Strain was a stranger to the bankruptcy proceedings. The summary proceedings in bankruptcy could not afford a full trial upon the issues of fact as between the trustee and Strain, and no effort was made to remove the action from the state to the federal court, even had there been a concurrent jurisdiction. There was no federal question involved in the mere fact that the plaintiff was a trustee in bankruptcy for Reynolds, the bankrupt. This principle is laid down in the recent case of *Spencer, Trustee, v. Duplan Silk Co.* (decided by the Supreme Court in December, 1903) 24 Sup. Ct. 174, 48 L. Ed. 287. There Spencer, as trustee in bankruptcy, brought trover in a state court in Pennsylvania, alleging that on January 13, 1900, certain chattels were the property of Bennett and Rothrock, and that by virtue of an adjudication in bankruptcy on that day plaintiff succeeded to the title of the firm of Bennett & Rothrock to the chattels, and that thereafter, and on January 15, 1900, the defendant wrongfully converted them to his own use. The cause was removed to the United States Circuit Court on account of the diversity of citizenship, and it was there tried, plaintiff obtaining judgment. The Circuit Court of Appeals reversed the judgment, and thereafter the cause was taken to the Supreme Court by writ of error. The Supreme Court dismissed the writ on the ground that the decision of the Circuit Court of Appeals was final, because its jurisdiction depended wholly upon the diverse citizenship of the parties. Chief Justice Fuller, in delivering the opinion, said:

"Plaintiff's declaration set forth no matter raising any controversy under the Constitution, laws, or treaties of the United States. It is true that, if the lumber and materials belonged to Bennett & Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication; but the question of Bennett & Rothrock's ownership on that day in itself involved no federal controversy, and the mere fact that the plaintiff was trustee in bankruptcy did not give jurisdiction. *Bardes v. First Nat. Bank*, 178 U. S. 524 [20 Sup. Ct. 1000, 44 L. Ed. 1175]. Indeed, if the case had not been removed, and had gone to judgment in the court of common pleas, and that judgment had been affirmed by the Supreme Court of Pennsylvania on the same grounds as those on which the Circuit Court of Appeals proceeded, a writ of error could not have been brought under section 709 of the Revised Statutes (U. S. Comp. St. 1901, p. 575), for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act was conceded, and no right specially set up or claimed under it was denied. Section 23 of the bankruptcy law does not enable us to maintain jurisdiction. The first two clauses read (before the amendment of February 5, 1903, 32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1903, p. 413]) as follows:

"Sec. 23a. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and

such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." (30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3431]).

"Plaintiff brought his action in the state court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under section 23 of the bankruptcy act."

This decision seems determinative of the point that the trustee properly brought his action in the state court. See, also, *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Donaldson, Assignee, v. Farwell*, 93 U. S. 631, 23 L. Ed. 993.

Undoubtedly, when Reynolds was adjudged to be a bankrupt, such adjudication had the force and effect of an attachment and injunction, and was a caveat to the world, and thereafter title to the bankrupt's property became vested in the trustee. But, on the other hand, rights which vested more than four months prior to the institution of bankruptcy proceedings were not impaired. Here, for example, Reynolds' ownership of the mortgaged chattels was subject to Strain's lien. As owner, Reynolds had the legal title, and Strain a special property. *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

It is argued that the case in the state court was not tried on its merits, and that there never was a judgment of recovery; but an examination of the pleadings in the action tried in the state court shows that the question of the validity of Strain's mortgage as against the trustee was raised, and that there was also involved the question of whether or not he unlawfully detained or converted the chattels so taken. The judgment of the state court was a dismissal of plaintiff's action, and that the defendant do have and recover from plaintiff, as trustee of the bankrupt, his costs. This was a proper form, and was on the merits. Section 1005, Code Civ. Proc. Mont. There were involved, and necessarily passed upon, the same matters which plaintiff would have decided here, as between himself and Strain; hence I think the question is *res judicata*. *Black on Judgments*, vol. 2, 604. Under this view of the jurisdictional question, it becomes unnecessary to express an opinion on the other points raised by the petitioner.

The demurrer is overruled, the rule to show cause is discharged, and the proceeding is dismissed.

## DENE STEAM SHIPPING CO., Limited, v. TWEEDIE TRADING CO.

(District Court, S. D. New York. November 3, 1904.)

### 1. SHIPPING—CHARTER HIRE—IMPROPER FITTINGS FOR CARRIAGE OF ASPHALT.

A ship chartered for a voyage to South American ports, which went to Trinidad, by the charterer's direction, and without objection, to load a return cargo of asphalt under a subcharter, was bound to furnish the special lining required for such cargo to prevent it from getting behind the permanent battens with which she was equipped; and, where such



lining was not provided, she is liable for the expense of taking off the battens and removing the asphalt behind them; the cargo being a lawful one, and the charter containing no special provision exempting the vessel from the duty imposed generally of providing proper equipment and fittings for the service.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin and Charles R. Hickox, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the libellant, the Dene Steam Shipping Company, Limited, owner of the steamship Myrtledene, to recover a balance of charter hire, amounting to \$2,486.70 claimed to be due from the Tweedie Trading Company under charter dated December 10, 1902, and a continuation thereof dated March 31, 1903. There is no dispute as to the correctness of such amount and the fact that it has not been paid, but the respondent claims that it has offsets amounting to \$2,180.95.

These offsets arise out of various expenses incurred by the respondent in connection with the charter of December 10, 1902. All the claims now insisted upon by the respondent were, it is said, covered by a clause in the continuation of the charter as follows:

"Whereas the owners have presented notice to the charterers that owing to steamer not having proceeded to South America on previous charter, they hold them liable for damages, now in consideration of the execution of this charter on the part of the charterers the owners agree to waive said claim, and they also for said consideration agree that they allow the carriage of asphalt on previous charter and on this charter (the charterers of course contending that they had this right anyway) and the owners agree to waive their claim for damages incurred by the steamer in fitting up for asphalt & in repairing damages done to the steamer and for any loss of time incurred by the steamer in repairing said damage."

The claimed offsets are:

"Disbursements at Point La Brea in strengthening bulkhead, including cables and cash to Master.....	\$ 260.44
Disbursements at Phila. in tearing out battens and replacing same, and removing asphalt behind them and behind wooden bulkhead .....	942.16
Proportionate amount of hire while Phila. work was being done..	983.26

\$2,180.95"

The first charter provided for a "round trip to South America, not south of River Plate, option of West Indies en route." The steamship was delivered to the respondent thereunder at Norfolk, Virginia, February 9, 1903, at 9:30 a. m. and she was first ordered to carry a load of coal thence to Port of Spain, Trinidad, which she did. At this port the steamer was ordered to Point La Brea, Trinidad, by the respondent to carry out a sub-charter, dated February 11, 1903, with the New Trinidad Lake Asphalt Company, Limited, which provided for the transportation of a part of a cargo of asphalt from Point La Brea to Philadelphia.

Trinidad asphalt is of a viscous nature for which vessels were often lined throughout, for the double purpose of facilitating the unloading and preventing the cargo from sticking to the permanent structure of

the vessel. The printed form of the sub-charter contained a provision "(9) Steamer to line to carry asphalt at her own expense." This clause was stricken out before the execution of the instrument. No lining was provided for the vessel, nor was there any dunnage on board which could be used for such purpose. The vessel had permanent battens and when she was discharged in Philadelphia, the stevedores declined to remove that portion of the cargo which had gone behind them without extra compensation to cover the additional expense, with the result that the battens had to be removed subsequently by the charterer at considerable outlay.

The question presented for consideration is upon whom it was incumbent to furnish lining to prevent the asphalt from sticking to the sides of this ship. Formerly it was necessary to line all ships to prevent asphalt damage, *Dene S. S. Co. v. Munson* (D. C.) 103 Fed. 983, 985. Prior to the steamer's departure from Norfolk, the president of the respondent wrote to the master, under date of February 12, 1903, as follows:

"In the asphalt charters in old times the shippers used to insert a clause in the charter compelling the steamer to line the steamer's holds with lumber at her expense, but recently they waive this clause as they find it not necessary to have the steamer lined, and in this case the clause requiring the steamer to line at her expense is stricken out. So if they should require the steamer to line serve them notice that the cost of same & the steamer's time lost while so doing is for their account. So far as we are concerned of course we have no objection to your using your dunnage for a lining if you desire, but as we understand it is not usually done now we see no necessity for it."

The evidence in this case shows that the use of lime often suffices to prevent damage and had the vessel been thoroughly whitewashed, i. e. behind the battens as well as elsewhere, it is probable that no damage would have ensued from the loading. The master was not aware of the danger of an asphalt cargo. In any event, the thorough whitewashing that was necessary was not practicable here on account of the permanent battens and about 50 tons of asphalt remained principally behind them and partly behind a wooden bulkhead built against the next row of beams immediately forward of one of the iron bulkheads. The No. 2 cross bulkhead was broken by the asphalt, some stanchions were bent and a beam was twisted. The master of the steamer repaired the bulkhead and stanchions while the cargo was being discharged but that part of the asphalt behind the battens remained at the time but was afterwards removed by the respondent and it now seeks to charge the cost against the owner, having deducted a sufficient amount to cover the expenses from the hire. The remaining asphalt was a source of danger to other cargo in hot climates and its removal was imperative to put the vessel in condition to secure another charter.

There was no provision in the contract for the carriage of any unusual cargo requiring special fittings for its transportation. With respect to the furnishing of necessary things for the steamer, the charter provided:

"1. That the Owner shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers,

**Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.**

"2. That the Charterers shall provide and pay for all the Coal, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crew), and all other Charges whatsoever, except those before stated.

"Charterers are to provide necessary dunnage and shifting boards, but Owners to allow them the use of the dunnage and shifting boards already aboard the Steamer."

It is now settled that asphalt is a lawful cargo, *Dene S. S. Co. v. Munson*, *supra*, and it was incumbent upon the ship to provide the necessary fittings so as to render her seaworthy when she was about to engage in a trade, which called upon her to carry it. The first charter did not specifically provide that she should go to Trinidad but she went there under the charterer's order without objection or protest. The possible carriage of asphalt, which is the principal article of export from that island, must have been in contemplation at the time she went, or, if not, then it is evidently within the special marginal agreement, which seems to indicate an intention that the vessel should assume the burdens incident to such a trip. It was apparently the owner's duty to make her fit and seaworthy in such respect, which, in view of the permanent battens, required special lining to prevent the asphalt from getting behind them. The sending of the vessel to Trinidad was a matter of dispute between these contending parties but when the continuation of the existing charter, or new charter, was arranged, any claim which the owner may have had in consequence of the Trinidad voyage was waived and the owner also agreed to waive a claim for damages and expenses, which it supposed it had but did not actually have because there were no damages and the charterer had paid the expenses. The agreement provided for the carriage of asphalt on the first as well as the new charter and it is not easy to see how the owner can justly escape the payment of the expense caused by the lack of proper fittings. It seems just as much within the final intention of the parties as the matters specifically covered by the special agreement.

The libellant is apparently entitled to some hire above the respondent's disbursements incurred in removing the asphalt and in replacing the battens and wooden bulkhead. The steamer should be considered off hire while the work was being done, for which the respondent should also have credit. To arrive at a correct result, the services of a commissioner are necessary. The question of costs will await the coming in of his report.

Decree for the libellant, with an order of reference to ascertain the extent of its recovery after deducting the respondent's necessary outlays as above indicated.

## In re WOODEND.

(District Court, S. D. New York, November 25, 1904.)

**1. BANKRUPTS—COMPOSITION—RATIFICATION.**

A bankrupt, having been engaged in stock, bond, and produce brokerage, and having been once expelled from the Consolidated Exchange for fraud, and having conducted his business in such a manner that he failed, owing \$227,000, with hardly sufficient assets to pay the expenses of administering his bankrupt estate, organized a corporation to continue the business, and offered in composition to issue to his creditors preferred stock in such corporation to the full amount of their claims, and, in addition, an amount of common stock equal to 10 per cent. thereof. The corporation's articles provided that the common stockholders should have exclusive voting power, and that the amount of capital with which the company should begin business was \$1,000, the effect of which arrangement would be to vest in the bankrupt, to whom the entire stock was originally issued in return for the good will of his previous business, entire control of the corporation. *Held*, that in the absence of proof that the stock had been issued for "cash or property," as required by statute, the holders thereof would become personally liable for corporate debts to the amount of the face value of their stock, and hence such composition would not be enforced as against a dissenting creditor.

Charles E. Le Barbier and Marshall S. Hagar, for the motion.  
Ernest G. Stevens and Hugo S. Mack, opposed.

HOLT, District Judge. This is a motion to confirm a proposed composition. The bankrupt has offered in composition to each creditor preferred stock in the corporation W. E. Woodend & Co. equal to the full amount of his claim, and in addition an amount of common stock equal to 10 per cent. of his claim. The corporation has been organized since the bankruptcy. The bankrupt and two other persons are incorporators. The certificate states that the object of the corporation is to carry on the business of stock, bond, and produce brokerage; that the amount of its capital stock is \$400,000, consisting of 4,000 shares of the par value of \$100 each, 2,500 shares being preferred stock and 1,500 common stock; that the holders of the preferred stock shall have no vote, but that the holders of the common stock shall have exclusive voting power; and that the amount of the capital with which the company shall begin business is \$1,000. The amount of the stock which has been deposited for the purpose of carrying out this composition is 2,270 shares of preferred stock and 227 shares of common stock. The statute under which the company was incorporated prohibits the issue of stock except for cash or property. There is no proof that the stock has been issued for cash or property. It is asserted by the counsel for the objecting creditors that the entire stock was originally issued to the bankrupt, that \$1,000 in cash has been contributed as capital, and that the consideration for the issue of the remaining \$399,000 of stock was the right to use the name and credit of the bankrupt and the good will of the stock brokerage business formerly carried on by him. If this is so, in my opinion the transfer of such rights is not a transfer of property, within the meaning of the statute. Even if such rights might be held to be property, it seems doubtful whether they are worth \$399,000, in view of the facts that

the bankrupt was expelled from the Consolidated Exchange for obvious fraud, and conducted his business in such a manner that he failed, owing \$227,000, and leaving such trifling assets that the trustee reports that probably nothing will be payable to creditors after the expenses of administration are defrayed. It is claimed that, there being no evidence of illegality in the issue of this stock, the court should presume that it was legally issued. Such a presumption might be proper in some circumstances, but the approval of a composition is discretionary, and, in my opinion, when such an unusual proposal of composition is made as to give stock in full payment without any cash or security, the bankrupt should give some evidence showing that the stock which he offers has some value. If in fact this company starts with only \$1,000 capital, its stock, the nominal value of which is \$100 a share, has an actual value of 25 cents a share, and its stockholders are personally liable to the amount of the face value of their stock for any debts which may be hereafter contracted by this corporation. As by the proposed composition the bankrupt is to be left with the majority of the common stock, which alone has voting power, his management of it, if unsatisfactory, could not be changed. The actual composition proposed, therefore, as I understand it, consists of an offer to pay debts with worthless stock, the acceptance of which will impose a heavy personal liability. For instance, a creditor for \$1,000 is to be forced to accept in full settlement 11 shares, worth \$2.75, the acceptance of which would involve him in a personal liability to the extent of \$1,100. I think that no such composition should be confirmed. It is urged that a large majority of the creditors have assented to it. Any creditors who choose to make such a settlement are free to do so, but, in my opinion, this court should not compel any dissenting creditor to accept such an offer.

The motion to confirm the composition is denied.

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TURNER v. FISHER et al.

(District Court, N. D. California. March 11, 1904.)

No. 295.

1. **BANKRUPTCY — VOIDABLE PREFERENCE — REASONABLE CAUSE TO BELIEVE DEBTOR INSOLVENT.**

Evidence considered, and *held* insufficient to show that a creditor to whom the debtor transferred property while insolvent, and within four months prior to his bankruptcy, had reasonable cause to believe him insolvent at the time, or that he intended to give a preference, so as to entitle the trustee to recover the property.

Action by Trustee in Bankruptcy to Avoid a Preference.

R. H. Cross, for plaintiff.

John R. Glascock, for defendants.

DE HAVEN, District Judge. This action is brought by the trustee of the bankrupt, Curry, for the purpose of setting aside an assignment made by the bankrupt to the Puget Sound Lumber

Company, of a certain note and mortgage. The assignment was executed on January 16, 1903, and within four months thereafter Curry was adjudicated a bankrupt. The complaint alleges that upon the date of the assignment Curry was insolvent, and that the Puget Sound Lumber Company, and its agents acting therein, had reasonable cause to believe that in making the assignment he intended to give a preference to the Puget Sound Lumber Company. The evidence, in my opinion, shows that Curry was insolvent at the time when he made the assignment referred to, but is not sufficient to show that the Puget Sound Lumber Company, or either of its agents, Fisher or Hunt, had reasonable cause at that time to believe that he was insolvent. The question of a creditor's knowledge of a debtor's financial condition, or whether he had reasonable cause to believe him insolvent, is one of fact, and the rule which governs the court in its determination is thus stated in section 963 of *Brandenburg on Bankruptcy* (3d Ed.):

"The creditor is not charged with knowledge of his debtor's financial condition from the mere nonpayment of his debt, or from circumstances which gave rise to mere suspicion in his mind of possible insolvency; nor is it essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent. He has reasonable cause so to believe if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, for he is charged with knowledge of the facts which such inquiry should reasonably be expected to disclose, or if he has knowledge of facts and circumstances which would cause a reasonably prudent man so to believe. While constructive notice is sufficient ground for such belief, yet the circumstances upon which such notice is predicated must be of a character to induce belief, as distinguished from mere suspicion."

And in discussing the same question, Mr. Justice Bradley, in delivering the opinion of the Supreme Court in the case of *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have not cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law."

See, also, *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *In re Eggert* (D. C.) 98 Fed. 843; *Id.*, 102 Fed. 735, 43 C. C. A. 1.

The evidence of the witnesses Fisher and Hunt, agents of the defendant corporation, is, in my opinion, entitled to credit. They testified, in substance, that they did not know of the insolvency of Curry, and, while the account due from him to the Puget Sound Lumber Company was about three months overdue, they were not pressing him for payment, and did not believe he was insolvent; and I am not satisfied from the evidence that any fact was brought

to their notice sufficient to excite in their minds as reasonable men a belief of the bankrupt's insolvency. My conclusion from all of the evidence is that the Puget Sound Lumber Company did not at the date of the assignment have reasonable cause to believe that in making it the bankrupt intended to give a preference to it, and the agents of the corporation did not at that time know that the bankrupt was in fact insolvent.

In accordance with these views, the defendants are entitled to judgment, and it is so ordered.

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UNITED STATES v. NATIONAL FIBRE BOARD CO.

(District Court, D. Maine. November 26, 1904.)

No. 82.

1. CUSTOMS DUTIES—ACTION TO RECOVER—JURISDICTION OF DISTRICT COURT.

A district court of the United States has jurisdiction of an action of debt to recover duties due from an importer to the United States, which through accident, mistake, or fraud have not been paid, the government not being limited to its remedy by summary proceedings against the goods under sections 13 and 14 of the customs administrative act of June 10, 1890, 26 Stat. 136, 137 [U. S. Comp. St. 1901, pp. 1932, 1933], or other provisions of the tariff laws for the collection of duties, which are not only a charge against the goods, but also a personal debt of the importer.

On Motion by Defendant to Dismiss.

Isaac W. Dyer, U. S. Dist. Atty.

Jerome F. Manning, for defendant.

HALE, District Judge. This is a civil action of debt, brought by the United States against the defendant, for the recovery of duties upon merchandise imported into the United States. The merchandise so imported, upon which duties are sought to be recovered, are certain bales of tow of flax entered as waste paper stock. The case now comes before the court upon the defendant's motion to dismiss the action on the ground that the court has no jurisdiction.

The only question presented to the court upon the record is: Has a district court of the United States jurisdiction to entertain an action of debt to recover duties due from an importer to the United States? The learned counsel for the defendant urges that the government is limited to the summary proceedings before the collector and before the general appraisers, as provided in sections 13 and 14 of the act of June 10, 1890 (26 Stat. 136, 137 [U. S. Comp. St. 1901, pp. 1932, 1933]), and in other provisions of the existing tariff law; and that the government has no other remedies against an importer for the collection of its duties. This question has been fully considered and passed upon by the courts. In *United States v. George*, 6 Blatch. 406, at page 416, Fed. Cas. No. 15,198, Judge Benedict says:

"It is said that there can be no legal liability for duties, because no duties can be collected, levied, and paid as duties unless the merchandise is in the

possession and control of the government; that, as soon as property is fraudulently withdrawn, the power to collect duty ceases, and fines, penalties, and forfeitures are imposed. But the law is otherwise. Duties are not simply a charge on merchandise to be collected only by the custody of the property. They are also a personal charge against the importer—a debt created by law—which may be collected by a civil action, wholly irrespective of the possession of the goods.”

In *United States v. Boyd* (C. C.) 24 Fed. 690, Judge Wallace, of the New York circuit, cites with approval the above case of Judge Benedict. Judge Wallace says:

“It is a very ancient doctrine that debt lies for customs due upon merchandise, even if the goods are forfeited for nonpayment of duties.”

The whole line of authorities are cited in an opinion of Judge Story in *United States v. Lyman*, 1 Mason, 482, Fed. Cas. No. 15,647. A leading case upon this subject is found in this circuit in *United States v. Cobb* (C. C.) 11 Fed. 76, where, at page 78, Judge Nelson says:

“The first objection was that the passage of the goods as free at the date of the entry was a decision of the collector, equivalent to a final liquidation of the duties in the case of dutiable goods; that the goods were free of duty; and that this decision was binding on the government; but this is manifestly not so. \* \* \* The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings in rem, but are not the sole remedies of the government for the collection of its duties. It is well settled that the right of the government to the duties is not limited to the lien on the goods or to the bond given for their payment. The act makes the duties a personal debt or charge upon the importer, which accrues to the government immediately upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled, or for any reason have never come to the hands of the customs officers, or the statutory proceedings have never been instituted, or through accident, mistake, or fraud no duties, or short duties, have been paid; and the importer is not discharged from his debt by a delivery to him of the goods without payment.”

The court also refers, in the case last cited, to *Meredith v. United States*, 13 Pet. 486, 10 L. Ed. 258; *United States v. Lyman*, 1 Mason, 483, Fed. Cas. No. 15,647; *United States v. Phelps*, 17 Blatch. 312, Fed. Cas. No. 16,039.

*United States v. Meredith*, supra, the leading case upon the subject, has been referred to by the learned attorney for the government in the case at bar. In that case Mr. Justice Story says:

“An action of debt lies in favor of the government against the importer for the duties whenever, by accident, mistake, or fraud, no duties, or short duties, have been paid.”

Upon an examination of sections 13 and 14 of the act of June 10, 1890, and of all the other provisions relating to summary proceedings which the customs officers are required by law to take against imported goods, the court can have no question but that these are summary proceedings in rem against imported goods, but that the government is not limited by statute to these proceedings, and is not prevented by them from bringing a civil action for the collection of duties, whenever, by accident, mistake or fraud, no duties have been paid. In the decisions which we have cited, duties are distinctly held to be a personal debt or charge upon the importer.



The rulings to which we have referred are not in any way affected by the present legislation of Congress relating to the subject-matter. Duties are still a personal debt, for which an action may be brought by the government against the importer immediately upon the arrival of the goods at the proper port of entry. Such action, being personal in its nature, may be brought in the district where the defendant resides; and in this district an action of debt is the appropriate remedy. The District Courts of the United States have jurisdiction of such actions, under section 563, par. 4 [U. S. Comp. St. 1901, p. 456], of the Revised Statutes of the United States, such actions being authorized by the controlling decisions of the United States courts.

The motion to dismiss is overruled, with costs.

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### THE MARY F. CHISHOLM.

(District Court, D. Maine. December 10, 1904.)

No. 135.

1. MARITIME LIENS—SUPPLIES—JUDGMENT OF MASTER AS TO NECESSITY.

Food supplies ordered by the master of a fishing schooner, who was also managing owner, for the use of the crew on a fishing voyage, under the usual lay contracts, in the absence of any showing of bad faith on his part, will be presumed to be supplies "necessary for the employment" of the vessel, within the meaning of the Maine statute giving a lien for such supplies, and the court will not undertake to determine that certain of the articles were "luxuries" for which the vessel is not liable.

In Admiralty. Suit to enforce statutory lien for supplies.

Benjamin Thompson, for libellant.

William H. Gulliver, for respondents.

HALE, District Judge. This is a libel in rem, brought on the 3d day of May, 1904, by Charles F. Guptill against the fishing schooner Mary F. Chisholm, to recover for certain chandlery stores and other supplies furnished and delivered by the libellant during the fishing seasons of 1902 and 1903, while she was engaged in the prosecution of the mackerel fishery. The lien which is sought to be enforced in the present suit is based upon section 7 of chapter 93 of the Revised Statutes of Maine, relating to liens upon domestic vessels, which is as follows:

"All domestic vessels shall be subject to a lien to any part owner or other person, to secure the payment of debts contracted, and advances made for labor and materials necessary for their repair, provisions, stores, and other supplies necessary for their employment, and for the use of a wharf, dry-dock or marine railway, provided that such lien shall in no event continue for a longer period than two years from the time when the debt was contracted or advances made."

This fishing schooner has lately been before the court in another case relating to supplies delivered to it. See 129 Fed. 814. The libel alleges that the schooner is a domestic vessel of the burden of 70 tons,

¶ 1. Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.

hailing from the port of Portland, and owned by residents of Portland, and that, during the fishing seasons of 1902 and 1903, James A. Ellsworth, the claimant, was master and managing owner; that in the months of April, May, June, July, August, and September, 1902, and in the months of June and July in the year 1903, the schooner was in the port of Portland, and was in need of certain material, stores, and supplies in order to repair and equip her and to render her seaworthy, and to enable her to enter upon and continue in the prosecution of certain fishing voyages; that the libelant, at the special request of the master and agent, furnished upon the credit of said vessel certain materials for her repair, and provisions, stores, and other supplies necessary for her employment, and that, under and by virtue of the laws of the state of Maine, the libelant is entitled to a lien upon said vessel. The answer admits that at the times mentioned in the libel the schooner required certain stores and supplies which were necessary in order to equip her and enable her to enter upon and continue in her business, and that the libelant furnished such stores upon the credit of the schooner. It, however, alleges that the schooner, during the times mentioned in the libel, was sailed on the customary lay for the mackerel fishery, and that under such lay it was the duty of the vessel to supply the crew with necessary provisions, and no more, and that milk, green vegetables, canned goods, butter, preserves, pickles, and similar supplies are not "necessary," but are luxuries, and are to be paid for by the crew of the vessel; that such supplies were not ordered and supplied upon the credit of the vessel, and were not in any way necessary for her employment in said business, but were wholly for the individual members of the schooner's crew.

It is agreed between the parties that all the items in the libelant's account were furnished by him on the order of Capt. Ellsworth, and delivered to the schooner, and that the prices charged for all these goods are the usual and customary market prices, except in the matter of one item of 307 yards of Woodbury duck, of the value of \$85.96, and two items of 195 yards of York duck, of the value of \$29.25, and 30 yards of cotton duck, of the value of \$9. The whole controversy is then embraced in two questions: First. Are the prices charged for the duck reasonable? Second. Under the statutes of Maine, does a lien exist for stores and provisions of the character set out in the schedules filed in the libel, these being referred to in the claimant's answer as "luxuries," and comprising "milk, green vegetables, canned goods, butter, preserves, pickles, and like supplies"?

The first question is purely one of fact. The libelant testifies that the charges for the duck were at the regular market price, that the bills for them were made up and presented to Capt. Ellsworth, and that he never made any objection. We do not remember that the evidence shows any denial by the defendant. Other men of large experience in the chandlery business were called as witnesses by the claimant, but did not testify upon this point. Upon the evidence in the case, the court finds that the prices charged for the duck are reasonable.

The second question involves the construction of section 7 of chapter 93 of the Revised Statutes of Maine, relating to liens on domestic vessels, and the nature of the goods which may be furnished under this

statute. The entire amount of libellant's claim is the sum of \$1,246.42. The claimant does not deny that the prices of all the outfits were correct and reasonable, but he does deny that, under the statute, certain articles in the libellant's schedules were necessary; he insists that those articles come under the designation of "luxuries." May a recovery be had for them in this suit? The claimant's objection is, first, that the schooner could have proceeded in the mackerel fishery without this class of outfits or supplies; second, that there is a custom in the port of Portland for the crews of vessels in the mackerel fishery to pay for this class of goods; that, as to this particular schooner, it was expressly agreed between the master and crew that the crew should pay for these supplies, and that the libellant knew of both the custom and the agreement. In our decision, 129 Fed. 814, this court held "that the remedy within the contemplation of this statute must be limited to such articles as are for the benefit of the ship in aid of the voyage, and necessary in order to make the ship accomplish her undertaking." In that case we held that all the supplies furnished related to the personal needs and convenience of the men, and were not supplies necessary for the employment of the vessel. The issue in the case at bar is an entirely different one. We must first address ourselves to the question of fact, whether or not the evidence in the case proves a custom in the port of Portland for the crews of vessels in the mackerel fishery to pay for goods of the class sued for in this libel. The evidence relating to this custom is very vague and unsatisfactory. We do not think it affirmatively proves such custom, nor do we think that in the case of this particular schooner an agreement has been affirmatively shown between the master and crew that the crew should pay for the supplies. It remains for us to decide whether the milk, green vegetables, canned goods, butter, preserves, pickles, and like supplies for which this suit is brought are necessary to the employment of the vessel, or whether they are mere "luxuries." The evidence tends to show that the master ordered these supplies in good faith; that he decided that they were necessary for the employment of the ship; that he found them requisite and necessary; and that he, with his crew, consumed them. It seems, too, that the supplies were all sold and delivered by the libellant in good faith, and upon the credit of the vessel. There is also evidence on the part of reliable witnesses that these were articles such as a master of a vessel engaged in the merchant service would have ordered and found requisite. The term "luxuries" is an entirely relative term. No such question is raised in the case at bar as was involved when this vessel was last before the court. In that case we held that the supplies were for the personal use of the fishermen, and not for the ship. In this case it is difficult to say that one class of food is any more for the personal benefit of members of the crew than another class of food. The old rule, applied by the English courts, is to the effect that, in the employment of the ship, the master is the agent of the owner; that his situation and duties furnish a presumption that he has authority from the owner to take all measures that may be necessary for rendering the employment of the vessel efficient and beneficial to his employer; that in the performance of this duty, in good faith, his judgment must prevail as to what food may be furnished to the men;

and that such judgment should be conclusive with the courts, unless he is shown to have acted in bad faith or in violation of his duty. The Alexander, Robinson's Admiralty Reports, 356 et seq.; Webster v. Seekamp, 4 Barn. & Ald. 352. We think that this rule has not been changed by the late decisions in the admiralty courts, and that it should not be changed. The rule is of especial force when, as in the case at bar, the master is one of the owners, and is in fact the managing owner, of the vessel. There is no evidence in the case at bar tending to show that the master acted in bad faith or in violation of his duty. He held the supplies in question to be necessary; we find nothing in the case from which we can come to a different conclusion. We think the rule should be, and is, that a competent master is presumed, in the absence of testimony to the contrary, to have provided what is fit and proper for the service in which the vessel is engaged, and to have acted for his owners in doing so. In this view of the case, we hold that the goods in question were supplies necessary for the employment of the vessel, within the meaning of the statute.

A decree may be entered for the balance, due the libelant for supplies furnished to the schooner, of \$896.42, to which interest may be added to the 8th of November, 1904, this interest amounting to \$158.41. The total decree for the libelant may therefore be for the sum of \$1,054.83, with costs.

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**A. L. WOLFF & CO. v. CHOCTAW, O. & G. R. CO. et al.**

(Circuit Court, E. D. Arkansas, W. D. November 18, 1904.)

No. 5,275.

**1. JURISDICTION OF FEDERAL COURTS.**

Under Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], a party cannot be sued in a federal court in any district other than that of which he is an inhabitant, except when the jurisdiction is invoked only upon the ground of a diversity of citizenship the action may be maintained in the district of the residence of either the plaintiff or the defendant; but, as this provision of the law is merely a privilege for the benefit of the defendant, he may waive it.

**2. SAME—AGAINST FEDERAL CORPORATIONS.**

An action against a corporation created by an act of Congress is one arising under the laws of the United States, and under the act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], can only be maintained in a federal court of the district of which it is an inhabitant (i. e., has its principal offices and transacts its corporate business), regardless of the residence of the plaintiff.

**3. RESIDENCE OF CORPORATION.**

A corporation is an inhabitant of the state and district in which its principal offices are, and its corporate business is transacted. The fact that it is doing business in a state or district other than that in which it has its residence, although it has, in compliance with the laws of such other state, consented to be sued in its courts, and for that purpose appointed an agent upon whom legal process may be served, does not make it an inhabitant of such state or district, within the meaning of the act of March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508].

(Syllabus by the Court.)

J. H. Harrod, for plaintiff.  
E. B. Peirce, for defendants.

TRIEBER, District Judge. The plaintiffs, citizens of the state of Missouri, instituted this action to recover damages from the defendants, the Choctaw, Oklahoma & Gulf Railroad Company, a corporation created by an act of Congress, having its principal office in the Indian Territory, and the Chicago, Rock Island & Pacific Railroad Company, a corporation created by and existing under the laws of the state of Illinois; both of the corporations doing business in this state and district.

While the residence of the parties, if there is a diversity of citizenship, or the cause of action is of a nature which the Constitution authorizes Congress to place within the jurisdiction of the national courts, is not strictly jurisdictional, but merely a privilege for the benefit of the defendant, which he may waive (*Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; *Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401; *Memphis Savings Bank v. Houchens*, 115 Fed. 96, 52 C. C. A. 176), the defendants in this case declined to waive it, and object to the assumption of jurisdiction by this court.

The jurisdiction of this court as against the Rock Island Company is invoked upon the sole ground of a diversity of citizenship, but, as neither the plaintiffs nor that corporation are citizens of this state and inhabitants of this district, the objection to the jurisdiction must be sustained, as the act of March 3, 1887, c. 373, 24 Stat. 552 [*U. S. Comp. St.* 1901, p. 508], expressly provides that actions "which are founded only on the fact that they are between citizens of different states shall be brought only in the district of the residence of either the plaintiff or defendant." It is equally well settled by the decisions of the Supreme Court that a corporation cannot be considered a citizen and inhabitant or a resident of a state in which it has not been incorporated, although it does business in that district, and has, in compliance with the laws of that state, consented to be sued in its courts, and appointed an agent upon whom legal process against it may be served. Consequently a corporation incorporated in one of the states of the Union cannot be compelled to answer to a civil suit at law or in equity in a Circuit Court of the United States held in another state or district, even if the corporation has a usual place of business in that district, unless the plaintiff is a citizen and resident of this district. *McCormick Company v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377; *In re Keasbey & Mattison Company*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402.

As to the other defendant, the Choctaw, Oklahoma & Gulf Railroad Company, the objection to the jurisdiction of this court is upon other grounds. That defendant being a corporation created by an act of Congress, the jurisdiction of this court is invoked upon the ground that it is an action arising under the laws of the United States. *Pacific*

Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; *Butler v. National Home*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. Ed. 346; *Texas & Pacific Railway Co. v. Cox*, 145 U. S. 601, 12 Sup. Ct. 905, 36 L. Ed. 829; *U. S. Freehold L. & E. Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470; *Supreme Lodge K. of P. v. England*, 94 Fed. 369, 36 C. C. A. 298.

Can a corporation of that kind be sued in a national court of a district other than that of which it is an inhabitant? The authorities hereinbefore cited are conclusive that a corporation is an inhabitant only of the state and district in which its principal place of business is. In *Galveston, etc., Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, it was held that a suit against a domestic corporation can only be maintained in a national court of the district in which its principal offices are, where its books are kept, and its corporate business transacted, although it may transact its most important business in another district or state. The act of March 3, 1887, provides that "no civil suit shall be brought before either of said courts [the courts of the United States] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Had there been nothing else added to this section, there could be no doubt whatever that no person could be sued in a national court in any district other than that of which he is an inhabitant, within the meaning of the law as hereinbefore defined. The fact that the act of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], of which the present act is amendatory, had this additional clause, "or in which he [the defendant] shall be found at the time of serving of such process or commencing such proceeding, except as hereinafter provided," is omitted in the act of 1887, is proof conclusive that the intention of Congress was to limit the jurisdiction of the national courts, and not to permit a party to be sued in a national court in any district other than that whereof he is an inhabitant, except in the one instance mentioned in the proviso to that section of the act of March 3, 1887. That proviso is:

"But where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either plaintiff or defendant."

It is therefore apparent that, under the judiciary act now in force, a suit arising under the laws of the United States—and this action, so far as it concerns the Choctaw, Oklahoma & Gulf Railroad Company, is of that nature—cannot be maintained in a national court in any other district than that wherein the defendant resides, unless the defendant sees proper to waive this privilege accorded him by the statute.

In *re Keasbey & Mattison Company*, *supra*, the suit arose under the trade-mark laws of the United States, and was instituted in the Circuit Court for the Southern District of New York by a corporation of Pennsylvania against a corporation existing under the laws of the state of Massachusetts, but doing business and having an agent authorized to be served with process in the Southern District of New York; and the court held, after reviewing all previous decisions of that court, and the language of the judiciary act of March 3, 1887, that the defendant could

not be compelled to answer in that district, of which it was not an inhabitant.

In *United States v. S. P. Shotter Company*, 110 Fed. 1, the government instituted a civil suit in the Circuit Court of the United States in the state of Alabama against the defendant, a corporation created under the laws of the state of West Virginia, but carrying on business within the District of Alabama. On the authority of *Shaw v. Mining Company*, *supra*, it was held that the court was without jurisdiction. The defendant corporation was an inhabitant of the state of West Virginia, the state of its incorporation, and could not be sued by the government in a court of the United States for the District of Alabama, although found there, and having an agent authorized to be served with process against it. Other cases to the same effect are *Donnelly v. U. S. Cordage Co.* (C. C.) 66 Fed. 613; *Manufacturing Co. v. Watson* (C. C.) 74 Fed. 418; *United States v. O'Brien* (C. C.) 120 Fed. 446.

The fact that Congress, by the act of 1887, made special provision for actions in which the jurisdiction depends only on a diversity of citizenship, permitting them to be maintained in the district of the residence of the plaintiff or defendant, but made no such provision for actions in which the jurisdiction depends upon other grounds, clearly indicates that it did not intend to permit a party to be sued in a national court in any district other than that where he resides, except where the jurisdiction is invoked upon the sole ground of a diversity of citizenship. No doubt this works a great hardship in cases of this kind—actions against federal corporations. They are permitted to remove a cause from a state to a national court against the wishes of the plaintiff, but cannot be impleaded in a national court, if such is the wish of the plaintiff, except in the district in which its principal offices are. But courts are powerless to remedy this injustice. Congress alone possesses that power, and until it sees proper to change the law the courts are bound by the statutes.

The demurrer of each of the defendants must be sustained, and the cause dismissed for want of jurisdiction.

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### THE PIERRE CORNEILLE.

#### THE LARNACA.

(District Court, N. D. California. December 7, 1904.)

Nos. 11,310, 11,318.

#### 1. COLLISION—SAILING VESSELS—RIGHT OF VESSEL CLOSE-HAULED TO KEEP HER COURSE.

A vessel sailing close-hauled is justified in maintaining her course as against an approaching vessel sailing free, in the absence of some clear indication that the latter will fail in her duty to keep out of the way.

#### 2. SAME—FAILURE TO MAINTAIN LIGHTS.

A collision occurred in the night just outside the entrance to the Bay of San Francisco between the ship *Larnaca* outward bound, and sailing

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¶ 1. See *Collision*, vol. 10, Cent. Dig. §§ 25, 37.

close-hauled, and the bark *Pierre Corneille*, coming in, and sailing free. The *Corneille* had a competent lookout, who, as well as the master and pilot, testified that they saw the *Larnaca* as a dark object when half a mile distant, and examined her through a glass, but could see no side lights, and could not make out her course, but supposed her to be inward bound. The starboard side light should have been seen if it had been burning. The *Corneille* changed her course to starboard, which brought her directly across the course of the *Larnaca*, and caused the collision: an act which would have been most improbable if they could have seen the *Larnaca's* lights. Held that, notwithstanding contrary testimony from officers and crew of the *Larnaca*, it must be found that the light was not burning, or was too dim to be seen at any distance, and that she was chargeable with fault for the collision.

In Admiralty. Cross-suits for collision.

Page, McCutchen & Knight, for libelant Giles.

Andros & Hengstler, for libelants Le Blond et al.

DE HAVEN, District Judge. These are cross-libels to recover damages resulting from a collision between the ship *Larnaca* and the bark *Pierre Corneille*. In *Giles v. The Pierre Corneille* the libel charges that the collision was caused solely by the fault of those in charge of the latter vessel, in this: that at and before the collision the *Pierre Corneille* was running free, and the *Larnaca* was sailing close-hauled, and that the former did not keep out of the way of the latter, as required by law. To this the owners of the *Pierre Corneille* answered, and in their libel against the *Larnaca* allege, that the collision was brought about solely by the negligence of those in charge of the *Larnaca*, in this: First, that the *Larnaca* did not exhibit the lights required by the sailing regulations of the act of March 3, 1885 (chapter 354, 23 Stat. 438-439), then in force; second, that when the master of the *Larnaca* saw that a collision was imminent he neglected to take precautions to avoid such collision, made necessary by the special circumstances of the case, and as required by article 24 of the same act of Congress. The vessels collided between 1 and 2 o'clock on the morning of November 11, 1896, just outside the bay of San Francisco. The night was dark, but clear. There was a light breeze, and the sea was calm. The *Pierre Corneille* was running free coming into the harbor, and the *Larnaca* was close-hauled on the starboard tack, sailing away from the port. The latter was originally bound for San Francisco, but a short time before the collision her master received orders through a pilot, directing him to wear his ship and proceed to Portland. The *Pierre Corneille's* pilot, in going out to her, passed the *Larnaca*, and noticed that the latter vessel was hove to, and that a pilot was boarding her, and supposed she was inward bound.

1. The evidence shows that the *Larnaca* held on to her course, although she observed the lights of the *Pierre Corneille*, and was thus informed that she was approaching on a course involving danger of collision. But the failure of the *Larnaca* to change her course cannot be imputed to her as a fault. The situation was not such as to clearly indicate to her master that the *Pierre Corneille* would fail in her duty of keeping out of the way, and in the absence of some clear indication of such failure of duty the *Larnaca* was justified in maintaining her



course. The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

2. There is a marked conflict in the evidence upon the question whether the Larnaca before and at the time of the collision exhibited the lights required by law. The burden of proving that such lights were not exhibited is upon the Pierre Corneille. It satisfactorily appears that there was a competent lookout properly stationed on the Pierre Corneille, and he testified that the Larnaca was first discovered as a dark object on the water from one point to one point and a half on the port bow, and apparently half a mile distant, and that he saw no lights on her. The master and pilot of the Pierre Corneille saw her at about the same time, and their testimony is, in substance, that they both observed her through glasses; that they did not see either of her side lights, and could not determine in what direction she was moving until it was too late to take effectual measures to prevent the collision. They also testified that they were able at the time to see the lights of different lighthouses within visual range, and that, if the lights of the Larnaca had been set, and burning properly, they would have seen them; and it is clear from all of the testimony in the case that if lights were in fact exhibited upon the Larnaca they should have been observed by those on board of the Pierre Corneille. The master of the Larnaca, her lookout, second mate, and some of her seamen testify with great positiveness that her lights were set and burning clear and bright from the time the Pierre Corneille was first seen until the collision. In view of the sharp conflict in the evidence, it is difficult to reach any certain conclusion as to the actual fact in relation to the lights upon the Larnaca, whether they were exhibited or not; but after careful consideration it seems to me the finding should be in favor of the Pierre Corneille. She was coming into the harbor, and was under command of an experienced pilot, and it is not at all probable that she would have been navigated in the way she was if the starboard light of the Larnaca had been seen, for with that light in view the master and pilot of the Pierre Corneille would have known that porting her wheel, as they did, and changing her course to starboard, would make a collision inevitable. But they did not see this light, and the most reasonable conclusion is that, if set at all, it was not supplied with sufficient oil, or for some other reason had become so dim that it was not visible for any distance. The language of Brown, J., in the case of *The Amboy* (D. C.) 22 Fed. 555, is particularly applicable to the question now under discussion, and may well be quoted in concluding this opinion:

"The purpose of lights is to be seen. If they do not fulfill that office to ordinary observation, the vessel must be held in fault; and when several witnesses concur in testifying that the lights could not be seen in a situation where they ought to have been seen, and, more especially, where it appears that the persons in charge of another vessel maneuvered their own vessel in reference to the other, and that, upon looking specially for colored lights, they could not see any, and actually navigated their own vessel in a way that would have been highly improbable had the colored lights been visible, the inference seems irresistible, and this court has often held, that there must have been some defect in the lights that ought to have been seen, but was not seen. *The State of Alabama* (D. C.) 17 Fed. 847; *The Alaska* (D. C.) 22 Fed. 548; *The Johanne Auguste* (D. C.) 21 Fed. 134, 140; *The Narra-*

gansett, 20 Blatchf. 87, 11 Fed. 918; The Sam Weler, 5 Ben. 293, Fed. Cas. No. 12,290."

It follows from what has been said that there must be a decree dismissing the libel of *Giles v. The Pierre Corneille*, and a decree in favor of the libelants in the case of *Le Blond et al. v. The Larnaca*, and the latter case will be referred to United States Commissioner Manley, to ascertain and report the damages.

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REHBEIN v. WEAVER et al.

(Circuit Court, N. D. Illinois. December 14, 1904.)

No. 27,118.

1. TRADE-MARKS—RIGHTS UNDER STATE STATUTE—ENFORCEMENT IN OTHER JURISDICTIONS.

A suit cannot be maintained in a federal court to enforce rights under a state statute relating to trade-marks, and providing for their registration, where the transactions complained of occurred outside of such state.

In Equity.

James A. Carr and Albert D. Currier, for complainant.  
Sullivan & Jarrett, for respondents.

KOHLSAAT, District Judge. This suit is brought by complainant to restrain defendants from infringing complainant's trade-mark, registered in accordance with the laws of Missouri. The jurisdiction is based upon diversity of citizenship. The amount involved is alleged to be "in excess of two thousand dollars."

This is a proceeding to enforce in this district complainant's rights under the Missouri statute. In *Black on Interpretation of Laws*, edition of 1896, it is stated that "it is not within the competency of the legislative power, upon grounds of public policy, to create personal liabilities, and impose them on persons and property out of the jurisdiction of the state, and on account of transactions occurring beyond its territorial limits." The bill seeks two remedies: (1) To restrain infringement of the Missouri registered trade-mark; (2) to restrain unfair competition. The record utterly fails to show a condition of facts which would warrant the relief prayed in the second case above set out. No damage is shown, nor does it appear that persons were likely to be misled by defendants' methods. As to the registered trade-mark, there is no jurisdiction in this court to enforce the Missouri law in regard to registration of trade-marks in the case of transactions occurring outside that state. Whether there is jurisdiction as to those acts which took place in the state is a matter of doubt. It does not appear that defendants ever were in that jurisdiction, or whether a right of action accrued in Missouri. But, aside from

¶ 1. Jurisdiction of federal courts as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.

that, even if such a right existed in Missouri, there is nothing in the record to show that in such case the amount involved in the controversy met the requirements of the statute.

The suit is dismissed for want of jurisdiction.

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THE FRED E. SCAMMELL.

(District Court, S. D. New York. November 5, 1904.)

1. SALVAGE—NATURE OF SERVICE—TOWING VESSEL FROM FIRE.

Towing a vessel from the vicinity of a fire, where there was remote danger, while a service of a salvage character, does not call for a substantial award. An allowance of \$100 made for towing a tug away from a fire on a bulkhead, near which she was lying, with other vessels, without her regular crew on board.

In Admiralty. Suit to recover for salvage service.

Peter S. Carter, for libellant.

Martin A. Ryan, for claimant.

ADAMS, District Judge. This action was brought by Henry Du Bois Sons Co., the owner of the steamtug, Tacoma, to recover for alleged salvage services rendered to the steamtug Fred E. Scammell, on the 21st day of January, 1904, while she was lying outside of the steamer Nanticoke, which was fastened to the bulkhead between Grand and Morris Streets, Jersey City. Outside of the Scammell was a scow, called the Charles A. Brown. A destructive fire broke out in a machine shop on the bulkhead, 20 or 30 feet from these vessels, which were all pulled out by the Tacoma and taken to near the end of the pier at foot of Morris Street.

The claimant contends that the services were not of a salvage character as the vessels were in no danger, the wind being from the north east, which would blow any flames away from them.

The testimony shows that the vessels were not in imminent danger but that there was a chance the flames would attack them, notwithstanding a slight wind from the north east, and if that happened there was danger of serious loss.

It appears that the services rendered were of a salvage character but of a low order and in duration of only about half an hour. The Scammell's danger was not great and there was little or no danger to the rescuing tug. It was not necessary to resort to the Tacoma's pumps but merely to tow the Scammell and the other vessels to a place of safety near by. It is not a case for a substantial award but merely one to encourage the exertions of salving vessels when others are threatened, especially when, as in this case, there was no regular crew aboard. The Scammell was worth about \$5,000.

An award of \$100 will meet the requirements of the case and I allow that amount.

¶ 1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

## THE OREGON.

(Circuit Court of Appeals, Ninth Circuit. November 7, 1904.)

No. 1,031.

**1. ADMIRALTY—SUITS IN REM—JOINDER OF LIBELANTS.**

A court of admiralty may properly permit a large number of passengers to join in a single libel in rem against a vessel to recover damages alleged to have been sustained by them severally by reason of the failure to keep the vessel in a cleanly condition during a voyage, and to supply suitable accommodations and a sufficient quantity of wholesome food and provisions.

**2. SHIPPING—SUIT BY PASSENGERS TO RECOVER DAMAGES—SUFFICIENCY OF PROOF.**

Where a large number of libelants join in a suit in rem against a vessel to recover damages for injuries alleged to have been received as passengers from causes which are common to all, and which may be established by the same evidence in respect to the claim of each libelant, it is not essential, to sustain a decree in favor of each, that his damages should be separately proved, or that all should testify.

**3. ADMIRALTY—LIBEL—VERIFICATION BY PROCTOR.**

While the practice is not, as a rule, to be commended, it is not error for a court of admiralty to permit a libel in which a large number of persons join to be signed and verified by their proctor on behalf of libelants shown to be outside of the jurisdiction, and whose signatures and verification it is impracticable to obtain.

**4. SHIPPING—CARRIAGE OF PASSENGERS—SEAWORTHINESS OF VESSEL.**

While a carrier of passengers by sea is bound to exercise the highest degree of care, prudence, and foresight, it is not an insurer of their safety, and there is no implied warranty, as in case of the carriage of goods, that the ship was seaworthy at the beginning of the voyage; and whether she was technically so or not is immaterial in a suit by passengers to recover for injuries received. Ross, Circuit Judge, dissenting.

**5. SAME—DUTY OF VESSEL TO PASSENGERS.**

It is the duty of the owners of a vessel to provide suitable accommodations for her passengers, to keep her in a clean condition, and to supply her with sufficient food and provisions to meet the contingencies of accident to the vessel and the resulting delay in the voyage, from whatever cause such accident and delay may arise.

**6. SAME—INSUFFICIENCY OF PROVISIONS.**

It is the duty of a passenger steamer making a voyage between Nome, Alaska, and Seattle, by the outside course, which is in the open sea, without a stopping place for 1,700 miles of the way, to carry provisions sufficient for her passengers for at least 20 or 30 days in addition to the usual time required for the voyage, to meet the contingency of accident and the resulting delays.

**7. SAME.**

Evidence considered, and *held* to entitle passengers of a steamship on a voyage from Nome, Alaska, to Seattle, to recover damages from the owners on the grounds that the vessel was not kept clean, and that the provisions supplied were insufficient in quantity, and to a large extent unfit for food, it being shown by a preponderance of the evidence that the vessel started with provisions sufficient to last not more than from 8 to 12 days, the usual time for the voyage being 8 days; that a large part of the meat was spoiled; and that on the breaking of the rudder, which caused a delay of 10 days, the passengers were placed on a short allowance; much of the food also being in such condition that many were

unable to eat it, the result being that they suffered from hunger during the remainder of the voyage.

8. SAME—LIMITATION OF LIABILITY—LEGALITY.

A provision of a steamship ticket exempting the carrier from responsibility for its own or its agents' negligence, provided it has used due diligence to make the vessel seaworthy, is void, as against public policy.

9. SAME—NEGLIGENCE OF OWNERS—DEFECTIVE CONDITION OF VESSEL.

A passenger steamship was delayed during a voyage by the loss of her rudder through the breaking of the shoe or extension of the keel holding the sternpost. The vessel had been repaired in dry dock six months before, and there was testimony that the shoe, which had been re-enforced by plates bolted on either side, was then broken or cracked; but this was contradicted by the manager of the dock and other witnesses, including the government inspector, who inspected the vessel at the time, and subsequently issued the certificate required by law, and testified that she was in all respects seaworthy. *Held*, that such evidence was insufficient to charge the owner or officers of the vessel with negligence which would render her liable to passengers for damages resulting from the delay occasioned by the accident. Ross, Circuit Judge, dissenting.

10. ADMIRALTY—COSTS—PROCTOR'S FEE.

Costs in admiralty are wholly within the control of the court, and are allowed upon equitable considerations. Where a large number of persons joined in the same libel, appearing by the same attorney, and the cause of action of each was proved by substantially the same witnesses, the allowance of a proctor's fee of \$10 on each claim was ample, and will not be disturbed on appeal.

Appeals from the District Court of the United States for the Northern Division of the District of Washington.

This is an action in rem, brought in the District Court for the District of Washington by 300 libelants and 58 intervening libelants against the steamship Oregon, to recover damages for injuries alleged to have been received as passengers on said steamship on a voyage from the ports of Nome and Teller, in the District of Alaska, to the port of Seattle, in the state of Washington. It is alleged in the libels that at all times therein mentioned the steamship Oregon was a carrier of passengers and freight plying in the waters of Behring Sea, the Pacific Ocean, and Puget Sound, between the ports of Nome and Teller, in the District of Alaska, and the port of Seattle, in the state of Washington; that on or about the 4th or 5th days of September, 1901, the said steamship Oregon was lying in the waters of Behring Sea, at anchor, offshore about 2½ miles from Nome and Teller, in the District of Alaska, and was advertised and was being advertised by its masters, owners, charterers, and agents in Nome and Teller as being about to sail on a voyage from said ports to the city of Seattle, a distance of about 2,300 miles, setting forth the advantages, conveniences, and accommodations offered and given to passengers upon said vessel upon said voyage. The libels recite the application by the libelants to the agent of the steamship, his representations that the vessel was in a first-class, safe, and seaworthy condition for said voyage, and that she was in all the necessary particulars well and abundantly equipped with all the necessary supplies and accommodations; that, relying upon such representations, libelants purchased tickets for transportation upon said vessel, some first-class and others second-class, and libelants were taken on board the vessel. But it is alleged that thereafter its master, owners, charterers, agents, and servants wholly disregarded and broke the promises, statements, agreements, and conditions upon which libelants purchased their tickets, and did violate and break the contract of transportation; that the said steamship Oregon left Nome, Alaska, on said voyage, on the 6th day of September, 1901:

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¶ 8. Limitation of liability of vessel owners, see note to *The Longfellow*, 41 C. C. A. 387.

that the vessel was not at said time in a seaworthy condition, and was not in a fit condition to put to sea, and was in a wholly unsafe, dangerous, and unseaworthy condition; that the rudder of said vessel was cracked, broken, worn, decayed, and in a weak and defective condition—all of which was well known at said time to the master, officers, owners, and agents of said vessel; that when about two days out to sea from Nome the rudder upon said vessel went to pieces, and broke away from said vessel, in a perfectly calm, smooth sea, without being subjected to any unusual or severe strain; that for a period of more than ten days said vessel lay helpless in the trough of the sea, and was wholly unmanageable, and pitched and rolled violently and excessively, and to such an extent as to cause great discomfort, inconvenience, anxiety, fear, and suffering to the libelants, during all of which time the lives of the libelants were in constant peril, and said vessel was in imminent danger of being engulfed and sunk; that the master, officers, charterers, and agents of said vessel failed and neglected to supply said vessel and libelants with a sufficient quantity of food and provisions for said voyage, and neglectfully put to sea from Nome on said voyage with a small and insufficient supply of food and provisions for said voyage, and carried upon said voyage a large number of passengers in excess of the number licensed and allowed by law to be carried upon said voyage, greatly inconveniencing and incommoding libelants thereby, and failed and neglected to carry and have on board of said vessel upon said voyage, and furnish to libelants, the amount of food and provisions and water required to be carried, furnished, and provided by law; that said master, officers, owners, and agents of said vessel withheld from and failed to furnish to libelants a suitable and proper supply of good, wholesome food, provisions, or meat which libelants were rightfully entitled to, and for a period of ten days required libelants to subsist upon one meal per day, consisting of a cup of coffee and a small cracker or sea biscuit; that the food so furnished during said period was scarcely sufficient to sustain life, and for two days upon said voyage libelants were required to subsist upon two meals per day of similar food; that during the remainder of the voyage, and until the arrival of the vessel at Seattle on the 25th day of September, 1901, the food furnished to libelants was poor, unwholesome, and furnished in small, limited quantities, and was poorly and partially cooked, and the meats were in an advanced state of decomposition, and wholly unfit for food, and libelants were unable to obtain other food, and were compelled to eat such decomposed food in order to sustain life, and were driven to eat the same by starvation; that the water furnished libelants to drink was insufficient, foul, and tainted, and unfit for drinking purposes; that the officers and agents failed to keep the vessel clean, and allowed the vessel to become dirty, foul, unclean, and filthy, and to remain in such condition. The injuries alleged to have been received by the libelants are charged to have been caused by the failure and neglect of the officers and agents of said steamship to supply said vessel and the libelants with a sufficient quantity of wholesome food, provisions, and water for said voyage, and because said steamship carried upon said voyage a large number of passengers in excess of the number licensed and allowed by law to be carried on said vessel, and because the officers and agents of said vessel failed and neglected to keep said vessel clean, and allowed said vessel to become dirty, foul, unclean, and filthy, and to remain in such condition, and because they failed and neglected to furnish and provide the libelants with a fit or suitable place in which to sleep, and failed and neglected to provide the libelants with sufficient towels and bedding for said voyage, and that libelants were obliged to sleep without sufficient covering, in the rigors of a long arctic voyage, and without any suitable berths or places in which to sleep, and such as libelants were entitled to have under the tickets purchased by them for transportation on said vessel; that libelants were crowded, with a number of other passengers similarly situated, in a small, unclean, close, poorly ventilated place, in which to remain and sleep upon said voyage. The charge of the libels is that in consequence of the premises, and of the wrongful, careless, negligent, harsh, and unlawful acts of the master, officers, owners, charterers, agents, and servants of said vessel, as aforesaid, libelants suffered very great want, hunger, thirst, cold, starvation, privation, pain of body, and anguish of mind, and became and were weak, sick, and debilitated, to

their loss and damage in the full sum of \$800 each in the case of first-class passengers and \$500 each in the case of second-class passengers, which said sum, with costs and disbursements in the action, libelants demand of the respondent.

It appears from the record that the original libels were filed on the 1st day of October, 1901, and on the same day libelants made application to the court for permission to join in and together prosecute an action in rem against the vessel; and, it appearing to the court that the claims of each of the libelants were similar in all respects, the court granted the application, and upon the further application of the libelants to allow the libel to be verified by the oath of their proctor the court granted the application, it appearing that many of the libelants were then absent from the state of Washington, and that it would be impracticable for all the libelants to sign the libel.

The White Star Steamship Company appeared and claimed the vessel, and, answering the libelants, denied the causes of action alleged in the libels, and alleged, among other things, that libelants were received aboard said steamship under and by virtue of a written contract between each of said libelants and the claimant, which contract was contained in the ticket from Teller City and Nome to Seattle, and which ticket required upon its face that, before the same should be accepted or used, or the holder of the same be received upon said steamship, such ticket and contract should be accepted by the purchaser, and such ticket signed by the purchaser; that each of the libelants accepted such ticket, and signed the same at the bottom thereof in his own handwriting, and agreed to each, every, and all of the conditions thereof; that one of the conditions printed upon the face of said ticket and contract, and so accepted and signed by each of the libelants, was as follows: "Neither said carrier, nor the vessel, its owners, charterers or agents of either, shall be responsible for loss, death, delay of nor injury to any passenger or his baggage or property, arising from the act of God or the public enemy or perils of the sea, or negligence in the navigation of the steamer or any other vessel, \* \* \* or from any act, neglect, or default of the shipowners' servants, whether on the steamer or not, or from any latent defect in hull, machinery or appurtenances of the vessel, though existing at the time of shipment or sailing on the voyage, or thereafter arising, provided the owners have exercised due diligence to make the vessel seaworthy. \* \* \* Neither the vessel, nor its owners, shall be, under any circumstances, including the negligence of the owners or its servants, liable to an amount exceeding \$100 for the death or delay to any passenger carried under this ticket. \* \* \* No agent or employé has any power to modify or waive in any manner any of the conditions named in this contract." It is further alleged in the answer that at the time the vessel sailed from the ports of Teller and Nome, on the 5th and 6th days of September, 1901, the said vessel was staunch, strong, and seaworthy, completely manned, equipped, and victualled with sufficient good, clean, and wholesome food to make the regular trip from Teller and Nome to Seattle with 500 or more passengers aboard, if the same should apply for transportation, and was in all ways fully and properly prepared for such voyage; was under the command of a master with competent and sufficient officers, and with a sufficient and capable crew; that all went well with said steamship while passing through the waters of Behring Sea and until a point about 250 miles to the south of and eastward of Unimak Pass, when suddenly the rudder shoe of said steamship was broken, and it was impossible to repair the same; that, in order to preserve the propeller of said steamship and save said steamship from irreparable disaster, it became necessary to cut away the rudder of said steamship; that the same was an unavoidable and inevitable accident incident to the perils of navigation and the perils of the sea; that the same could not have been foreseen nor prevented by the claimant, or any of its officers or agents; that by reason of such unavoidable and inevitable accident, only, the voyage of said vessel from Teller and Nome to Seattle, which usually and reasonably occupied a period of seven days only, was prolonged from said natural period of seven days to a period of eighteen days; that by reason of said unavoidable accident and the perils of the sea and the prolongation of said voyage, the master of said ship, fearful that the supply of provisions thereon would run short, and the passengers on said

steamship be subjected to greater hardships, decided to carefully apportion the amount of food to be furnished to each person during the latter part of said voyage after such unavoidable and inevitable accident, and did so apportion the amount of food to be furnished to each passenger, libelants in this action; that at all times said food was good, clean, and wholesome, and sufficient for the health and comfort of said passengers, and that said passengers, libelants herein, were in no wise injured or damaged thereby, or in any other wise injured or damaged upon said voyage; that after the cutting away of the rudder of said steamship it became necessary to employ the crew of said vessel at all hours of the day and night in manufacturing and preparing a jury rudder under which said vessel might proceed to its destination in the port of Seattle, and at divers and many times it was necessary to employ the crew of said vessel otherwise than in the care and comfort of the passengers thereof for the purpose of saving said vessel from any disaster which might arise while said jury rudder was being manufactured and prepared; that at the time when the rudder of said vessel was cut away water broke into and rushed into the linen closet of said vessel, and by reason thereof it is admitted that doubtless many discomforts were felt by the passengers of said steamship, but it is alleged that each, every, and all of said discomforts were due solely to the perils of the sea arising from the unavoidable and inevitable accident to the rudder of said steamship, and could not in any wise be avoided by the claimant, or the officers, agents, or crew of the vessel. It is further alleged that the claimant, its officers, agents, and crew, did each, every, and all of the acts which could possibly have been done to avoid any inconvenience, discomfort, injury, or damage which might or could arise from the unavoidable and inevitable accident due to the perils of the sea, and that the libelants were in no wise injured or damaged as a result thereof, or in any other way upon said voyage.

The taking of testimony in the case before the United States commissioner at Seattle was commenced on October 2, 1901, and continued from time to time until March 6, 1902. The depositions and testimony of a number of witnesses were taken elsewhere, and filed as late as November 26, 1903. On December 7, 1903, the following order was made by the court upon the objection of the claimant to the taking of further testimony: "This cause having come on for hearing in open court on the 30th day of March, 1903, the claimant objecting to the libelants taking any further testimony on the grounds that the same would be cumulative, and it appearing to the court that a large amount of testimony had been taken, and that the testimony of the remaining libelants would necessarily be cumulative, the court made an order that the libelants cease taking testimony as to individual libelants, and that no further testimony be taken whatever, except as to the general conditions on said respondent vessel; to which order libelants excepted, and, said order not having been entered, it is now ordered that the same be entered nunc pro tunc as of the said 30th day of March, 1903."

From the testimony taken upon the issues raised by the pleadings, it appears that the steamship Oregon is an iron steamer, built at Chester, Pa., in the year 1878; that she is a screw propeller, and measures 1,642 tons net; that she has 58 staterooms and 227 berths, and is allowed by the certificate of inspection issued to her by the inspectors of hulls and boilers on the 17th day of May, 1901, to carry 510 passengers, namely, 227 first class, and 283 second cabin or deck or steerage passengers; that her full complement of officers consists of one master, three mates, four engineers, with nine firemen, three watchmen, and forty-one deck crew. In addition to these facts, the court below found as facts that on the 6th day of September, 1901, the steamship Oregon left Nome on a return trip to her home port, having on board 474 passengers, in addition to her officers and crew, consisting of 111 persons, including about 20 men, who, being without money to pay fare, were permitted to work their passage; that only fine weather was experienced within Behring Sea, and the vessel proceeded prosperously until she was 200 or more miles south of the Aleutian chain of islands, when the winds became stronger, and the sea became moderately rough; that in the afternoon of September 9th, the vessel having progressed as described, and the weather being moderately rough, without any jar or other indication of an accident having been noted,



it was discovered that the steering apparatus was not working properly; that, after a thorough investigation, consuming about two hours, it was found that the rudder was out of position, having settled down in the water; that then, to save the propeller, there being no sufficient tackle or appliances on the ship to correct the disarrangement or save the rudder, the fastenings were severed, and it was suffered to go adrift; that the captain and crew were efficient in meeting the emergency, and with reasonable promptness a jury rudder was constructed, by means of which the vessel proceeded without assistance to Port Townsend, and she was then towed to her destination, reaching Seattle on September 24th, being delayed in making the run about 10 days beyond her usual time; that it was afterwards ascertained that the propelling end of the ship's keel and shoe to which the rudder post was attached was broken off, and one or two blades of the propeller were also broken off; that there was no evidence that the vessel met with any trouble by grounding or coming into collision with any object afloat or aground, and no severe storms were encountered; that the mishap could only be accounted for on the theory that the shoe was inherently weak; that the shoe had been re-enforced by wrought-iron plates about 2 feet in length, riveted on each side of it, and for this purpose holes  $1\frac{1}{8}$  inches in diameter were bored through the shoe, through which bolts were driven and riveted to hold the plates, and that the break occurred on the line of one of these holes; that when the vessel was in the dock, several months previous, one of the plates mentioned was found to be fractured, and that the same plate was taken off, welded together, and replaced with new rivets.

The court found that if the shoe was broken at that time—concerning which there is a conflict of testimony—it was bad workmanship to repair a part of the ship so important as this by merely strapping the broken fragments together by such plates as are described in the testimony, and, if the shoe was not broken, then the fact that one of the plates was fractured indicated very clearly that in working the vessel there must have been such a strain as caused the shoe to spring in a manner to fracture one of the plates, and that bad judgment was used in replacing the broken plate instead of putting in a new, sound shoe of sufficient strength to serve the purpose, without any re-enforcing plates. The court found that it was not good workmanship to attach the plates by rivets for the purpose of giving added strength to the shoe, because the rivet holes necessarily impaired its strength more than the plates re-enforced it. The break occurred at the weakest place, which was in line with one of the rivet holes. The vessel being in mid-ocean at the time of the accident, without a rudder, those on board suffered from fright and anxiety, and, as it could not be known then what difficulties were to be overcome, or how long they might be adrift, every one on board was placed on short allowance of food, and for several days they suffered from hunger. The ship was not provided with a sufficient supply of food for such a voyage. There was abundance for a run of ordinary duration, but accidents and delays should have been anticipated. The stock of provisions on board was not entirely exhausted when she arrived at her home port, but she might have been delayed a much longer time, and in a few days those on board would have been reduced to the point of starvation.

The court further found that the Oregon had been out of commission for a time when she was purchased by her present owner for \$63,000, and that before putting her in commission again \$113,000 was expended in repairs and refitting her; that the work was done under the general directions of the United States inspectors of steam vessels for the district of Washington, so as to meet the requirements of the inspection laws, and after the work was completed she was inspected and passed by those officials, and she was also inspected by experienced and competent representatives of the underwriters; that then, after being operated successfully during one season, she was again docked and repainted, and was supposed to be in good condition, and the voyage referred to was the fourth from Seattle to Nome and return after she was in dock the last time; that her principal owner, as well as her master and chief engineer, believed that she was a good ship; that they were not chargeable with culpable negligence in the sense of having acted in bad faith, or with having failed to meet the requirements prescribed by the statutes re-

lating to the construction, repair, equipment, and inspection of passenger ships.

The court also found as a fact that the number of passengers carried on the voyage in question was not in excess of the number which the vessel was permitted by law to carry, nor in excess of the number for which accommodations were provided. The court further found that the vessel was not seaworthy when she left Seattle, owing to the weakened condition of the shoe, as heretofore described.

The court found as a conclusion of law that the libelants and interveners had legal claims to compensation, which it was the duty of the court to enforce, and therefore the court fixed the amount of damages to be awarded by the decree to each of the libelants and interveners at double the amount of fare paid, with interest thereon at 6 per cent. per annum from October 1, 1901, and a proctor's fee of \$10. The total amount of the judgment in favor of the libelants and intervening libelants was \$33,868.77, and costs taxed at \$1,282.52. The case comes here on cross-appeals, both sides contending that the decree of the District Court is erroneous.

Richard Saxe Jones and L. C. Gilman, for appellants.

William Martin, Proctor, for appellees and cross-appellants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first objection urged by the appellants is directed to the action of the court in making the order allowing the libelants to join in and together prosecute an action in rem against the vessel. The court recited in its order that it appeared from the libels that the claims of each of the libelants were similar in all respects, but the controlling fact was that it was a proceeding in rem. This action of the court is sanctioned by authority. In the case of *The Prinz Georg* (D. C.) 19 Fed. 653, numerous libelants were steerage passengers on the defendant's vessel on a voyage from Palermo to the port of New Orleans. These libelants were all joined in one suit to recover the penalty against the vessel provided by the act of August 2, 1884, c. 374, 22 Stat. 186, and for the recovery of further damages. The claimants of the vessel interposed an exception to the libel on the ground of misjoinder of parties. The court, in overruling the exception, said:

"Where a thing is defendant and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; i. e., whenever it is necessary to rank the claims or to proportion the proceeds. This would happen whenever the proceeds should be insufficient to pay all the claims in full. Again, when, as in this case, the claims rest upon a charge of a voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz., whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision in this respect, and for this reason the joinder would be permissible. But I think the joinder is allowed even in cases which are in their origin distinct, and have no connection save that they are asserted against a common res. When there is a suit in rem, it is a prerequisite of jurisdiction that there should be a warrant and a seizure. In these cases there must be either the expense of 60 seizures, or there must be a joinder that one seizure may arrest for all the claims. Therefore the joinder is allowed. The difficulties of answering and defending are not enhanced, and the expense is reduced. It is for this reason, also, that the statute permits that suits separately commenced may be consolidated by the court when they are 'of a like nature or relative to the same question.' Act

July 22, 1813, c. 14, § 21; Rev. St. § 921 [U. S. Comp. St. 1901, p. 685]. Judge Ware, speaking of unconnected claims of materialmen, thus lays down the rule: 'Being maritime liens, there is no doubt that they may be enforced by process in the admiralty, where all may join and have their rights settled in a single suit, or may intervene for their own interest, after a libel has been filed, and have the whole matter disposed of in or under one proceeding, or one attachment, instead of having as many suits as there are creditors.' *The Hull of a New Ship*, 2 Ware (Dav. 199), 203, 205, Fed. Cas. No. 6,859. See, also, Judge Bett's opinion in *The Childe Harold*, where the same rule was followed, *Olc. 275*, Fed. Cas. No. 2,676. The objection is, not that the cause of each libellant is not distinctly and issuably stated, but that they are all stated in one pleading, and are, in their nature, separate causes of action accruing to distinct persons. In other suits the ruling might be very different, but in a proceeding in rem, in the admiralty, this is not irregular or unauthorized, and the exception must be overruled."

The action of the court in consolidating the numerous libels in this case was so clearly in accordance with established admiralty practice that it should be commended as eminently just and proper for all parties concerned.

Counsel for claimant contend in their last brief that they do not claim that the court was in error in allowing the libellants to join together in one libel, but that the objection was that the libellants had no community of interest, and that the damage sustained by each libellant should have been proven separately; that the court had no right to assume that the libellants who did not testify had suffered any damages whatever. There is nothing in this objection, considered from any point of view. There is no rule of law or procedure requiring libellants in admiralty or plaintiffs in any case to testify in their own behalf, and one case may be submitted upon the testimony taken in another case involving the same facts, as is frequently done. Moreover, the claimants are not in a position to raise this objection, since it was upon their objection that the court on December 7, 1903, entered an order requiring the libellants to cease taking testimony as to individual libellants, on the ground that it would necessarily be cumulative. Furthermore, the objection can only be directed against judgments entered in favor of certain libellants who are not identified or pointed out by the objection or the assignment of errors, except by the statement that a number of libellants did not testify, and a reference to the index of the testimony for the names of those who did testify. If the claimant had such objection to decrees being entered in favor of any particular libellants, he should have named them in his objection, and pointed out the insufficiency of the evidence to justify the decrees. We cannot sustain the objection as here presented.

It was next objected that it was error on the part of the court to entertain the libels verified by the proctor. It appears from the record that 155 libellants signed the libel, and severally and separately verified the same, and that the names of 145 libellants (excluding duplicate signatures), whose names appeared in the caption of the libel, were signed by the proctor, and by him verified, under an order of the court permitting such signature and verification. We do not think this practice should be encouraged, but under the circumstances of this case we cannot say that the

court was in error in making the order, upon the showing that the libelants were absent from the state of Washington, as appears from the recital contained in the order.

The pleadings present two questions upon the merits: First, whether the vessel was in a seaworthy condition when she set out on her voyage from Nome to Seattle; and, second, whether the officers and agents of the vessel were guilty of negligence in failing to keep the vessel in a cleanly condition, and to supply the libelants with suitable accommodations and a sufficient quantity of wholesome food and provisions for the voyage. The contract involved in this case is a contract for the carriage of passengers, with respect to which the carrier is not an insurer, as would be the case if the contract were for the carriage of goods. In the latter case the carrier is liable absolutely for goods lost or destroyed, unless such loss or destruction is occasioned by the act of God or the public enemy. In the former case the carrier is liable only on the ground of negligence. 2 Greenleaf on Evidence, § 222. In the leading case of *Stokes v. Saltonstall*, 13 Pet. 181, 191, 10 L. Ed. 115, the distinction between these two classes of contracts is stated by the Supreme Court of the United States, as follows:

"It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent: that he or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that, so far as human care and foresight can go, he will transport them safely."

In the case of the *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 440, 9 Sup. Ct. 469, 471, 32 L. Ed. 788, Mr. Justice Gray, speaking for the court, refers to this distinction in the following language:

"The fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence."

Among the implied obligations assumed by the carrier of goods by sea is the warranty of the shipowner that the vessel in which the goods are carried is in a seaworthy condition when she commences her voyage. In this warranty the shipowner undertakes responsibility for any defects in the ship or her machinery or equipment, even for defects not discernible by careful examination. *Carver's Carriage by Sea*, § 17.

In *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012, the Supreme Court stated the rule to be as follows:

"Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects known or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear."

In the *Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688, the language of Mr. Justice Gray, delivering the opinion in the same case in the Circuit Court, was quoted with approval, to this effect:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of the beginning of her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is or shall be in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or his negligence."

This statement of the rule was again quoted and reaffirmed in *The Caledonia*, 157 U. S. 124, 130, 15 Sup. Ct. 537, 39 L. Ed. 644.

The carrier of passengers, either by land or sea, does not assume this responsibility. *Abbott's Law of Merchant Shipping* (13th Ed.) p. 208; *McPadden v. New York Central R. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705; 5 Am. & Eng. Enc. of Law (2d Ed.) 480; 6 Cyc. 591. But, instead of this warranty, he is held to a very high degree of care, prudence, and foresight. When a carrier undertakes to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that he should be held to the greatest possible care and diligence. The personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such a case may well deserve the epithet "gross." *Philadelphia & Reading R. R. Co. v. Derby*, 55 U. S. (14 How.) 468, 485, 14 L. Ed. 502. We may therefore dismiss the question whether or not the vessel was technically seaworthy when she set out on her voyage, and confine our inquiry to the question whether the officers and agents of the vessel were guilty of negligence in overcrowding her with passengers, in failing to keep the vessel in a cleanly condition, and in failing to supply the vessel and the libelants with a sufficient quantity of wholesome food and provisions for the voyage.

We shall also defer the consideration of the question as to whether the owners of the vessel were negligent in sending the vessel to sea with a defective rudder shoe. The court below found that the vessel was not seaworthy when she left Seattle for the round voyage to Nome and return, by reason of the weakened condition of this shoe. But, as we have seen, the question whether the vessel was technically in a seaworthy condition when she set out on her voyage is not properly a question involved in this case with respect to contracts for the carriage of passengers; and the question whether the owners of the vessel were negligent in sending her to sea in a defective condition may be deferred, for the present, to consider the proximate cause of the alleged injury to the libelants, namely, the negligence charged against the owners in overcrowding the vessel, in keeping her in an unclean condition, and in failing to supply the libelants with sufficient wholesome food and provisions for the voyage; for it must be manifest that the duty of the owners of the vessel in this respect was not dependent upon the question as to whether the vessel, when she set out on her voyage, was

in a defective condition or not. It was the duty of the owners of the vessel to provide suitable accommodations for her passengers, to keep her in a clean condition, and to supply her with sufficient food and provisions to meet the contingencies of accident to the vessel and the resulting delay in the voyage, from whatever cause such accident and delay might arise.

The libelants claim that the vessel was overcrowded, and had on board about 150 passengers in excess of the number allowed by law. The vessel held a certificate issued by the inspectors of hulls and boilers at Seattle, allowing her to carry 510 passengers. There appears also to have been a permit issued by the inspectors under section 4466 of the Revised Statutes [U. S. Comp. St. 1901, p. 3045] allowing the vessel to carry 50 additional passengers, for whom standee bunks had been provided; making a total of 560. The vessel was also entitled to carry a complement of officers and crew numbering 61; making a total of passengers, officers, and crew of 621. The passenger and berth list of the vessel for this voyage was introduced in evidence, and shows the total number of passengers as 474. The agent of the vessel at Nome testified that the tickets sold for the voyage in question numbered 474. The tickets issued to the passengers by the agent at Nome were introduced in evidence, and numbered 474. In addition to these passengers, the agent testified that three or four persons were taken on board at Nome for the voyage to whom no tickets were given. There were also about 20 men who, being without means, were permitted to work their passage to Seattle. These were added to the crew, making a total number of officers and crew of 111. When the vessel reached Port Townsend, at the entrance to Puget Sound, she was boarded by Dr. L. T. Seavey, the acting assistant surgeon of the marine hospital service at that place. He testified that the captain of the vessel reported to him that he had 474 passengers and 111 officers and crew, making a total of 585. Dr. Seavey testified that he counted the number of persons on board, and found that his count tallied within a few of the number of passengers given by the captain. The difference is probably accounted for by the three or four persons taken on board without tickets. This evidence shows that the number of persons on board the vessel was about 589, or about 32 less than the number allowed by law. The libelants claim a larger number, on the evidence that a number of passengers testified that they could not get berths to sleep in, but were compelled to sleep on the deck, in the hatchways, in the dining room and social hall, and other places about the vessel. This evidence is met by the testimony that some of the passengers preferred such places to sleeping in the berths. After a careful examination of the evidence, we are unable to find testimony sufficient to justify this court in disturbing the findings of the court below in this respect.

The libelants complain that the vessel was not kept in a clean condition. This charge has for its foundation in part the lack of cleanliness on the part of many of the second-class passengers, who, coming from mining camps and other like places, probably brought

their uncleanness with them on board the vessel. The complaint has also for its foundation the lack of proper service on the part of those charged with the duty of keeping the vessel in a cleanly condition. This charge is partly explained by the fact that after the accident to the rudder the crew was for some time kept at work upon the jury rudder, and the work of keeping the vessel clean neglected. The court below made no finding with respect to this complaint, but we are convinced from the testimony that the complaint is well founded, and should have been considered in awarding damages to the libelants. The difficulty is in determining to what extent damages should be allowed for this particular default.

The complaint that the officers and agents of the vessel neglected to supply the vessel and the libelants with a sufficient quantity of wholesome food is the most serious charge that we have to deal with in this case. And while the testimony is contradictory, and in many particulars must be grossly exaggerated, we are satisfied that the complaint is well founded. The vessel left Nome on her return voyage to Seattle on September 6, 1901. Fine weather was experienced in Behring Sea. At 8 p. m. on September 8th the vessel passed through the Aleutian Islands. Between 2 and 3 p. m. on September 9th the vessel broke down and became disabled by the loss of her rudder. The first indication of the accident was the discovery that the steering apparatus was not working properly. After a thorough examination, consuming about two hours, it was found that the rudder was out of position, having settled down in the water. To save the propeller, the fastenings to the rudder were severed, and it was allowed to drop into the sea. It was afterwards ascertained that the projecting end of the keel and the shoe to which the rudder post was attached, was broken off, and one or two blades of the propeller had also been broken off. After the broken rudder had been cut adrift, the master of the vessel proceeded to rig a jury rudder, which was completed about noon the next day. The vessel then made about 160 miles with this jury rudder, when, the weather becoming worse, it was found that alterations would have to be made in the rudder. It was accordingly taken on board for reconstruction, and while this work was going on the steamship Empress of China, on her regular voyage from Vancouver to Japan, was sighted. The Oregon had then been eight days out from Nome, and was flying the signal "want of assistance." The Empress responded to the signal, and was boarded by the master of the Oregon, who obtained from the Empress a supply of provisions and a piece of wire cable to take the place of some ropes on the jury rudder. The rudder, being reconstructed, was placed in position, and the Oregon proceeded on her voyage. Several times during the remainder of the voyage, when the sea was rough, the rudder was taken in to prevent it bumping into the vessel. The Oregon arrived at Port Townsend about 11 a. m. on September 24th. From this point she was towed to Seattle, where she arrived about 11:30 p. m. on the same day. When the injury to the rudder was discovered, or very soon thereafter, the passengers were placed on short rations. How long they were

kept on short rations, it is difficult to determine accurately from the testimony. It is certain, however, that it commenced on September 10th with two meals a day, and on September 11th with one meal, and that the one-meal ration was continued for several days, then two meals were served for a few days, and for the last two or three days three meals were served. The short rations were served for a period of 10 or 11 days. The voyage of the Oregon from Nome to Seattle, under ordinary circumstances, occupied about 8 days. On this occasion it took 18 days, or a delay of 10 days. The short rations corresponded to this period.

How was this vessel provisioned when she left Nome?

E. F. McLaughlin, a libellant, testified that he was acting as assistant butcher on the Oregon on the trip in question, working his way down from Nome to Seattle. He estimated that there was from 4,000 to 4,500 pounds of fresh meat on board when they left Nome; that they used from 1,000 to 1,200 pounds a day, and therefore had a little over 2,000 pounds on hand at the time of the accident. He testified that the condition of the ice chest was such that the meat was in the water much of the time, and became badly spoiled; that he threw out a quarter of beef about the second or third day out, because it was spoiled; that most of the meat sent up to the cook to be served to the passengers was tainted, and some contained maggots. He estimated that when leaving Nome they had 9 head of beef, 2 hogs, a little spoiled sausage, some tongues and sounds, 3 barrels of tripe, and  $1\frac{1}{2}$  barrels of corned beef; that one barrel of corned beef was thrown overboard, because it had spoiled. He did not know the amount of canned meats aboard.

James J. Hales, a meat cutter on the ship, testified that when he went on board there were three quarters of beef hanging at the stern, two of which were totally unfit for use; but only one was thrown overboard, the others being partly used. He stated that there were from 4,000 to 5,000 pounds of fresh meat on board, including 3 hogs and 15 sheep; that the fresh meat would have run for four or five days, serving three meals a day at the rate used for the first three days of the voyage; that after the accident they served very little fresh meat to the steerage, and sometimes none at all to any one during the day; that sometimes meat that was in very bad condition was sent to the kitchen, as he was not permitted to throw it overboard.

Frank Applebaum, assistant storekeeper, testified that he made an inventory of the provisions in the storeroom right after the accident occurred; that there were but 38 sacks of flour on board then; that it would require 75 sacks for an eight-day trip, feeding that number of passengers three meals a day; that there was some pilot bread in the forecabin, but it was very musty; that the cabin butter ran out shortly after the accident, and they had to fall back upon the steerage butter, which was very strong; that the purser told the witness they were short of stores, and must handle them very judiciously; that they wished to have some goods left when they got to port, in order to make a good showing. The witness stated that some dog salmon was found in the baggage depart-



ment, and fed to the passengers; that the salt horse was not fit to eat, a very foul smell coming from the barrels containing it. The witness received from the Empress of China 47 sacks of flour, 56 cans salmon, 6 cases corned beef, 3 sacks granulated sugar, 6 boxes tea, and 800 pounds rice.

Arthur Aylett was a waiter in the steward's department for the first-cabin passengers. He testified that there were but 50 sacks of flour put aboard in Seattle for the trip up, and that when they left Nome they had about provisions enough to feed 350 people 10 or 12 days. He had worked on Atlantic liners for many years, and stated that it was the rule on those ships to carry a three-months supply of provisions, while on the Oregon there was not more than enough to feed the number of passengers on board for eight days. He also stated that the meat was in very bad condition, and not suitable to serve.

C. H. Campbell testified that he had had experience as steward on vessels running to Nome; that the list of provisions made by the assistant storekeeper of the vessel shortly after the accident occurred would last 600 people about  $7\frac{1}{2}$  days. He also testified that it is usual, on vessels running to Alaskan ports, to have an extra stock of provisions on board, and that  $3\frac{1}{2}$  pounds of provisions per day should be allowed for each person.

R. L. Ferguson worked in the bakery of the steamer, and testified that on the day before meeting the steamer Empress of China they mixed cornmeal and buckwheat and all kinds of flour with the white flour to make bread; that he saw no other flour after that but the Canadian flour obtained from the Empress; that they used from 7 to 10 sacks of flour daily while he was in the bakery, and, in his opinion, there would not have been sufficient food if the trip had been made in seven days.

Roderick J. Marston, a second-class passenger, testified that he had followed the sea off and on for 20 years; that in ships going from London to Sydney (a 35-day voyage) they always took 3 months' provisions—hard tack, salt pork, and canned goods. He testified that he worked in the pantry on the Oregon one day after they had obtained provisions from the Empress of China, and saw very little provisions; that there were only 32 sacks of flour in the ship then, about four or five days before reaching Seattle.

Capt. James W. Connor, a master mariner of 14 years' experience, was second officer of the Oregon on the voyage in question. He testified that he was familiar with the amount of provisions required to be carried by steamships on sea voyages between New York and Liverpool; that a vessel of the size of the Oregon, when making a voyage of from 6 to 12 days' duration, would be required to carry provisions for a voyage of about 50 days, and that the supply of provisions for the Oregon on the voyage from Nome to Seattle would be required to be for at least 40 days, in the fall of the year. He also testified that on the voyage in controversy the Oregon had provisions for only 8 days.

Capt. James Carroll, a master mariner of 30 years' experience, and for many years engaged in the carriage of passengers by ves-

sel on the Alaskan coast, testified that in provisioning vessels for a voyage from Seattle to Nome he would calculate for 30 days' extra supply of provisions. These provisions would be for emergencies, and outside of the supplies required for the regular voyage. His testimony indicated that he was referring to the outside course between Seattle and Alaska, upon which the Oregon was sailing at the time of the accident.

The evidence on the part of the claimant tends to show that the vessel was provided with fresh provisions for a voyage of not to exceed 12 days.

Francis Rotch, the agent of the White Star Company at Seattle, and private secretary of S. G. Simpson, the principal owner of the stock of that company, made an estimate of the provisions required for the voyage from Seattle to Nome and return, and the amount of provisions supplied the vessel for the voyage. This estimate is as follows:

100 passengers and crew, at 1½ lbs. fresh meat per day, Aug. 24 to Sept. 6th, inclusive, 13 days.....	1,950 lbs.
474 passengers and 111 crew at 1½ lbs. fresh meat per day, for estimated voyage 8 days and 2 days' emergency rations.....	8,825 lbs.
Total amount estimated consumption.....	10,775 lbs.
Received at Nome .....	1,600 lbs.
"    "    Seattle.....	10,071 "
Total received .....	11,671 lbs.
Balance over all estimates .....	896 lbs.
Not including 5 doz. live fowls, 200 lbs. fish, 125 lbs. turkey, 100 lbs. chickens. In addition, smoked meats and salt meats:	
Bacon .....	581 lbs.
Hams .....	638 "
Salt beef, 4 bbls.....	800 "
Corned " 7 " .....	1,400 "
Smoked" .....	85 "
Salt pork, 3½ bbls.....	700 "
Pigs' feet, 1½ " .....	350 "
Pickled tongues, 1 bbl.....	200 "
Tripe, 2½ bbls.....	550 "
Spare ribs, 2 bbls.....	400 "
	5,654 lbs.
Fresh meats .....	11,671 "
Total meats .....	17,325 lbs.
Required for voyage .....	10,775 "
Surplus .....	6,550 lbs.

W. H. Simpson, the chief steward of the vessel, testified that he had been going to sea for 23 years, and had been chief steward of vessels for 13 or 14 years, and had been on the Oregon since the July previous to the voyage in controversy as chief steward. He stated that the vessel was provisioned at Seattle, except that which was obtained at Nome; that the number of passengers on the vessel from Seattle to Nome was 7 or 8, and on the voyage coming down from Nome the number was in the neighborhood of 500;

that the fresh meat placed on board the vessel at Seattle was about 11,000 pounds; that at Nome he obtained the full carcass of a very large beef, 4 muttons, and about 200 pounds of pork loins and fresh sausage; that when the vessel left Nome there was on board between 8,000 and 9,000 pounds of fresh meat; that the amount of fresh meat required for 600 people would be 900 or 1,000 pounds per day, or a pound and a half each. He testified that they also had canned meats and fish and salt meat on board, but did not state the quantities. He further stated that the regular trip of the Oregon from Nome to Seattle never took over eight days, except the preceding one, when the vessel called at Dutch Harbor, which made the trip a little over nine days in duration. Being asked how many days' supply of provisions the vessel had for the number of passengers on board, he answered, "Well, I could figure three straight meals, full diet, for 12 days."

Capt. George Seeley testified that he issued orders relative to the selling of food on the vessel; that he told the second steward and one or two waiters that he would put them in irons, chain them to the furnace door, and burn them up if he caught them stealing an article of food. He says the vessel had ample provisions.

We think this evidence establishes the fact that the vessel was not sufficiently provisioned for the number of passengers carried on the voyage from Nome to Seattle. Between the Aleutian Islands and Puget Sound, a distance of nearly 1,700 miles, the voyage is in the open sea, without a stopping place of any kind. A vessel may become disabled on such a voyage without being able to obtain assistance for many days, or perhaps weeks. The prudence, care, and foresight required of a carrier under such circumstances is that the vessel should be provisioned, not merely for the usual voyage of 8 or 10 days, but a further period of at least 20 or 30 days, to meet the contingency of accident and the resulting delays. We are of the opinion, therefore, that the failure to so provision the Oregon was negligence.

The testimony relating to the lack of wholesome food on this voyage is shocking in the extreme; and, making allowance for exaggeration, it still remains unequalled by anything in the reports of ocean navigation of late years. The following extracts are taken from this testimony:

John N. Myers, a first-class passenger, testified that when put on short rations coffee was served in the mornings, usually without anything else, and in the afternoon a meal was served, consisting of a piece of meat, a small potato or spoonful of rice, and a slice of bread, dished out all together on a plate; that he paid for extra food at times, spending about \$25 for food on the trip, and so did not suffer as much as others did from hunger.

H. C. Brown, a first-class passenger, stated that as soon as the rudder broke the food was very poorly served, and not well cooked; that the meat was spoiled, and the water was bad. His wife testified that on the third day out she became sick from poisonous food; that the meat was green, and the rice only partially cooked; that she suffered from hunger during the rest of the voyage. There is

testimony on behalf of the claimant tending to show that she was poisoned by eating stale plums which she brought on board, but this testimony is very indefinite and uncertain.

J. S. Rainey, a first-class passenger, testified that the food was so bad after the accident that he could not eat it, and was so weak that he could hardly get to the hotel at end of voyage.

James McGee, a first-class passenger, testified that for four or five days he was given only bread and coffee, with nothing else, and but one slice of bread.

Charles W. Lyke, a first-class passenger, stated that for five days he had only coffee in the morning, with no bread. His wife stated that she was faint from hunger on the voyage; that the meat was unfit to eat; and that she divided her rations with her child, as they would not give him a sufficient quantity.

Mrs. Sophia Gonzales testified that, though very ill, she could get no one to bring food to her room, and suffered greatly from hunger.

Mrs. May Collins testified that she was so weak from want of food that she had to remain in bed much of the time; that she bought food several times from the waiter, but the meat became too bad to eat when about five days out.

Samuel Myers, a first-class passenger, stated that he could not eat the food furnished; that he bought bread at \$1 a loaf, and some other food, of the waiters, until one of them was put in irons.

H. D. Domar, first-class passenger, testified that the meat was very rank, and the dog salmon served, though bad, was better than the meat.

Frank Schwartz, first-class passenger, testified that he knew all the stewards, and went into the kitchen freely, and saw all the food prepared. He stated that they would have to cut off large rotten pieces from the meat, and take the rest and boil it; that it was not fit to feed to a dog; that the fresh meat obtained from the Empress of China was never put on the table, but that the witness had some of it, paying therefor \$10 a steak; that he also had eggs for \$5 and \$6 a dozen, though none were served on the table; that he paid \$3 a loaf for bread, and bought canned meats, himself and three other men spending \$285 on the voyage for extra food. He stated that the women suffered so much from hunger that finally they were served with mush in the mornings in addition to the coffee, but not the men.

C. F. Dunckel also stated that he could not eat the rations served, but got along by buying extra food.

Mrs. Lomar stated that she could not eat the food given her, as the meat was green, and the coffee nauseating. She had taken some fresh eggs on board, which saved her life.

M. H. Ingersoll and Mr. and Mrs. N. H. Lillie testified that the meat was tainted, the rice uncooked, and the water bad; that the food was miserably served, and not sufficient in quantity to keep one from suffering from absolute hunger.

F. H. Herbert testified that he had to spend \$80 on the trip in order to get anything that he could eat.

Mrs. Becket stated that the food was very poor; that her children were sick, and had to go without food for 48 hours, except for some crackers which she had brought, as she could obtain nothing from the stewards. Finally, upon an order from the doctor, she obtained a piece of toast for her child.

J. W. Dodd, first-class passenger, testified that he suffered from hunger many times on the trip; that not only the meat was very bad, but the chicken also; that it made his little girl sick to eat it. Mrs. Dodd testified that she was ill during most of the voyage, but could only get the same food as was served to the passengers generally, and of that she could only eat the rice and bread, which was served in very insufficient quantity.

W. F. Austin, first-class passenger, testified that he was made ill for four days on account of the bad food; that it was all bad in quality, and very little in quantity; that he paid a dollar a day for a few crackers for his wife, who was unable to leave her room. Mrs. Austin stated that the doctor said her illness was on account of the food.

B. Bemmer, first-class passenger, testified that after they were out five days there was nothing but refuse of the stores left; that soup was brought to his room to him when ill which had maggots floating on it.

James Groendyke, first-class passenger, testified that the meat was bad from the day of the accident.

Mrs. G. E. Foster testified that because of tainted meat and poor cooking of other food there was danger to health; that she was poisoned by the bad food, and had to consult the ship's doctor; that she shared her rations with children and babies on board; that three days after they were put on short rations both men and women looked as if starving to death, and some were too weak to carry their small baggage when they arrived at Seattle.

W. T. Hume, a first-class passenger, testified that when they were placed on short rations no attempt was made to give decent service or properly cooked food; that friends of his were made ill by the poisonous condition of the meat, and one lady suffered serious illness from ptomaine poisoning; that the food given them was of such a character that it afforded no sustenance, and within half an hour after eating the passengers would be as hungry as ever; that sea biscuits which were furnished the first-class passengers were found to be maggoty.

George H. Woods, a first-class passenger, stated that the butcher, whom he knew, told him not to eat the meat, as it was rotten; that the chickens were blue and black when he saw them lying on blocks near the kitchen; that he could not drink the water.

Mrs. Georgie Grant and Della Beecher, first-class passengers, testified that the food was unfit to eat, and that they suffered from hunger and thirst.

I. A. Hodges, first-class passenger, declared that the meat was rotten, and the dog salmon served in its place could not be eaten by a white man. Mrs. Hodges testified that she suffered extremely from hunger and the filth on the vessel; that the little children look-

ed as bad as the starving children of India; that she had a box of provisions of her own on board, but the officers objected to her giving it to the passengers; that she did get some hot water, however, and make beef tea for the children; that one of the butchers warned her not to eat the meat, for fear she would be poisoned.

A. G. Walsh, a first-class passenger, testified that he had to eat at the third table, and in consequence got only coffee during the entire day at times; that his stomach became so deranged from the effects of hunger and poor food on the trip that he was obliged to be under the care of physicians for a year and a half afterwards.

Charles W. Garside also testified that he was obliged to stay at medicinal springs for two months after the voyage before he was in condition to attend to business.

W. F. Burns, first-class passenger, testified that he suffered from starvation and from sickness caused by eating tainted beef.

L. L. Oie, a second-class passenger, testified that on the 11th of September they got coffee in the morning and three little sea biscuits that were very musty; on the 12th, one meal; on the 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th, one meal, and coffee in the morning. The meal consisted of a little meat, some half-cooked rice or a potato, and one slice of bread. He became so weak he was barely able to crawl around.

Henry Larsen, a seafaring man, assisted in fixing the rudder, but became so weak from hunger that he could not stand at times.

Several of the second-class passengers testified that they helped around the kitchen in order that they might obtain food; that even in this way they suffered from hunger.

Between 70 and 80 second-class passengers testified uniformly that when put upon one meal a day the cooking was very poor, the meat tainted, the coffee unsatisfactory, and that all suffered from hunger.

James Alexander, second-class passenger, testified that he had been a butcher for 16 years, and from his knowledge the meat furnished to the passengers was rotten, and not fit to be fed to animals.

Paul Loncan, a second-class passenger, testified that he was a cook by occupation; that he helped the butcher to clean the ice box; that they took out several barrels of foul water in which the meat had been lying; that, although they took on fresh meat at Nome, it was spoiled before it was used, because of bad packing; that he did not dare to eat meat during the entire voyage, and sometimes had to wait so long for his portion of bread and potato or rice, because of standing in line to be served, that it was 5 o'clock in the afternoon before he had anything to eat.

J. L. Penny, a waiter on the steamer, testified that the meat on board was unfit for use when they left Nome; that he heard much complaint in every department because of insufficient food, and saw men picking up scraps from the refuse to eat.

James Barnes, messman for the engineers and officers, testified that the ship had not nearly as many stores on board as on the previous trip; that he helped to store the ship on both trips; that

the meats were so bad the engineers and officers would not eat them.

Many testified that they could not remain in the vicinity of the butcher shop because of the stench that came from it.

In contradiction of this testimony the claimant introduced a number of passengers as witnesses, to whom the situation on board the vessel did not appear so disagreeable. These passengers are not libelants, and have made no complaint against the vessel.

E. A. Abbott testified that the quality of the food which he received at all times was good. He saw no putrid meat, nothing but what was eatable. He had dog salmon one night, and did not fancy it very much, but ate what he had; did not consider it as good as other salmon he had eaten.

Abram A. Manning, a marine engineer of 40 years' experience, testified that the quality of the food was as good after the breaking of the rudder as it was before, but the quantity was not there. Before the breaking of the rudder he heard no fault found with the quality of the food. He states that they were five days on one meal a day, and after that they had coffee in the morning, and one substantial meal, commencing about 3 o'clock in the afternoon. The provisions were all put on each man's plate, dished out in the steward's department, and he had something to take from his meal to his stateroom nearly every time; so, if he wanted a lunch between times, he would eat it. Sometimes he had a piece of bread, and sometimes a piece of meat.

E. W. Melse, freight agent for the Pacific Clipper Line, testified that he had no fault to find with the provisions prior to the accident. After the accident the quality of the food was very good, considering the conditions. He had one meal a day, and on those days he had, in addition, a breakfast consisting of coffee and sometimes mush and crackers, and once or twice there was meat. After the jury rudder got to working, the meals were just the same as they were before the breakdown, and the quality was just the same.

Sidney G. Gale and wife were called as witnesses for the claimant. Mr. Gale had been in the employ of the White Star Company at Nome, the company that owned the Oregon. He testified concerning the meat placed on board the vessel at Nome, and other matters, but was not asked as to the quality of the food served after the accident. Mrs. Gale was interrogated upon this subject, and testified that for the first few days after the ship broke down they were put on one meal a day; that they also had breakfast, consisting, on the first few days, of coffee and crackers, and after that of oatmeal or cereals. She stated that the cooking was good, and the food in first-class condition.

S. E. Lewis, a master mariner of 15 or 16 years' experience, testified that he had no complaint to make in regard to the quality of the food; that, while they were put on rations of one meal a day, they had tea and coffee, and maybe a biscuit, in the morning, and then a regular meal in the afternoon at 2 o'clock. The meat he saw was not rotten.

Charles Livingston testified that after they were put on one meal a day the food was well cooked, with one exception. He got some rice that was not well cooked, but never any spoiled meat. Mrs. Livingston testified that the quality of the food was all right; that she had all she wanted all the way down.

Frank Muldoon testified that he did not remember that any bad or spoiled food was furnished him on the trip, except once, when he happened to get a handful of crackers that were musty, and he could not eat them. With this exception, the quality of the food was good, though there was not enough of it.

Eugene O'Connor testified that the quality of the food he received was all right, and that he got no rotten meat. The rice served to him was cooked. He did not think the food unhealthy, or that it caused any one to be sick.

David Piper, a master mariner, testified that he thought the meals very fair for that country; that the meat was all right, so far as he was concerned—the pork, mutton, and beef.

Fred Warner, a master mariner, testified that the quality of the food, both before and after the accident, was good. He suffered no great hardship from hunger.

Mrs. M. B. Reed testified to the same effect.

Reuben E. Lane, a passenger, was called, and testified concerning the number of meals served on the vessel after the breaking of the rudder, but was not asked as to the quality of the food.

These 14 witnesses were all of the passengers that were called on behalf of the claimant upon this subject. Of the ship's officers and crew, the following testified in favor of the quality of the food: John Ansell, first officer, Dr. J. Allen Harmsley, ship's surgeon, Samuel Sutton, chief engineer, W. H. Simpson, chief steward (above mentioned), James H. Close, steward, A. H. Harris and Albert Austin, cooks, A. L. Cunningham, bedroom steward, Chris Dranga, steerage steward, Fred Luckcrath, waiter, B. Ogden, steerage waiter, and George G. Reis, porter.

The further fact is to be noted that about 116 passengers have not joined in this action, and have made no complaint concerning the provisions or the lack of food on board the vessel. This fact is urged as evidence that they had no cause of complaint, and, further, as evidence that no cause of complaint existed with respect to any of the passengers. But the silence of these 116 passengers cannot be so construed. Not every one who has a cause of complaint against another submits the complaint to the determination of the courts. An injured person may prefer to abide the injury in silence, rather than incur the trouble and annoyance of seeking a legal remedy. The testimony of these passengers was open to both sides, and no inference can be drawn either way. We do not know whether they considered themselves injured, or not.

The weight of testimony was clearly in favor of the libelants, and justified the finding of the court below that they were entitled to recover damages for the injuries they received in consequence of the failure and neglect of the owners, officers, and agents of the vessel to supply them with a sufficient quantity of wholesome food.



We consider the award of the court sufficient, under the circumstances, including whatever damage the libelants sustained by reason of the uncleanly condition of the vessel.

The claimant contends not only that the vessel incurred no liability by reason of any of the facts involved in this case, but that the company owning the vessel expressly contracted with each and every passenger for nonliability. This contract was contained in the conditions of the ticket purchased by each passenger. This ticket was signed by the passengers and the agent of the company, and this contract, which was expressly made a part of the ticket, provided, among other things, that neither the carrier nor the vessel, its owners, charterers, or agents of either, should be responsible for loss, delay, or injury to any passenger arising from negligence in the navigation of the steamer or any other vessel, or from any act, neglect, or default of the ship's owners' servants, whether on the steamer or not, or from any latent defect in the hull, machinery, or appurtenances of the vessel, though existing at the time of shipment or sailing on the voyage, or thereafter arising, provided the owners had exercised due diligence to make the vessel seaworthy. We have already explained that the liability of a vessel for an injury arising out of latent defects in the vessel is not implied in the contract for the carriage of a passenger, and that question is therefore not involved in this case. With respect to the other provision of the contract, relieving the carrier from responsibility for the negligence of the carrier provided he has used due diligence to make the vessel seaworthy, it is perhaps sufficient to say that this provision, if it means anything, is also inapplicable to the present case. But if, by any construction of its terms, it can be held to be applicable, it is clearly void by reason of being against public policy. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Companie La Flecha v. Brauer*, 168 U. S. 104, 117, 18 Sup. Ct. 12, 42 L. Ed. 398.

In the libellant's cross-appeal numerous errors are assigned in support of their contention that the damages awarded by the District Court were insufficient to compensate them for the injuries they sustained on board the vessel. These errors relate in part to the failure of the court to find certain facts which it is claimed establish the negligence of the owners and officers of the vessel in knowingly sending the vessel to sea with a defective rudder. It appears from the evidence that the projecting end of the keel of the vessel supporting the rudder post had riveted on each side and running lengthwise with it bars of iron called "plates." The projecting end of the keel is called a "skag" or "shoe." The evidence is not entirely clear as to the purpose of these plates fastened on each side of the skag or shoe. They were on the *Oregon* when she was purchased by the White Star Steamship Company. Some of the witnesses seem to think that they were placed there to re-enforce or strengthen the shoe, while others were of the opinion that they were placed there to protect the shoe in crossing over bars at low water. This opinion is in a measure supported by the fact that the

plates were wider than the shoe, and extended below it, so that they would strike the ground before the shoe would. In May, 1901, the Oregon was placed in the dry dock at Quartermaster's Harbor, Seattle, for the purpose of cleaning and painting the vessel, and putting her in order for the business of the season of 1901. She was examined by the United States inspectors, the marine surveyors, the superintendent of the dock, her principal owner and other persons connected with the vessel, for the purpose of determining what repairs were necessary to place her in a fit condition for the service in which she was to be employed. It was then discovered that one of these bars alongside the shoe was broken, and it was taken off for repairs. It is claimed by the libelants that it was then discovered that the shoe was broken or cracked, and that the vessel was knowingly sent to sea with the shoe in this defective condition. The charge that the shoe was cracked or broken is positively denied by the claimant. The evidence in support of the charge is the testimony of witnesses employed in and about the vessel.

Frank E. Wing, a boiler maker's helper, remembered the steamship Oregon being in the dry dock at Quartermaster's Harbor in May, 1901. There were two plates on her skag, he testified—a plate on each side of it. One was broken, and the skag was also broken. They took off the plates, and had one of them welded up and riveted. The keel or skag was broken clear off, and the patches of iron were put on either side. They were riveted on. These iron plates were about an inch thick and about six inches wide, the same width of the keel. One was broken at about the same place the skag or shoe was broken. The shoe was not in a safe or strong condition when the vessel left the dry dock. The way it looked to the witness, it was not seaworthy at all. The keel or shoe itself was about 4 by 5. That piece of iron was broken clear off, and the only thing that held it was the pieces of iron put on either side of the shoe. It was puttied up to make a smooth-looking job. There were several rivets along the stem that were loose, covered by the plates. These were not tightened.

William G. Sypher was also a boiler maker's helper. He testified that they took off the two plates. One was broken. They welded it up and riveted it on. The skag or shoe under the plates was broken off. It was broken off at the same place that the plate was broken. There would be no difficulty in discovering this if a person were around there and made any examination at all. The plates covered up about four or five rivets, which were perfectly loose; could move them back and forth with his fingers for a quarter of an inch. They puttied up and painted over. The plates were not sufficient to make it safe where it was broken off.

Charles Blake, a shipbuilder, helped to take the plate or strap off, and sent it to the shop to be welded. It was broken to pieces. There was a flaw in the keel on the top, but, he says, to tell the truth, he never examined it enough to know where the crack went, whether clear through or whether it was broken underneath or not.

It was nighttime when they took it off, and he never examined it close to see whether it was cracked clear through or not.

Roy Martinalich, boiler maker's helper, worked at the dry dock. They took off a plate and put another one in its place. Saw a crack in the keel or shoe. The plates were put on to straighten the skag, which had been cracked through, to hold the two pieces together.

Elmer Sofo, a boiler maker, but who within the past several years had been following shopwork, was at Quartermaster's Harbor when the Oregon was in the dry dock in May, and saw them fixing the shoe or skag. Saw there was a crack in it, but he was not working on the vessel at the time, and could not swear to anything he was not working on. It is not the usual way to put plates on to re-enforce a skag.

H. E. Hagloff, a carpenter, was at Quartermaster's Harbor when the steamer Oregon was in the dock. Saw them patching up one of the plates—welding it. It was broken in two on the starboard side. He did not see the skag to which the plate was fastened, but saw a kind of crevice there—a little crack in the center. They filled up the holes and crevices with a kind of cement. After the vessel was cemented up and painted, the inspector could not detect those cracks, but the witness supposed that the inspector saw them before the painting was done.

John Bussanich was working at the dry dock, making rivets for the boiler maker. He testified that the skag was cracked, but how deep it ran he could not tell. There was a little crack in the corner. A patch had been put on it before. One of the plates was broken. They took it out, and put a new piece of iron on it to make it long enough, and put it back again. The work was well done on that part.

Joseph Martinalich was at the dry dock in May, 1901. Worked there half a day. Saw the Oregon, and helped to take the strap off. It was broken. The skag was cracked, but the witness pointed out a place on the diagram nearer the stern of the vessel than the other witnesses.

In support of the denial of the claimant that the vessel was sent to sea with a defective shoe, the following testimony was introduced:

Capt. George Seeley, the master of the vessel, examined the rudder shoe when the Oregon was in the dry dock in the spring of 1901. The rudder shoe was not broken. There were two plates put on that part of the rudderpost, keel, and shoe. They were continuous plates, running from the keel to the sternpost, and formed to fit the shape of the rudder shoe. They had been there for a number of years before the present owners bought the boat, when she was running on the Columbia river bar. They were put on for the purpose, as she went over the bar at low water, dragging in the sand going up the river, of preventing the chafing of the keel. Previous to the time the rudder broke down no one ever reported to the master that the rudder was out of order. No sea captain of

reasonable experience would go to sea with a broken rudder. If the shoe had been broken when she was in the dry dock, he says he would have seen it, and he saw nothing to indicate that it was broken. He did not examine the shoe in particular; had no reason to do so. Saw the vessel when she got on the dock after the accident. The shoe was broken short up to the sternpost, probably five or six inches back from the sternpost.

Samuel Sutton, chief engineer of the Oregon on the voyage in question, had been such engineer for nearly two years. The plates on the shoe had been there ever since he had known the ship. Vessels that navigate the Columbia river and the Columbia river bar are subject to an excessive wash on that part of the trip. They drag on the bar, and pieces are put on to protect them from the wash of the sand. He testified that they had fairly good weather, on the voyage in question, down to the Pass; that shoes have been known to break in all kinds of weather. It is no unusual thing for a shoe to break. When the rudder broke there was quite a heavy sea running.

Frank Walker, naval constructor, naval architect, and marine surveyor for Lloyds, was connected with the Quartermaster's Dry Dock in 1900 and 1901. The Oregon went on the dock May 6, 1901, principally for painting and cleaning. There was a re-enforcing plate on the stern frame slightly fractured, and they deemed it advisable to take it off and repair it. The nature of the fracture was principally bad welding. The witness superintended the taking of that plate off, and also the putting of it on; examined the shoe, and to the best of his knowledge it was not broken. If it had been broken, he would have noticed it immediately. He could only surmise what the re-enforcing plates were put on for. The vessel had formerly been in a trade where she had been scraping over sand bars on the Columbia river. The bottom of the keel and the bottom of the shoe had been worn to a certain extent, but nothing out of the way, and those plates had been placed on each side to re-enforce the skag. They extended below the skag, and the plates would wear, and not the skag. The witness marked on a diagram the point where the plate was welded, almost dead in the center. He saw the vessel after she broke down, in September, 1901, and examined her then as the surveyor for Lloyds' agency. The shoe was broken within about 10 or 12 inches of the sternpost proper. The last break was not within two feet of the break in the re-enforcing plate which was welded in the spring. The last break was a clean, clear, fresh break. After the repairs were made on this vessel in May, 1901, so far as stern frame, sternpost, rudder propeller, and skag were concerned, she was seaworthy. The effect of salt water upon iron is to show up the grain. It will show a lot of streaks and marks where the grain of the iron runs. An inexperienced man might think this grain in the iron was a crack. It is a very common thing. Had the skag been broken, the vessel would not have gone to sea. The United States inspectors would not allow a ship to go to sea with a broken skag. No one would have passed her.

Sol G. Simpson testified that the White Star Company owned the Oregon; and he owned all the stock of the company except two or three shares; that when the Oregon was on the dry dock in the spring of 1901 he had charge of the repairs. He took the United States inspectors up there. Previous to the return of the ship to Seattle in a broken condition, he had no knowledge of her having a broken shoe, or being in an unseaworthy condition. Did not think she was. The ship was inspected by the inspectors, and they informed him that she was in good condition in every way. He spent \$113,000 to put her in that condition after he bought her. One of the plates was taken off when she was on the dry dock. The rivets which held the plates on had corroded, and they were riveted. The angle of one of the plates was cracked, and the inspectors said to take that plate off and weld a piece of iron in that angle and re-enforce it, and put it back again, which was done. The witness was not notified that it was fixed in an unsafe manner. The shoe was not broken.

Edwin C. Warner, manager of the Puget Sound Dry Dock Company, remembered the steamship Oregon being in the dry dock in May, 1901. The United States inspectors inspected her and directed what repairs should be made. The shoe or skag was not broken. The witness saw it himself. When a vessel is placed in the dry dock, before any repairs are made the vessel is subject to the inspection of the United States inspectors. The owners wait for the inspectors to appear, and they examine the vessel, and dictate what repairs shall be made. In every case repairs are made exactly as they dictate, because the vessel is subject to their inspection afterwards. It is customary, in making repairs of that kind, to always exceed what is known as the original construction; that is, a large factor of safety is added. So far as the stern frame, sternpost, rudder propeller, and skag are concerned, that vessel was seaworthy when she left the dock managed by the witness in May, 1901. In his opinion, an extraordinary sea struck the shoe. That that was the only explanation of the break. The plates were put on the shoe to keep the sand from rubbing on the shoe. They projected below the keel an inch and a half or two inches. There was no crack or break of any kind in the skag or shoe under the plate at the point where the plate broke. The plate was broken as near the center as possible. When the vessel broke down the skag was broken close up to the sternpost, somewhere in the neighborhood of 15 or 18 inches from the sternpost, and, counting the fillet, 12 inches. It was a fair, square break, with no sign of flaw or fracture. It was all clean.

The certificate of the inspectors was introduced in evidence. It certified that the vessel was inspected by them on May 17, 1901. The certificate is signed by William J. Bryant, Inspector of Hulls, and C. C. Cherry, Inspector of Boilers. This certificate was issued under the provisions of section 4417 of the Revised Statutes [U. S. Comp. St. 1901, p. 3024], requiring that the inspectors should once in every year carefully inspect the hull of each steam vessel within their district, and satisfy themselves that every such vessel so sub-

mitted to their inspection was of a structure suitable for the service in which she was to be employed; that she had suitable accommodations for passengers and crew, and was in a condition to warrant the belief that she might be used in navigation as a steamer with safety to life. The general rules and regulations in force at that time governing United States inspectors required that "whenever any steam vessel is placed upon the dock for repairs, it shall be the duty of the owner or agent to report the same to the board of local inspectors of that district, so that a thorough inspection may by them be made to determine what is necessary to make such vessel seaworthy, if the condition or age of the steamer, in the judgment of the inspectors, renders such examination necessary." The presumption, as well as the evidence, is that these officers performed their duties in the case of the Oregon.

Upon the testimony quoted, the District Court found as a fact that the principal owner of the vessel, as well as her master and chief engineer, believed that she was a good ship, and that they were not chargeable with culpable negligence in the sense of having acted in bad faith, or with having failed to meet the requirements prescribed by the statutes relating to the construction, repair, equipment, and inspection of passenger ships. This finding is fully justified by the evidence, and is in no way modified by the finding that the vessel was not seaworthy when she left Seattle, which finding is based upon the opinion of the court that the mishap could be accounted for on no other theory than the inherent weakness of the shoe. Moreover, the court declares what it means in finding that the vessel was not seaworthy. It says: "In all contracts of affreightment there is an implied warranty of the seaworthiness of the ship at the time of leaving port; and, although the utmost diligence may fail to detect latent defects, the carrier is not exempt from liability for damage to her cargo resulting from unseaworthiness due to a latent defect. Of necessity one party or the other must carry such risks, and the law places that burden on the owner"—citing the cases of *The Rover* (D. C.) 33 Fed. 515, and *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, cases involving contracts for the carriage of goods, and not for the carriage of passengers. We do not think the evidence establishes the fact that the owner, officers, or agents of the steamship Oregon sent her on the voyage under consideration knowing that her rudder was in a defective condition.

The disallowance of a proctor's fee of \$20 in each case claimed in the cost bill was correct. Costs in the admiralty are wholly within the control of the court, and are allowed upon equitable considerations. *Benedict's Admiralty* (3d Ed.) §§ 550-552; *The State of Missouri*, 76 Fed. 376, 381, 22 C. C. A. 239. The libelants all appeared by the same attorney, and the cause of action of each claimant was proven by substantially the same witnesses. In the damages awarded by the court a proctor's fee of \$10 in each case was allowed, and this allowance, we think, was liberal. It was certainly sufficient. The same observation is applicable to the claim for a deposition fee of \$250 for examining and cross-examining each witness.

It follows that the judgment and decree of the District Court is affirmed.

ROSS, Circuit Judge (concurring). I concur in the judgment and in the opinion, except in such portions of the latter as hold that the question of the seaworthiness of the Oregon at the time of the voyage in question was not involved in the case, and that the evidence fails to show any negligence on the part of her owner in that regard. I agree, of course, that a carrier of passengers is not an insurer of their safety; but it is just as well settled that such carrier must exercise the highest degree of care, prudence, and foresight. I agree with the court below that the evidence in the present case shows that the Oregon was unseaworthy prior to and at the time of entering upon the voyage in question, and that the condition of her rudder, as presented when she was in the dry dock in May, 1901, was sufficient to have acquainted the owner and its representatives with that fact. It is, in my opinion, the duty of a steamship company engaged in the carriage of passengers to furnish a good, staunch, and sufficient ship for the purpose, manned by a competent crew. Such was the distinct ruling of this court at the last term in the case of *The City of Rio de Janeiro* (In re Pacific Mail S. S. Co.) 130 Fed. 76, and is, as I understand it, the well-settled law. 5 Am. & Eng. Enc. of Law (2d Ed.) 532, 558, and cases there cited. And while it is true, as has been said, that such carriers, in the case of passengers, are not insurers of their safe carriage, they are bound to exercise the highest degree of care, prudence, and foresight, not only in fitting the vessel for sea, but in its navigation as well. Section 4493 of the Revised Statutes [U. S. Comp. St. 1901, p. 3058] in terms declared that:

"Whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of said vessel, or either of them, and the vessel, shall be liable to each and every person so injured, if it happens through any neglect or failure to comply with the provisions of this title, or through some known defects or imperfections of the steaming apparatus or of the hull."

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**STANDARD MARINE INS. CO., Limited, OF LIVERPOOL, ENGLAND, v.  
NOME BEACH LIGHTERAGE & TRANSPORTATION CO.**

(Circuit Court of Appeals, Ninth Circuit. November 7, 1904.)

No. 979.

**1. MARINE INSURANCE—CONSTRUCTIVE TOTAL LOSS—ABANDONMENT.**

In marine insurance, a constructive total loss is one upon the happening of which the insured may abandon the subject-matter of the insurance; and, unless there remains something of value to pass to the underwriter, there is nothing to abandon, and no case for the application of the doctrine of constructive total loss.

**2. SAME.**

An insured cargo was damaged to some extent on the voyage from perils of the sea, and after reaching the port of delivery both vessel and cargo

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¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1192, 1195.

were sold in satisfaction of a claim for salvage. There was no evidence to show the amount of the damage to the cargo, nor was the value of the salvage services ever ascertained. There was no abandonment prior to the sale. *Held*, that there could not be an abandonment afterwards, to create a constructive total loss, the property having passed beyond control of the insured; nor were the facts such as to constitute a total loss without abandonment.

3. SALVAGE—AUTHORITY TO DETERMINE RIGHTS—NONJUDICIAL OFFICER.

The captain of a revenue cutter lying at Nome, Alaska, at a time when there was no court at the place, had no authority to determine the rights of salvors, unless as arbitrator by agreement of the parties; the question being a judicial one, of which a court of admiralty alone has jurisdiction.

4. MARINE INSURANCE—SUE AND LABOR CLAUSE—CONTRIBUTION BY INSURER TO EXPENSE.

Under a marine policy requiring the insured to sue, labor, and travel, and use all reasonable means for the security, preservation, and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk, the sum at risk is the valuation of the property as stated in the policy, which is conclusive between the parties; and the rule is not changed because such sum happens to equal the sum insured, thus obligating the insurer to pay the whole of the expense incurred under the sue and labor clause.

5. SAME—LOSS THROUGH WILLFUL ACT OF MASTER—CALIFORNIA STATUTE.

Under Civ. Code Cal. § 2629, providing that "an insurer is not liable for a loss caused by the willful act of the insured, but he is not exonerated by the negligence of the insured, or of his agents or others," expressly made a part of a marine policy on cargo, there can be no recovery for loss or damage resulting directly from the act of the master in designedly undertaking to force the vessel through floating ice on a voyage to Alaska, with knowledge of the dangers to be encountered and with ample time to have avoided them, in order to arrive more quickly at his destination and secure a better market for his cargo. Such conduct is not mere negligence, but is a willful omission to perform his legal duty and an intentional commission of a wrongful act.

In Error to the Circuit Court of the United States for the Northern District of California.

Van Ness & Redman, for plaintiff in error.

Nathan H. Frank, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This writ of error brings up for review a judgment against the Standard Marine Insurance Company, Limited, based upon a policy covering certain articles laden on the barkentine Catherine Sudden for a voyage from the port of San Francisco to Nome, Alaska, whereby the insurance company insured certain merchandise of the defendant in error, laden below deck, in the sum of \$5,250, and a lighterage plant, also belonging to the defendant in error, laden on deck, in the sum of \$3,000, against—

"Perils of the seas, pirates, assailing thieves, jettisons, barratry of the master or mariners, and all other losses and misfortunes that have or shall come to the hurt, damage, or detriment of the said property, or to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy."



The policy provided that the risk thereunder should "cease at ship's tackle or thirty days after arrival at destination"; and, in accepting it, the defendant in error engaged for itself, its factors, servants, and assigns—

"To sue, labor, and travel, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof, and also to use all proper and legal means to recover, through general average or otherwise, from the parties interested in vessel, freight, or cargo, either or all, any sums due the property insured or its owners, on account of sacrifices, losses, or expenses incurred for the general safety or the common good, to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk."

None of the articles in question were covered by the memorandum clause of the policy, which provided that all articles not excepted under that clause were—

"Warranted by the insured free from particular average and partial loss, unless occasioned by standing, sinking, fire, collision, or other extraordinary peril hereby insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and all such loss shall be settled on the principles of salvage loss, with benefit of salvage to the insurers."

The policy contained the further stipulation—

"That the provisions of the Civil Code of California shall be conclusive and binding, as regarding the warranty of seaworthiness, liability of insurers in case of prior, subsequent, or simultaneous insurance, and such other questions as are therein legislated upon and not otherwise provided for in this policy."

The complaint alleges that while the vessel was proceeding upon her voyage the whole of the insured merchandise and lighterage plant were lost by perils of the sea, to the damage of the defendant in error in the full sum insured.

Among the defenses interposed by the insurance company were the following: That the *Sudden*, with its cargo, including the articles here involved, sailed from San Francisco for Nome April 28, 1900, and on or about the 28th day of May, 1900, in passing through and out of Unimak Pass into Behring Sea, met drift ice, and within 24 hours thereafter met with large fields of ice; and within 48 hours thereafter ran into and was surrounded with heavy ice, and thereafter, and on or about the 3d day of June, 1900, was struck by ice on her port bow, which was thereby stove in; that by reason of the injury the vessel was so crippled that she was compelled to seek and obtain assistance from other vessels then in the vicinity. That the property insured by the defendant to the action, and then on board the *Sudden*, consisted of miscellaneous merchandise stowed below deck, and a lighterage plant, consisting of a launch, scow, and surf boat or boats, loaded upon her deck. That in the vicinity of the *Sudden* at the time were the sailing vessels *Pitcairn* and *Rube Richardson* and the steamer *Corwin*. That considerable portions of the merchandise so insured by the defendant to the action were taken from the *Sudden* by the *Pitcairn*, *Rube Richardson*, and *Corwin*. That the plaintiff to the action then and there arranged with the captain of the *Corwin* to tow the *Sudden* and the launch, scow, and surf boat or boats to Nome,

Alaska, agreeing to pay as salvage for towing the launch, scow, and surf boat or boats the sum of \$2,500; and that in pursuance of that agreement the Corwin did tow the launch, scow, and surf boat or boats and the Sudden, with so much of the insured cargo thereon as had not been taken from her by the Corwin, Pitcairn, and Rube Richardson, to Nome. That the plaintiff to the action sailed the Sudden into the ice, knowing full well that so to do endangered the safety of that vessel, and that so to do was not consistent with good seamanship, or with due and proper care; but that plaintiff, when ice was encountered, in the exercise of due and proper care, should have changed the course of the vessel, and have sought open water or a port of safety until the danger from ice had passed. That upon the arrival of the Sudden and the launch, scow, and surf boat or boats at Nome in tow of the Corwin, the launch, scow, and surf boat or boats were delivered to the plaintiff to the action, and upon the suggestion of its agent at Nome a survey was held upon the vessel and cargo, resulting in the condemnation of both vessel and cargo, and a recommendation that they be sold; whereupon the vessel and cargo were sold at public auction. That the sale of the cargo was by manifest lots, without inspection or opportunity to inspect by the purchasers thereof. That at the sale the merchandise here in question was sold for \$530, which was at the time of a value greatly in excess of that amount. That with the lighterage plant the insured merchandise could have been landed at Nome. That the plaintiff to the action did not in any way seek to arrange with the Corwin, or with any of its officers, agents, or servants, for the landing or delivery to the plaintiff of the insured merchandise, or any part thereof, nor to secure from the Corwin, or any of its officers, agents, or servants, nor from the Pitcairn or Rube Richardson, the return or delivery to the plaintiff of any of the merchandise taken from the Sudden, nor any compensation therefor, and did not in any way seek, and has not in any way sought, to arrange or agree with the Corwin, or with any of its officers, agents, or servants, for the amount to be allowed or paid to it by way of salvage for the insured merchandise in question, and did not in any way seek, by the purchase of such merchandise at such sale or otherwise, or at all, to recover the insured merchandise, or otherwise to reduce the loss to the plaintiff or to the defendant to the action. That had the plaintiff sought to secure the delivery to it of the insured merchandise, or had bid in the same at the auction sale, it could and would have greatly lessened the loss to plaintiff on such merchandise. That upon the arrival of the Sudden at Nome the weather was calm, and that the insured merchandise could have been safely landed and delivered to the plaintiff, and would have been so delivered if plaintiff had sought to secure the delivery thereof.

It appears from the record that the Sudden left San Francisco in command of Capt. John L. Panno, on the 28th day of April, 1900, and proceeded on her voyage, sailing through the Unimak Pass into Behring Sea about the 1st of June. We extract from the testimony of Capt. Panno:

"We sailed from San Francisco on the 28th day of April. The vessel was not down in the water more than usual. She was properly loaded. As a mariner I considered it a late date to start for Nome Beach. Vessels had gone ahead of us; the Thrasher and the Pitcairn, and several others. I cannot remember the names. Most all the steam vessels had gone ahead of us. The Thrasher was a steamer, and the Pitcairn was a sailing vessel. The Rube Richardson was a sailing vessel. The Pitcairn left some time in January or February. We overtook her on the way up. She had two or three months the start of us. I found her in the ice. The Unimak Pass is located at the entrance to the Behring Sea. We passed through Unimak Pass into Behring Sea. We went through the pass about the 1st of June. We did not come in sight of ice until after we got to Unimak Island. I think that was about two and a half or three days from Unimak Pass. The ice was about five miles away when I first sighted it. It was about 5 o'clock in the afternoon then. It was on the lee beam. It was to the left of us. The ice was in small pieces, as big as this room and bigger. They were floating pieces, broken ice. Some of them were about level with the water, and some of them eight or ten feet high. It is generally understood that the largest part of a chunk of ice is that below the surface of the water. I had no idea how far below it extended. Some of these small chunks that I noticed floating about were a quarter of a mile, a mile, and five miles apart. They were not very numerous. I sailed right on, and did not turn around and go back. My object was to get through it. When I got to the ice itself I found leads once in a while. Perhaps tonight I would be all inclosed with ice—ice all round us, so we could not move any way; but during the night that ice would move, and perhaps in the morning at 8 or 9 o'clock we would have a lead of four or five miles that we could sail through. But around these leads, on each side and forward, it was full of ice. The ice got thicker as I proceeded. I sighted a lot of vessels at about the time I first struck this ice in Behring Sea. They were all in the same position that I was; some steamers and some sailing vessels. The Pitcairn and the Rube Richardson were sailing vessels, both bound for Nome, with the same kind of cargo that I had. We were all trying to get there as soon as we could, as early as we could get there. We wanted to market our goods. The next morning after sighting the ice it was broken, but rather larger; larger in proportion. I do not know whether it was any thicker. It was about the same height out of the water. It was thicker as to the pieces being closer together. I kept on sailing through it all that day and all the next night. On the third day we could not get through it. We got in a lead, and we could not get through. I tacked ship and stood back again, and found a lead, I suppose 10 or 15 miles. I went right into it, still fighting to get up to Nome. I did not get through that lead. I got up about 10 miles and fell in with the Portland and another steamer. I fell in with two steamers and stopped in the ice with them; made fast to the ice and lay there two days. They were stuck in the ice. We lay there until we got a lead, and kept working up through it. We continued four or five hours after we got out of the last pack before we were stopped again. In the next lead I was in the company of two steamers, and the steamers left about 4 o'clock in the morning ahead of me through that lead and went on through out of sight. I got under way about 8 o'clock in the morning and started after them, and at about 11 o'clock, or 10 o'clock, I hit a piece of ice. The ice did not hit me. I hit it. My vessel ran into the ice. She hit it, and knocked her bow in, something like that desk there [indicating]. There was a piece of ice which I supposed I would go clear of, and down under water it stuck out like that desk, and hit her bow down under water. The ice was a great deal harder underneath than it would have been on top. It looked like fresh-water ice. The moment I struck the ice there was a hole in my bow. As soon as I felt her hit it, I put her bow on a cake of ice, so as to catch her there, so as she would not go down. I put my colors down, put the Union down in distress. When they sighted me they came down and stopped; that is the Richardson and the Pitcairn. They were coming down the lead astern of me, and they came up and made fast with me; one a little further off than the other. I signaled them for help. Some of the people from the Richardson and the Pitcairn got off their vessels and got on mine. They lay by me until I got towed away by the steamer. The

people from the Rube Richardson and the Pitcairn took some of the goods off the Sudden. They were out stores from between decks, mostly flour and lard, and such things as that, and I gave them leave to take them. I found the vessel was filling full of water, and it would be spoiled, and I gave them leave to take them. These stores were put away on the Sudden in the between-decks. The Sudden had two decks. Below that was the hold of the vessel. These stores and provisions were on the second deck. There was nothing on the upper deck in the way of provisions. I made no distinction, as between the provisions or stores belonging to the Nome Beach Lighterage & Transportation Company and those that belonged to other shippers, in giving them permission to go on board and take provisions. The men that had the other stores, their goods were all marked. They took perhaps altogether ten tons. Most of these belonged to the Nome Beach Lighterage & Transportation Company. I told the Rube Richardson people to take these goods, after they had taken them, to Cape Nome, and what salvage there was on them we would pay it. The Pitcairn people— All of our crew and everybody was board the Pitcairn. I did not say anything to him, because I thought they would eat them all up, as we would be there four or five days. The Corwin came in sight next day, and pumped the water out of my ship, and took it in tow, and carried us to Nome. I made an arrangement at that time with the Corwin people with regard to the lighterage plant that was on board. There was a written agreement signed at that time, as between myself and the captain of the Corwin, or the agent, or whoever he was. I think Capt. West was captain. This was signed on board of the Corwin before they started. It was drawn up and written after I had talked with the Corwin about the terms on which the lighterage plant was to be taken to Nome. I made no arrangement with the captain of the Corwin as to what he would charge for taking the hull of the Sudden to Nome. I made no arrangement with him at that time as to what he would charge for taking the cargo belonging to the Nome Beach Lighterage & Transportation Company to Nome. I did not enter into any arrangement with the captain of the Corwin at that time, or with anybody else on board of the Corwin at that time, as to what should be charged for saving anything, except the lighterage plant. I did not expect, and they did not expect, to save anything when they commenced on it. So I could not make any arrangement. I made no arrangement with them as to what the salvage service should be, or what the payment for it should be. The written agreement was signed before the water was pumped out of the Sudden and they started to Nome. After they got her up so that she could be towed, between that time and the time that we got to Nome, I did not enter into any arrangement with anybody on board of the Corwin looking to an arrangement of the charge they should make for salvage services for saving the goods on board of that ship."

At Nome the only anchorage is the open roadstead, and there the Sudden was anchored. It appears from the evidence that the weather was at the time good, and as a matter of fact continued good for a good many weeks; but it also appears that storms are liable to occur there at almost any time. The cargo had been wet with salt water for seven or eight days, and, so far as it consisted of groceries and canned goods, was greatly damaged. But the 150 tons of coal belonging to the defendant in error, and included within the property covered by the policy in question, was not much, if at all, damaged.

The defendant in error had sent to Nome as its agent one Morine, and given in his charge \$3,000 of its money. Previous to the arrival of the Sudden Morine had disposed of most of that money and had become seriously ill. Because of his illness and his consequent inability to look after the interests of the defendant in error, he appointed Capt. Omar J. Humphrey in his stead to take charge of the Sudden and her cargo, and to represent the defendant in

error in respect thereto. Morine had no express authority to make such appointment, but it appears that his action in that regard was ratified by the company by letter of date July 2, 1900. Humphrey accepted the appointment, and upon the arrival of the Sudden, in tow of the Corwin, assumed the responsibility of the defendant in error in respect to the business in question. He arranged for the payment of the \$2,500 stipulated to be paid for the salvage of the lighterage plant, and took possession of the same, which was first used—in accordance with the salvage agreement between the masters of the Sudden and the Corwin—in discharging the cargo of the latter. There is testimony to the effect that the reasonable value of the services of the lighter was \$400 for 10 hours' work, and for the launch \$50 a round trip of not exceeding one hour for each tow of the lighter.

It appears that at the time in question there were from 20,000 to 25,000 people at Nome, attracted there by the wonderful discoveries of gold. There were no courts nor regularly established government of any kind at the place; but the United States revenue cutter Bear, with its officers and men, was there. With the consent and approval of Humphrey, a survey, composed of the ship carpenter of the Bear, the president of the Chamber of Commerce of Nome, and an experienced shipmaster, was held upon the Sudden, and she and her cargo condemned. It was by them recommended that the vessel be sold, which was done. Upon the demand of the captain of the Corwin, and with the consent of Humphrey, the miscellaneous cargo of the Sudden was put up and sold. The auction was held in Nome, and the sale was made by manifest lots, the goods remaining in the hold of the vessel anchored off the beach, without examination by any buyer as to quantity, quality, or condition, and without any opportunity of such examination. The portion of the cargo owned by the defendant in error and covered by the policy in suit, sold at such sale, consisted of 150 tons of coal and 6,000 feet of lumber sawed, fitted, and ready to be put together as a house, and all of the insured merchandise, except the small lots taken by the Pitcairn, Rube Richardson, and Corwin, and was sold for the aggregate sum of \$530, which amount was turned over to the Corwin. The evidence tends to show that neither Humphrey, nor Capt. Panno, nor any other person connected with the defendant in error, took any step or made any effort to secure an agreement with the salvors fixing a proper salvage charge, or to secure the unloading or delivery of the goods of the defendant in error subject to a salvage lien in favor of the salvors, or the unloading of those goods prior to the sale in order that the most advantageous prices might be obtained therefor at the sale, or with the view to the buying in of the goods in the event that there should not be buyers thereof at fair prices; in short, that no steps were taken, and nothing whatever was done by the defendant in error, nor by any one for or on its behalf, to minimize the loss. On the contrary, there is much evidence in the record tending to show that the sale was not made in good faith, but in furtherance of a design to dispose of the property in question at prices far below its real value. One pregnant circumstance tend-

ing to show this is testimony to the effect that of the 150 tons of coal belonging to the defendant in error 100 tons were bought by Humphrey for \$4 a ton, the cost of lightering which from ship to shore was at the time only \$18 a ton; whereas, it appears in the testimony that coal was at the time worth at Nome from \$30 to \$90 a ton, and that as a matter of fact Humphrey shortly thereafter sold a part of the same coal for \$60 a ton. It is true that the sale was advertised in a paper published at Nome, and that during its progress it was interrupted by one Gollin, who announced himself as the agent of the San Francisco Board of Marine Underwriters (of which board the plaintiff in error is a member), and that at Gollin's request the sale was adjourned to enable him to make an investigation, and that he thereafter consented, as agent of the San Francisco Board of Underwriters, that the sale should continue. It is also true that Gollin testified on the trial of this case that the sale was "fair and square," and also that the general manager of the plaintiff in error testified that he thought the company should pay the loss as claimed by the insured. But it further appears that his company is reinsured for all but \$1,000 of such loss, and that those reinsurers seriously object to such payment.

It will be thus seen that all of the insured articles in question, with the exception of such portions thereof as were taken on board the *Corwin*, *Pitcairn*, and *Rube Richardson*, arrived in specie at destination, and that the loss for which defendant in error sues (except as respects the lighterage plant) arose out of their sale at Nome under the circumstances indicated. The terms of the policy have been stated, under which it is clear that, in a case where the facts warrant it, a recovery may be had for a total loss, either actual or constructive, and for a partial loss, provided such loss be occasioned by stranding, sinking, fire, collision, or from any extraordinary peril insured against, and amounting to 50 per cent. on the sound value of the whole shipment at the port of delivery. A constructive total loss is one upon the happening of which the insured may abandon the subject-matter of the insurance. Unless there remains something of value to pass to the underwriter, there is, as a matter of course, nothing to abandon, and no case for the operation of the doctrine of abandonment. 1 Am. & Eng. Enc. of Law, pp. 5-13, and authorities there cited; Civ. Code Cal. §§ 2705, 2717.

It is said for the defendant in error that the merchandise cargo was a constructive total loss, for the reason that when it reached the roadstead at Nome it was still in peril, because of the constant danger of the *Sudden* going ashore. "Hence," argues counsel, "the cargo was, at the time of sale, by reason of a peril insured against, in danger of absolute destruction, and then and there the subject of abandonment." Undoubtedly so; but the trouble with counsel's point is that, so far as the evidence shows, the insured did not then, nor at any other time when the property was the subject of abandonment, undertake to abandon it. It is plain, therefore, that in so far as concerns the merchandise portion of the cargo in question there could, under the evidence, be no such thing as a constructive total loss; for long prior to the attempted abandonment all that

portion of the cargo had absolutely passed from the insured. It had nothing to abandon, and there was, therefore, in respect to it, an absolute total loss, or there was no such loss at all. Whether the case showed a loss amounting to 50 per cent. or more caused by sinking, and recoverable under the provision of the policy relating to that matter, is another question.

It is further contended for the defendant in error that there was a constructive total loss, for the reason that the danger of the Sudden going ashore at Nome rendered a sale of both vessel and cargo justifiable, and that, "where vessel or property is justifiably sold after damage by peril insured against and condemnation, it is a total loss without abandonment," within the rule declared in *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249. In that case the vessel insured, having received damage from the perils insured against, put into the harbor of St. Domingo. A survey was called, and the surveyors reported that she could not be repaired there, by reason of the want of materials and the extraordinary expense of making repairs at that place, without incurring an expense exceeding her value, and they therefore condemned her to be sold for the interest of whom it might concern, which was done. The purchaser afterwards refitted her for sea. It was held that the survey was not conclusive evidence of the necessity of the sale; that, if the sale were necessary, it would constitute a total loss without an abandonment, and in such case the plaintiff could recover for a total loss; but that in case of a constructive total loss he could recover only as for a partial loss, inasmuch as by the transfer he had put it out of his power to make an abandonment. The facts of that case were quite unlike those of the present one. Here the vessel, with her cargo, was anchored at Nome, in good weather, which continued for weeks, and with a lighterage plant owned by the insured capable of discharging the cargo. There was no sale by the master of vessel or cargo for the benefit of whom it might concern, but a sale by the salvors to satisfy their lien. It is not doubted that a salvage service is a loss by a peril of the sea, and that, when it is found to equal or exceed half the value of the insured property, the insured may, under such a policy as that in suit, prior to a sale ordered to satisfy the lien of the salvors, abandon and claim as for a total loss. But in the present case there is neither a showing as to the amount of the damage to the cargo, nor that the value of the salvage services was ever ascertained. Unless the loss was at least equal to 50 per cent. of the sound value of the cargo at the port of delivery, there was, under the terms of the policy, no liability of the insured, and, as a matter of course, no forced sale of any kind could create one.

It is further contended on the part of the defendant in error, and was so contended in the court below, that the retention by the Pitcairn, Rube Richardson, and Corwin of such portions of the cargo in question as were taken on board those vessels (in quantity, according to the testimony, about ten tons; value not stated), and the sale by the Corwin of the balance of the merchandise cargo, constituted a total loss from a peril of the sea. The correctness of that

proposition was and is controverted by the plaintiff in error. Upon the point the court below instructed the jury:

"The accident to the vessel, by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost, but for the intervention of the salvors who applied themselves to the rescue. In this way the vessel and cargo came rightfully into the possession of the salvors, who thereupon, and after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and, so claiming, permanently deprived the owners of said property. There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf, other than the captain of the revenue cutter then at that place, and who, acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the law, and for this loss the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo."

We are of opinion that that instruction of the court was substantially correct (*Monroe v. British & Foreign Ins. Co.*, 52 Fed. 787, 789, 3 C. C. A. 280), except so far as it stated that the captain of the revenue cutter then at Nome was a recognized authority for the determination of the question of salvage. The evidence did not justify the statement that the question of salvage was submitted to the captain of the Bear by the parties in interest as arbitrator, and it is perfectly clear that, otherwise, he had no power in the premises; the question of salvage being a judicial one, of which a court of admiralty only has jurisdiction. There is a good deal of force in the claim on the part of the plaintiff in error that it was entitled to the peremptory instruction requested by it, on the ground that there was no evidence tending to show any effort on the part of the insured to adjust the salvage or otherwise minimize the loss; but, in view of all of the circumstances of the case, we conclude that that question of fact was properly one for the determination of the jury.

In respect to the lighterage plant the plaintiff in error requested the court below to instruct the jury that the plaintiff to the action could not recover any of the consideration paid by it to the salvors for the salvage of that plant, or any portion of the value of such services, if in fact the plant or any material portion of it was not at the time of the salvage agreement in danger of being lost by reason of the injury to the *Sudden*. That request was refused, and instead the court instructed the jury as follows:

"It does not appear that any injury or damage resulted to the lighterage plant from the accident to the *Catherine Sudden*, or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor, and travel, and use all reasonable and proper means for the security, preservation, and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is \$3,000. And with respect to said plant, if you find that the *Catherine*



Sudden was seaworthy for the voyage, the plaintiff is entitled to recover the \$2,500 paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the *Corwin* at Nome."

The claim of the plaintiff in error that the court was in error in refusing the peremptory instruction requested is based upon the rule laid down by Mr. Barber:

"Where the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed, where it is evident from the facts of the case that no danger of a total loss existed." Barber, Prin. Law Ins. p. 370.

The reason for the rule, as stated by Barber and in the cases cited by him, is that the insurer, being liable only for a total loss, is not interested in the prevention of anything less than a total loss, and cannot properly be called upon to contribute to an expense incurred to prevent a loss in which it is not concerned. But in the present case, as has been seen, the insurance was not against total loss only, but against actual and constructive total loss, and against partial loss, if occasioned by stranding, sinking, fire, collision, or other extraordinary peril insured against and amounting to 50 per cent. or more on the sound value of the whole shipment at the port of delivery. The valuation fixed in the policy is conclusive between the parties.

In Arnold on Insurance (7th Ed.) p. 411, it is said:

"There is by English law no exception to the rule under discussion. As long as the contract of insurance remains unimpeached, the valuation in the policy can under no circumstances be opened; or, to use the words of Cockburn, C. J., 'where the value is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then in respect of all rights and obligations which arise upon the policy of insurance the parties are estopped' from disputing the value stated."

In *The Potomac v. Cannon*, 105 U. S. 630, 26 L. Ed. 1194, the Supreme Court said, concerning such valuation:

"That valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance."

In section 2736 of the Civil Code of California the law is thus declared:

"A valuation in a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or a total loss, if the insured has some interest at risk."

We think the court below rightly held the "sum at risk" to be fixed by the terms of the policy. The circumstance that that sum happens, in the case in hand, to equal the sum insured, thereby obligating the insurer to pay the whole, instead of a part, of the expenses incurred under the "sue and labor" clause of the policy, does not change the binding character of the valuation. We are of opinion that the instruction under discussion was correct.

It appears, however, from the testimony of the master himself, that he well knew of the existence of the ice and of the risk incurred in endeavoring to push through it, and that he well knew all of this in ample time to have avoided it. Can it be properly held that it was not his duty to have avoided the danger—that he did not com-

mit a wrongful act when he deliberately, willfully, undertook to "fight" his way, as he himself expressed it, through the ice, for the purpose of arriving quickly at Nome, and thus secure for his principals a better price for the merchandise, and that they might the sooner realize the profits expected to accrue from the lighterage plant that he carried? We think this must be answered in the negative. Taking the captain's testimony to be true, it is not, in our opinion, a case of negligence at all, whether simple or gross, but one of a deliberate and reckless assumption of a well-known danger, which the law made it the master's duty to have avoided. It was both a willful omission to perform his legal duty, and an intentional commission of a wrongful act, resulting in the loss in question, for which, both upon principle and authority, the insurer, in our opinion, is not liable. In the first place, we think the liability asserted does not exist because of that provision of the Civil Code of California expressly made a part of the policy in suit, declaring that:

"An insurer is not liable for a loss caused by the wilful act of the insured: but he is not exonerated by the negligence of the insured, or of his agents, or others." Section 2629, Civ. Code.

Speaking of that statutory provision the Supreme Court of the state said, in the case of *McKenzie v. Scottish U. & N. Ins. Co.*, 112 Cal. 548, 557, 44 Pac. 922:

"The ordinary negligence of the insured and his agents has long been held as a part of the risk which the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability. But willful exposure, gross negligence, negligence amounting to misconduct, etc., have often been held to release the insurer from such liability. To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose was the object of the framers of our Civil Code. Under section 2629 of the Civil Code the nice distinctions often made necessary are dispensed with, and the general proposition is established that no form of negligence on the part of the insured, or his agents or others, leading to a loss, avoids the policy, unless it amounts to a willful act on the part of the insured. The Code thereby sets at rest a fruitful cause of litigation. This section was not intended, however, to absolve the insured from the performance of those acts which he has expressly covenanted to perform. To do this would be, not to measure his conduct and obligations under the contract, but to abrogate it. When the insured in the present case warranted, in case the mill was idle and not in use, to have a watchman on duty constantly day and night, in and immediately about the buildings or works, he bound himself to the performance of specific acts, from the performance of which no negligence could exonerate him."

But while, under the statute cited, negligence on the part of the insured, whatever the degree, does not exonerate the insurer, he is relieved of responsibility for loss occasioned by "the willful act of the assured." The court below instructed the jury that by this latter provision—

"Is not meant an act intentionally or negligently done, resulting in the loss of the insured property, even though the negligence be gross; but the act must be one concurred [in] by the insured with the corrupt design of destroying the property."

It is, in our opinion, impossible to sustain that construction of the California statute. "Negligence and willfulness are the op-

posites of each other. They indicate radically different mental states. \* \* \* Negligence is also to be carefully distinguished from fraud; the distinction arising in this case, as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or constructively; negligence is never so." 16 Am. & Eng. Enc. of Law, pp. 395, 396, and cases there cited. In negligence, as said by Beardley, J., in *Gardner v. Heartt*, 3 Denio (N. Y.) 232, "whatever may be its grade, there is no purpose to do a wrongful act or to omit the performance of a duty." But an intent to do a wrongful act or to omit the performance of a duty is necessarily willful. Such willfulness may fall short of fraud, against which, on the part of the assured, the policy in suit insured; for it covered barratry of the master and mariners. The distinction was very clearly pointed out by Chief Justice Shaw in the case of *Chandler v. Worcester Mutual Fire Ins. Co.*, 3 Cush. 328. That was an action upon a fire insurance policy, in which the defendants admitted the making of the contract, the loss within the time, and all the facts necessary to constitute a prima facie case for the plaintiff. They also admitted that there was no fraudulent design to set fire to the building insured, and declared that no evidence of that sort would be offered. The defendants proposed to show, and as matter of defense rely on proof of, the gross negligence and carelessness and the gross misconduct of the plaintiff as the cause of the loss. On the offer of this evidence the trial judge ruled that proof of the gross negligence and carelessness and of the gross misconduct of the assured, as the cause of the destruction of the building by fire, would constitute no defense to the action, and thereupon rejected the evidence. The court, speaking through Chief Justice Shaw, said:

"The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitute no defense. Whether the same rule will apply equally to a case where a loss has occurred by means which the assured by ordinary care could have prevented is a different question. Some of the cases countenance this distinction: *Lyon v. Mells*, 5 East, 428; *Pipon v. Cope*, 1 Campb. 434. But it is not necessary to decide this question. The defendants offered to prove gross misconduct on the part of the assured. How this misconduct was to be shown, and in what acts it consisted, is not stated. The question, then, is whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn the building we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, but not including a mere nonfeasance. Suppose the assured, in his own house, sees the burning coals in the fireplace roll down onto the wooden floor, and does not brush them up. This would be mere nonfeasance. It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flame began to kindle in a small spot, which a cup of water would put out, and the assured has the water at hand, but neglects to put it on. This is mere nonfeasance; yet no one would doubt that it is culpable negligence, in violation of the maxim, 'Sic utere tuo ut alienum non laedas.' To what extent such negligence must go, in order to amount to gross misconduct, it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that 'crassa negligentia' was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the considera-

tion that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury. Whether the facts relied on to show gross negligence and gross misconduct, of which evidence was offered, would have proved any one of these supposed cases, or any like case, we have no means of knowing; but, as they might have done so, the court are of opinion that the proof should have been admitted, and proper instructions given in reference to it. The terms 'slight negligence,' 'want of ordinary care,' and 'gross negligence' are useful in their way; but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of parties thereby affected. The proper business of jurisprudence seems to be to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them."

In the case of *Williams v. New England Insurance Co.*, 3 Cliff. 244, Fed. Cas. No. 17,731, the owners of an insured vessel attempted to put her across the bar at Hatteras Inlet. She struck on the bar and was wrecked. The master knew that the depth of water on the bar was such as to make the attempted passage dangerous. Judge Clifford held that, under the circumstances, the loss was not within the protection of the policy, saying:

"Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur; but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act or by that of any agent for whose conduct he was responsible." Citing *Thompson v. Hopper*, 6 El. & Bl. 944; *Marsh, Ins.* 376; *American Ins. Co. v. Ogden*, 20 Wend. 305; *Bell v. Carstairs*, 14 East, 374; *Cleveland v. Union Ins. Co.*, 8 Mass. 308.

The case of *Orient Insurance Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63, was, like the present, an action to recover on a policy of marine insurance. The insured sued as for a total loss arising from one of the perils specified in the policy. The insurance company pleaded non assumpsit and payment, with leave to give in evidence the matters set forth in its affidavit of defense, which was adopted as a special plea. According to the bill of exceptions in the case, there was evidence in behalf of the plaintiffs tending to show that, without willfulness or design on the part of her captain, the vessel was carried, April 28, 1880, before the expiration of the policy, over the falls of the Ohio river, at Louisville, Ky., and sunk, receiving damage in a sum equal to 50 per cent. of her agreed value, and that on the 18th of May, 1880, it being apparently impracticable to float her off and repair her, the vessel was abandoned as a total loss, and the sum due under the policy demanded. The evidence introduced by the company tended to establish, among other things, these facts: The master of the *Alice* (the vessel in question) was C. F. Adams, one of the assured, and a son of the other plaintiff. Before the sailing of the vessel he had the reputation of being a "drinking" man, and of that fact his father was informed. On her arrival at Louisville, on the morning of April 28, 1880, the

master gave the usual signal (which was transmitted to the engineer) that he had no present need of the engines. The joint of the mud valve was out of order, threatening damage to the freight, and making repairs necessary. The steam was thereupon blown off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud valve connected with the boiler needed repairs. The work of repairing made it necessary to blow off steam. The captain subsequently went on deck, and, without making inquiry of the engineer as to the condition of the steam, or receiving any notice from him that steam was ready, tapped his bell at about 8:30 a. m. as a signal to let go the boat. At that time there was not sufficient steam to propel the vessel. It is the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam, and await his reply that the steam is ready before giving the order to let go. Upon being let go she was carried by the current down the river and over the falls, and, striking a pier, was badly damaged, in consequence of which she sunk soon thereafter below the bridge in about 18 feet of water. The plaintiffs thereafter offered, among other things, evidence tending to show that "it was the custom of the river that the engineer should give notice to the captain before exhausting steam, and that it was not the custom for the captain to have notice from the engineer that steam was ready before giving the order to let go." The court, at the request of the plaintiffs and against the objections of the company, instructed the jury that "where a loss under a policy of insurance, such as the one in suit, happens from the perils of the river, it is not a defense to the insurance company that the remote cause of loss was the negligence of the insured or his agents," and that "the mere fault or negligence of the captain of the vessel, by which the Alice was drifted into the current and drawn over the falls, will not constitute a defense for the company, unless the jury should be satisfied that the captain acted fraudulently or willfully, with design in so doing." The theory of the defense was disclosed by the request to instruct the jury that, if they "are satisfied from the evidence that the accident and loss was caused by the misconduct of Capt. Charles F. Adams, then the plaintiff cannot recover." This request was denied, but the court said to the jury:

"This is true, if the jury is satisfied that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the vessel to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but if the proximate cause of the loss was the stranding of the vessel, this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employes."

#### The Supreme Court said:

"We do not perceive anything in these instructions of which the insurance company can rightfully complain. The court proceeded upon the ground that if the efficient, and therefore proximate, cause of the loss was a peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the

signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling."

And after referring to various cases the Supreme Court further said:

"But it is insisted that the court should have granted the request of the company to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the master. Had that request been granted in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence, as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy."

Thereby was recognized the distinction above pointed out between negligence, fraud, and a willful exposure to known dangers.

The doctrine of respondeat superior being applicable to the case (Phillips on Insurance, Vol. 1, § 1056; Orient Ins. Co. v. Adams, supra; American Ins. Co. v. Insley, 7 Pa. 223, 47 Am. Dec. 509), it follows that if Capt. Panno did, with knowledge of the dangers to be encountered and with ample time to have avoided them, designedly undertake to force the Sudden through the ice in order to reach Nome quickly, that his principals might gain pecuniary advantage, he was guilty of the willfulness which the California statute declares relieves the insurer of liability, and the jury should have been so instructed by the court below. This construction of the California statute is, as shown above, in accord with the general law upon the subject.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

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## SOUTHERN PAC. R. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1904.)

No. 956.

### 1. EQUITY—OBJECTIONS TO JURISDICTION—WAIVER.

Where a bill presents a case in which it is competent for a court of equity to grant the relief sought, and it has jurisdiction of the subject-matter, an objection to the jurisdiction in equity on the ground that there is an adequate remedy at law must be taken by plea, demurrer, or answer at the earliest opportunity, and if not so taken it will be considered as waived.

### 2. SAME—JURISDICTION—ADEQUATE REMEDY AT LAW.

A court of equity has jurisdiction of a suit by the United States against a railroad company, its mortgagees, and others to ascertain and determine what portion of lands erroneously patented to the company under a grant have been sold to bona fide purchasers, the rights of other purchasers holding under executory contracts to obtain a confirmation of the titles of such bona fide purchasers, and for the cancellation of the patents to the lands which have not been so disposed of, and an accounting from the company for moneys received for lands sold, in accordance with the provisions of Acts March 3, 1887, c. 376, 24 Stat. 556 [U.

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¶ 1. See Equity, vol. 19, Cent. Dig. §§ 173-176.

S. Comp. St. 1901, p. 1595], and March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], such court being the only one which can furnish a plain, complete, and adequate remedy which will reach the ends of Justice with reference to all the parties and issues.

**3. PUBLIC LANDS—LAND ERRONEOUSLY PATENTED UNDER RAILROAD GRANT—STATUTE AUTHORIZING RECOVERY OF PRICE.**

The provisions of Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], for the bringing of suits against railroad companies to recover the minimum government price of lands erroneously patented to such companies under grants, and which they have sold to bona fide purchasers, are not invalid as creating an indebtedness by a retrospective act, nor as condemning the companies to pay a debt without a hearing, the debt having been created when a company sold land to which it had no right and which was patented to it through mistake, and a recovery being dependent on proof of such facts in the suit.

**4. RES JUDICATA—SPLITTING CAUSE OF ACTION—DISMISSAL WITHOUT PREJUDICE.**

A suit by the United States against a railroad company for the cancellation of patents to lands erroneously issued to defendant, dismissed without prejudice as to certain of the lands which defendant alleged that it had sold to bona fide purchasers, is not a bar to a second suit against the company and such purchasers for an adjudication of their rights and title, and a recovery from the company of the price of the land if it shall be found that they were bona fide purchasers.

**Appeal from the Circuit Court of the United States for the Southern District of California.**

For opinion below, see 117 Fed. 544.

This is a bill in equity, brought by the United States against the Southern Pacific Railroad Company and the trustees in certain mortgages, to secure bonds issued by said company, and against numerous other defendants to determine the title to over 30,000 acres of land situate within the limits of the grant to the Southern Pacific Railroad by the act of March 3, 1871, c. 109, 16 Stat. 473, which were excepted from such grant by reason of a prior grant to and reservation for the Atlantic & Pacific Railroad Company by the act of July 27, 1866, c. 278, 14 Stat. 299; to ascertain and determine what portion of the lands have been sold by the Southern Pacific Company to bona fide purchasers; to obtain a confirmation of the title to such lands as are in the hands of bona fide purchasers; for the cancellation of patents of such lands as are still owned by the company; and for an accounting for the moneys received by the Southern Pacific Railroad Company, for such lands as it has sold to bona fide purchasers, to the extent of \$1.25 per acre, in accordance with the provisions of the acts of Congress of March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], and March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]. The averments in the bill are quite lengthy. A synopsis thereof is contained in the decision of the Circuit Court, to which reference is here made. *United States v. Southern Pacific Railroad Co.* (C. C.) 117 Fed. 544-550. The final decree entered by the court, from which the appeal herein is taken, is divided into eight subdivisions.

In subdivision 2 "the court finds and determines that all the lands described in this subdivision are within the limits of the grant made unto the Atlantic & Pacific Railroad Company by act of Congress approved on July 27, 1866, c. 278, 14 Stat. 299, as established by the map of definite location filed by that company in the General Land Office during the year 1872, which grant was forfeited unto the United States by act of Congress approved on July 6, 1886, c. 637, 24 Stat. 123; that none of the said lands are situated within the limits, primary or indemnity, of the grant made unto the Southern Pacific Railroad Company, by section 18 of the said act of Congress of July 27, 1866, c. 278, 14 Stat. 299; that in former litigations between the United States and the said Southern Pacific Railroad Company it was finally and conclusively adjudged and determined, as between the United States and any

claim to said lands by said company by virtue of the act of Congress of March 3, 1871, c. 109, 16 Stat. 473, that such lands became, upon the passage of the forfeiture act of July 6, 1886, c. 637, 24 Stat. 123, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain; that all of the said lands have been erroneously patented by the United States unto the said Southern Pacific Railroad Company; that the said Southern Pacific Railroad Company sold all of the said lands to bona fide purchasers thereof, at purchase prices paid, in each instance, equal to or in excess of one dollar and twenty-five cents per acre; that the title of each of such purchasers to the lands of their respective purchases, as set forth in the several items of this subdivision (148 in number), was confirmed unto such purchasers by acts of Congress approved on March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], and March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]; and that the defendant Southern Pacific Railroad Company is indebted to the United States for all of the said land so sold at the rate of one dollar and twenty-five cents per acre, with interest at six per cent. per annum from and after the date of this decree." It then separately adjudges and decrees a confirmation of the title of the purchasers coming under this subdivision.

In subdivision 3 the lands are all situated the same as in subdivision 2, and were sold to bona fide purchasers thereof at the prices set forth in the several items of this subdivision (5 in number), "each of such sales being for a price less than one dollar and twenty-five cents per acre; and that the defendant Southern Pacific Railroad Company is indebted to the United States for the several sums of money received from the said purchasers, as in the items of this subdivision set forth." And then enters a separate decree confirming the title to such purchasers upon payment by them to the United States of a specified sum of money, being the difference between the amount paid to the railroad company and \$1.25 per acre.

Subdivision 5 finds and determines the facts with reference to certain lands which are situated within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company of July 27, 1866, c. 278, 14 Stat. 299: "That the lands in the conflicting limits of the grant to the Atlantic & Pacific Railroad Company and to the Southern Pacific Railroad Company, made by the act of Congress of July 27, 1866, c. 278, 14 Stat. 299, are in process of being partitioned, and said grants are in process of adjustment and settlement in the Department of the Interior. 183 U. S. 519, 534, 535, 22 Sup. Ct. 154, 46 L. Ed. 307." In this subdivision it is "ordered, adjudged and decreed that the bill of complaint for the said lands, and for the value thereof, be and hereby is dismissed without prejudice to any further suit or action against the defendant Southern Pacific Railroad Company, D. O. Mills, and Homer S. King as trustees, and Central Trust Company as trustee," to certain fractional sections thereof, and confirms the title to certain other parties therein named.

In subdivision 6 "the court finds and determines that the following described lands are covered by patents issued by the United States otherwise than under or by virtue of any land grant made unto the Southern Pacific Railroad Company, and as to such lands it is ordered, adjudged, and decreed that the bill of complainant herein is hereby dismissed without prejudice," and specifies the sections, or fractional sections, of land coming under this head.

In subdivision 7 "it is further ordered, adjudged, and decreed that the defendants Southern Pacific Railroad Company, Homer S. King as trustee, and Central Trust Company as trustee, have no title, estate, or interest" in certain lands therein mentioned.

In subdivision 8 "the court finds and determines that the defendant Southern Pacific Railroad Company is indebted to the United States in the sum of thirty-three thousand one hundred and ninety-two dollars and seventy-nine cents (\$33,192.79) for twenty-six thousand five hundred and fifty-four and twenty-three hundredths (26,534.23) acres of land, at one dollar and twenty-five cents (\$1.25) per acre, erroneously patented by the United States unto the said company, and by it sold to bona fide purchasers from whom it has received in payment therefor, in each instance, a sum equal to or in excess



of one dollar and twenty-five cents (\$1.25) per acre; together with the sum of four hundred and four dollars and thirteen cents (\$404.13) received by the said company from the land sales made at less than one dollar and twenty-five cents (\$1.25) per acre, set forth in subdivisions 3 and 4 hereof; in all, the sum of thirty-three thousand five hundred and ninety-six dollars and ninety-two cents (\$33,596.92);" and entered a decree for the recovery of said sum.

The several acts of Congress referred to in the bill of complaint, and mentioned in the decree in relation to the lands granted to appellant, the forfeiture thereof, and the rights of the government therein, form a material and necessary part of the history of the facts leading up to the present case. It is deemed unnecessary to repeat these facts. The questions in relation thereto have all been settled and determined by the courts. A reference to some of the decisions is all that need be given to complete the history as to such facts. See *United States v. Southern Pacific Railroad Co.* (C. C.) 86 Fed. 962; *Id.*, 98 Fed. 27, 45, 38 C. C. A. 619, 637; *Id.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *United States v. Southern Pac. R. Co.*, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307; *Southern Pac. R. Co. v. United States*, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896.

Wm. Singer, Jr. (Wm. F. Herrin, of counsel), for appellant.  
Joseph H. Call, Sp. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement). The points of contention specified by appellant in its brief are three:

"(1) The case proved shows no ground of equity jurisdiction.

"(2) The case proved shows no cause of action at law, and herein the court erred in rendering any judgment for money in favor of complainant.

"(3) The splitting of demands by voluntary dismissal of part thereof from suit No. 600 is a bar to this suit, and all other issues here are res judicata by decrees in the other former suits set forth in the bill of complaint."

The broad contention of appellant is that the suit is simply an action at law to recover money for the lands sold by appellant; that "the amount is only a question of arithmetic," to be ascertained by multiplying the number of acres sold at so much per acre; that the suit is in substance an action of debt or assumpsit, for money had and received, in the form of a suit in equity; that the averments in the bill as to determining who are bona fide purchasers, the quieting of titles, and annulling of patents, are simply suggested in order to give color of right to sue in equity; that, as to the lands sold by the railroad company to bona fide purchasers, "there were no titles to confirm nor patents to annul," and, as no grounds for equitable relief are stated in the bill of complaint, it should be dismissed. The grounds upon which this contention is sought to be maintained are varied and extensive, and require a careful and painstaking examination of the statutes mentioned in the bill and decree, and of numerous authorities cited by the respective counsel.

Appellant filed its answer to the merits of the bill, without any demurrer, plea, or other objection to the jurisdiction in equity. The government was therefore put to the expense of taking the

testimony, and the cause was submitted to the court and tried upon its merits. The first objection to the jurisdiction of the court upon this ground was made in the argument of counsel for appellant at the hearing. It is claimed by appellee, upon these facts, that appellant waived any right to object to the final determination of this cause as one in equity, the court having power to grant the relief sought by the bill, and the court below so held. Upon this point counsel for appellant claims that the court erred; that the true rule is that where the plaintiff, upon the face of his bill, shows he has a plain, adequate, and complete remedy at law, and no other equitable relief is prayed for, it is not necessary that an objection to the jurisdiction in equity should be taken in limine in the answer; that it need not be made by demurrer or plea; that if taken at the hearing it is sufficient; and, if it clearly exists, it is the duty of the court, *sua sponte*, to recognize it and give it effect. The following authorities, among others, are cited in support of this rule: *Mills v. Knapp* (C. C.) 39 Fed. 592; *Hoey v. Coleman* (C. C.) 46 Fed. 221; *Oelrichs v. Spain*, 15 Wall. 211, 227, 21 L. Ed. 43; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Killian v. Elbinghaus*, 110 U. S. 573, 4 Sup. Ct. 232, 28 L. Ed. 246; *Litchfield v. Ballou*, 114 U. S. 192, 5 Sup. Ct. 820, 29 L. Ed. 132; *Jones v. Bradshaw*, 16 Grat. 361; *Green v. Massie*, 21 Grat. 362; *Buffalo v. Town, etc.*, 85 Va. 222, 7 S. E. 238.

The principle, as applied to the particular facts in these cases, may, for the purposes of this opinion, be admitted to be true. We have had frequent occasion, notably in *German Savings & Loan Society v. Dormitzer*, 116 Fed. 471, 472, 53 C. C. A. 639, and *Utah-Nevada Company v. De Lamar* (recently decided; C. C. A.) 133 Fed. 113, to call attention to the fact that the language as used by the courts in their opinions must be read and construed in connection with the facts of the case about which the court is speaking.

Most of the cases relied upon by appellant did not present a case where it was competent for a court of equity to grant the relief asked for, while in the case at bar the averments in the bill clearly show that it is competent for a court of equity to grant the relief asked for. This distinction must not be overlooked by the courts. In the latter line of cases it is held that failure to object to the jurisdiction in equity must be taken by plea, demurrer, or answer at the earliest opportunity, and, if not so made, it will be considered as having been waived.

In *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594, 596, 32 L. Ed. 1005, the court said:

"The point is also pressed that the remedy at law was plain, adequate, and complete, and jurisdiction in equity therefore wanting. \* \* \* The defendants fully answered the bill, and raised no such objection, and, the cause being at issue and evidence taken, it was ordered on the 23d of February, 1883, by consent, to be heard by the General Term in the first instance. On the 24th of March, 1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law. We have had occasion recently to remark that where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject-matter, this objection should be taken at the earliest opportunity, and before the defendants enter upon a full defense. *Reynes v. Dumont*, 130 U. S. 354 [9 Sup. Ct. 486, 32 L. Ed. 934]."

In *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 535, 10 Sup. Ct. 604, 606, 33 L. Ed. 1021, the court said:

"Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before this court in *Reynes v. Dumont*, 130 U. S. 354, 395 [9 Sup. Ct. 486, 497, 32 L. Ed. 934], and was carefully considered, and the rule, with its limitations, thus stated: 'The rule as stated in 1 Daniel's Ch. Prac. 555 (4th Am. Ed.), is that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it;' and, in a note on page 550, many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter.'"

See, also, *Insley v. United States*, 150 U. S. 512, 515, 14 Sup. Ct. 158, 37 L. Ed. 1163; *Perego v. Dodge*, 163 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113; *Williamson v. Monroe* (C. C.) 101 Fed. 322, 329.

This conclusion, of itself, is a sufficient answer to appellant's contention that the complainant's cause of action is simply an individual common-law demand for the value of so many acres of land. But if appellant could now raise the question, it could not, in our opinion, be sustained.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. The circumstances of each case must determine the application of the rule.

In *Boyce v. Grundy*, 28 U. S. (3 Pet.) 210, 215, 7 L. Ed. 655, the court said:

"It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

In *Oelrichs v. Spain*, *supra*, relied upon by appellant, the court said:

"The sixteenth section of the judiciary act of 1789, c. 20, 1 Stat. 82 [U. S. Comp. St. 1901, p. 723], provides 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law'; but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete'; or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity.' Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury. But this principle has no application to the case before us. Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. \* \* \* The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation."

*Kilbourn v. Sunderland*, *supra*; *Joy v. St. Louis*, 138 U. S. 1, 49, 11 Sup. Ct. 243, 34 L. Ed. 843; *United States v. Union Pacific Ry.*,

160 U. S. 1, 51, 16 Sup. Ct. 190, 40 L. Ed. 319; *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 12, 19 Sup. Ct. 77, 43 L. Ed. 341.

In carrying out these principles, the courts have held that, where a court of equity is authorized to take jurisdiction over a cause for any purpose, it may retain the cause for all purposes within the scope of the equities to be enforced, and proceed to a final determination of all the matters at issue therein. *May v. Le Claire*, 11 Wall. 217, 236, 20 L. Ed. 50; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829; *Ward v. Todd*, 103 U. S. 327, 329, 26 L. Ed. 339; *Hopkins v. Grimshaw*, 165 U. S. 342, 358, 17 Sup. Ct. 401, 41 L. Ed. 739; *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 275, 53 C. C. A. 551; *Douglas Co. v. Tennessee Lumber Mfg. Co.*, 118 Fed. 438, 55 C. C. A. 254; 1 *Pomeroy's Eq. Jur.* § 181; *Lynch v. Railway Co.*, 129 N. Y. 274, 280, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523; *Whitehead v. Sweet*, 126 Cal. 67, 75, 76, 58 Pac. 376.

That the bill upon its face presents sufficient averments of fact to authorize equitable interposition and relief cannot be questioned. Appellant virtually concedes this. But it argues that, when probed to the bottom, it will be found that all the so-called grounds of equitable relief have been settled and disposed of either by the mutual agreements of the railroad company and the government, or by the express provisions of the act of Congress of March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], and that the sole question really involved herein is simply a money demand on the part of the government against the railroad company; that the other parties named as defendants have no interest in the litigation, their rights having been previously settled, either by prior litigation or the acts of Congress; and hence that it legally follows that all the equitable allegations of the bill could not have been woven into the complaint for any other purpose than that of giving color of right to sue in equity, a proceeding which, it is claimed, has not received the sanction of the courts, and is wholly inadmissible.

The authorities cited and relied upon by appellant upon this branch of the case are substantially to the effect that, as was stated by the court in *Buzard v. Houston*, 119 U. S. 347, 352, 7 Sup. Ct. 249, 252, 30 L. Ed. 451:

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Parkersburg v. Brown*, 106 U. S. 487, 500 [1 Sup. Ct. 442, 27 L. Ed. 238]; *Ambler v. Choteau*, 107 U. S. 586 [1 Sup. Ct. 556, 27 L. Ed. 322]; *Litchfield v. Ballou*, 114 U. S. 190 [5 Sup. Ct. 820, 29 L. Ed. 132]."

In that case the court expressly recognized the rule, which we have before stated, that a suit in equity to enforce a legal right can be brought when such court can give more complete and effectual relief in kind or degree on the equity side than on the common-law side.

In *Parkersburg v. Brown*, *supra*, the bill as filed asked for equitable relief, and sought to charge the city as a trustee, and to reach

the property covered by the deed of trust. The relief granted by the decree was a simple money judgment against the city for the interest due on the bonds at the date of the decree, based on the legal liability of the city to pay the bonds and coupons, and the court said:

"For this there was a plain, adequate, and complete remedy at law in each bondholder, if the city was thus liable. So that the decree made could not be sustained in any event."

This character of cases has no special application to a case like the present.

In *Ambler v. Choteau*, *supra*, the only point decided was to the effect that where the object of a suit in chancery is the recovery of the damages which the complainant alleges he has sustained by reason of an unlawful and fraudulent conspiracy to cheat him out of his interest in an original invention, which is the subject-matter of the controversy, the bill should be dismissed, as his remedy is at law.

In *Litchfield v. Balloy*, *supra*, it was held that a bill in chancery which sets forth facts that would support an action at law for money had and received fails for want of equity jurisdiction.

In *Scott v. Neely*, 140 U. S. 106, 110, 11 Sup. Ct. 712, 714, 35 L. Ed. 358, the court said:

"All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side."

These cases illustrate the grounds upon which appellant relies to sustain its contention. They, in our opinion, fall short of lending any aid or comfort in that direction. The facts in the cases are readily distinguishable from the case at bar.

It may be that the United States could have maintained an action at law for the amount of money found to be due from appellant on the familiar and well-recognized principle announced in *Gaines v. Miller*, 111 U. S. 395, 397, 4 Sup. Ct. 426, 28 L. Ed. 466, and other authorities cited by appellant, that whenever a person or corporation has received money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay the latter, and the obligation may be enforced in assumpsit for money had and received, if that is the only question involved in the action. The suit in hand is, however, of a different character. It is true that one of the objects of the suit was to obtain a judgment and decree against appellant for the amount of money claimed to be due the United States, but it also involved the necessity of ascertaining and establishing the rights of the bona fide purchasers of certain of the lands; the rights of other parties to whom land had been sold by appellant to purchasers under executory contracts that had not been fully executed, and the rights of certain bondholders claiming an interest in some of the lands included in the grant to appellant. It did not appear upon the hearing that the averments in the bill of complaint concerning these matters were false or did not exist, nor did the complainant obtain

any relief by the decree which the court was not authorized, upon the showing made, to grant.

We are of opinion that the government had the right to bring a suit which would settle all these matters, and prevent any further litigation upon any of the questions involved herein. The amount of money, if any, due from appellant, could be ascertained by a full consideration of all these matters, and some of the questions raised and determined could not be reached and determined in a court of law. The same considerations which invoke the jurisdiction may control the remedy. A court of equity, with its flexible procedure and far-reaching powers, could alone furnish a full, complete, and adequate remedy, to which the government was entitled, by so molding and applying the remedy as to reach the ends of justice with reference to all the parties and all the issues raised by the bill.

In 1 Story's Eq. Jur. (12th Ed.) § 33, the author said:

"Perhaps the most general, if not the most precise, description of a court of equity, in the English and American sense, is that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is therefore sometimes concurrent with the jurisdiction of a court of law, it is sometimes exclusive of it, and it is sometimes auxiliary to it."

The act of Congress of March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], limiting the time in which suits for the cancellation of patents may be brought, provides that in certain specified cases no suits need be brought for the cancellation of patents, nor for the confirmation of the title held by bona fide purchasers. In section 2 it is provided:

"That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed."

It then further provides that:

"An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or cer-

tified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter."

Then in section 3, after specifying several conditions, it provides:

"If it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

The act of Congress did not create the debt due from the railroad company to the government; it did not "adjudge or decree that the corporation thereby became the debtor of the United States"; nor was the passage of the act "an attempt by retrospective statute to deprive citizens of property without due process of law." It was not a "usurpation of judicial power." The railroad company was not "condemned without a hearing to pay a debt." The ingenious argument of appellant in relation to these matters is not supported by a full consideration and proper interpretation of the various provisions of the acts of March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], February 12, 1896, c. 18, 29 Stat. 6 [U. S. Comp. St. 1901, p. 1596], and March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]. All laws necessarily bear with them all the powers or incidents necessary to fully carry out their intention. One of Domat's rules, referred to in Sedg. on Constr. of Stat. & Const. L. (2d Ed.) 243, is that:

"All laws, whether natural or arbitrary, are intended to produce results conformable to that general idea of justice in which they originate. Consequently, their application must be governed by the demands of this general spirit of justice; or, in regard to natural laws, by equity; and, in regard to positive or arbitrary laws, by the intention of the legislator. In this distinction and discrimination the science of law mainly consists."

The obligation of the railroad company, or debt created, arises from the facts set forth in the bill of complaint and proven at the trial. The railroad company had received patents for lands under an erroneous interpretation of the law. It was a clear mistake, and conveyed no rights or title whatever to the railroad company to any of the lands in question. The company sold a portion of the lands to bona fide purchasers, in many cases receiving more than the government price therefor. Not having any title to the lands, and having received the money for the lands it sold to bona fide purchasers, it must be held responsible to pay the amount specified in the act therefor. As was aptly stated by Judge Ross in the court below:

"The company, having sold and disposed of the government's property without right, was, regardless of the statute, liable to the government, if not for its true value, certainly for the amount of money received by the company therefor, and which it had no right to retain; for, having received the land illegally, and disposed of it for money, there was an implied con-

tract on the part of the company to pay over the money so received to its true owner."

Annexed to the bill of complaint are two exhibits: Exhibit A, showing lands that were erroneously patented by the United States to the Southern Pacific Company prior to March 2, 1896, containing in the aggregate 30,062.79 acres (the record shows that a portion of these lands were sold by executory contracts, which remain unexecuted); Exhibit B, showing so much of the lands embraced in Exhibit A as were erroneously patented by the United States to the Southern Pacific Company prior to March 2, 1896, and which, prior to said date, had been sold by said company to bona fide purchasers, containing in the aggregate 16,512.56 acres. Most of the lands described in these exhibits are identical. Exhibit A is virtually a copy of Exhibit B, with here and there an additional tract.

The contention of appellant that "the splitting of demands by voluntary dismissal of part thereof from suit No. 600 is a bar to this suit" cannot be sustained. With reference to this contention, the bill of complaint avers:

"That heretofore, on the 7th day of January, 1898, another suit was depending in this court, brought by your orator against said Southern Pacific Railroad Company, and numbered 600, to vacate and annul patents to certain lands, including those lands described in Exhibit B annexed to this bill. That said Southern Pacific Railroad Company filed answer therein, and alleged, in substance and effect, that the said tracts of land (Exhibit B) had been, prior to March 2, 1896, sold by said railroad company to purchasers in good faith and for value, and which purchasers were bona fide purchasers of said lands within the meaning of the acts of Congress in that behalf. \* \* \* Your orator, relying upon the truth of such averments and of such testimony as to those lands described in said Exhibit B, dismissed from said case 600 the lands described in said Exhibit B, without prejudice."

The bona fide purchasers who had bought their lands from the railroad company were not made parties to that suit, and no adjudication could have been made therein as to the title of lands held by such bona fide purchasers. In the present suit the bona fide purchasers of the land are properly represented. An adjudication of their title and rights, and a recovery from the railroad company, is sought by the government for the price of the land which had been erroneously patented and sold. It will thus be seen, not only that the parties to these suits are different, but the subject-matter of the suit is also different. The relief sought and the issues raised are by no means identical; but a discussion of this point is wholly unnecessary, because the other suit (No. 600) as to certain lands was dismissed without prejudice, and such a dismissal cannot be pleaded in bar (*Hughes v. United States*, 4 Wall. 232, 237, 18 L. Ed. 303; *Bunker Hill & Sullivan M. Co. v. Shoshone M. Co.*, 109 Fed. 504, 507, 47 C. C. A. 200, and authorities there cited), nor can it in any other manner affect the rights of the government in the present suit.

The decree of the Circuit Court is affirmed, with costs.



SOUTHERN PAC. R. CO. et al. v. UNITED STATES.  
(Circuit Court of Appeals, Ninth Circuit. October 17, 1904.)

No. 1,045.

**1. PUBLIC LANDS—RAILROAD GRANT—LANDS WITHIN SURVEY OF MEXICAN GRANT.**

Where, at the time of the attaching of a railroad grant of lands in California, certain lands within the place limits of the grant were within the boundaries of a Mexican grant as previously surveyed on petition of the claimant, pursuant to Act July 1, 1864, c. 194, 13 Stat. 332. such survey, the plat and field notes of which were of record in the General Land Office, had the effect of withdrawing all lands included therein from the operation of the railroad grant, although, upon a re-survey subsequently ordered by the Land Department, some of such lands were excluded.

**2. SAME—MEXICAN GRANT—FINALITY OF DECREE OF CONFIRMATION.**

The finality of a decree of a District Court confirming a Mexican grant of lands in California was not affected by a mere application for an appeal, where the appeal was never perfected, but was docketed and dismissed by the Supreme Court for that reason on application of the claimant.

**3. SAME—EFFECT OF SURVEY AS WITHDRAWAL OF LANDS FROM OPERATION OF RAILROAD GRANT.**

Where a Mexican land grant in California, after its confirmation, was surveyed pursuant to Act July 1, 1864, c. 194, 13 Stat. 332, and a copy of the survey, after its approval by the Surveyor General of the state, was filed with the Commissioner of the General Land Office as required by such act, the fact that it had not been approved by the Commissioner did not change its effect as a withdrawal of the land embraced therein from the operation of a railroad grant which attached while it so remained on file, nor did the fact that it was subsequently disapproved and a new survey ordered.

**4. SAME—RAILROAD GRANT—BONA FIDE PURCHASERS.**

Under the mortgages made by the Southern Pacific Railroad Company in 1875 and 1893 to trustees for bondholders, covering the sections of land "granted by said acts of Congress," without specific description, the trustees took only such lands as were included in the grant, and did not become thereby bona fide purchasers of any particular tract not then patented and not actually included therein.

**5. SAME—STATUTE REQUIRING PAYMENT FOR LANDS ERRONEOUSLY PATENTED AND SOLD.**

The provisions of Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], confirming the title of bona fide purchasers of lands from a railroad company to which they were erroneously patented, and also requiring the company to pay the government price for lands so patented and sold, are within the power of Congress and valid, and it is no defense to an action to recover such price that some of the lands involved were sold by the company for less than the government price, where it received a larger average price for the lands, taken as a whole.

**6. EQUITY—OBJECTIONS TO JURISDICTION—WAIVER.**

Where a bill presents a case in which it is competent for a court of equity to grant the relief sought, and it has jurisdiction of the subject-matter, an objection to the jurisdiction on the ground that there is an adequate remedy at law must be taken by plea, demurrer, or answer, and is waived by answering to the merits.

**7. PUBLIC LANDS—RAILROAD GRANT—RECOVERY FOR LANDS ERRONEOUSLY PATENTED AND SOLD.**

Under a grant to a railroad company of specific lands lying within certain place limits, with the right upon condition to select indemnity

lands in lieu thereof, it is no defense to a suit by the United States under Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], to recover the government price of lands not in fact within the grant, but which were erroneously patented thereunder and have been sold to bona fide purchasers, that the company has not yet received the full quantity of land to which it is entitled, where there are sufficient other lands within its indemnity limits from which it may select to make up the deficiency.

Appeal from the Circuit Court of the United States for the Southern District of California.

For opinion below, see 123 Fed. 1007.

Wm. Singer, Jr., and Wm. F. Herrin, for appellants.

Joseph H. Call, Sp. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On February 28, 1901, the United States filed its bill in equity against the Southern Pacific Railroad Company and other defendants to quiet its title to certain lands in California, and to cancel and annul patents to other lands alleged to have been erroneously issued by the United States to the railroad company as a part of its grant of March 3, 1871, except such lands as had been sold by the railroad company to bona fide purchasers, and to obtain adjudication concerning the question of what lands had been sold to such bona fide purchasers, as to which it prayed that the title of purchasers might be confirmed, and that judgment might be had in favor of the United States against the railroad company for the sum of \$1.25 per acre. Testimony was taken upon the issues raised upon the bill and the answers of the several defendants, and on the merits a decree was entered by the Circuit Court in favor of the United States, quieting its title to lands not patented, vacating patents for lands patented to the railroad company and not sold, confirming the titles of bona fide purchasers of patented lands, and adjudging that the railroad company pay the government price for the lands found to have been sold to bona fide purchasers. The railroad company and the trustees of certain trust deeds executed by it have appealed to this court.

On September 28, 1838, the Mexican government executed to John Bandini a grant for a tract of land known as the "Rancho Jurupa," and on December 4, 1838, gave him juridical possession thereof. The grant was described as follows:

"Commencing at the foot of a small hill standing alone at the canada which the Messrs. Yorba recognize as their boundary, on the further side of the river Jurupa, which hill the Indians, in their tongue, call 'Pachappa,' which was taken for a landmark, placing on it certain stones on top of others; thence course westerly along the bank of said river thirty thousand varas to the point of the same table-land on which Mr. Bandini had established his house, and where the said river makes a bend, where a stake was driven for a landmark; thence northerly, fronting towards Cucamonga, seven thousand varas, passing between the two springs of Guapan, ending at the first white sand bank which there is on said course towards Cucamonga; thence easterly the same thirty thousand varas, to a small lone mountain on the left hand of the high road going from San Gabriel to San Bernardino, called by the In-

dians 'Catamalca,' and which was designated as a landmark; thence southerly seven thousand varas to the point of beginning at the foot of the small hill called 'Pachappa,' which makes a corner, east, west."

In December, 1852, Bandini filed his petition and claim for said land with the Board of Land Commissioners, appointed and constituted pursuant to the act of Congress of March 3, 1851, c. 41, 9 Stat. 631, entitled "An act to ascertain and settle the private land claims in the state of California." On October 17, 1854, the said Commissioners confirmed the grant of said Bandini in accordance with the description thereof contained in his petition and grant. On an appeal taken to the District Court of the United States for the Southern District of California, Abel Stearns having been substituted for Bandini as his successor in interest, the decree of confirmation was, on April 5, 1861, affirmed by that court. On January 14, 1869, Abel Stearns having filed in the office of the United States Surveyor General at San Francisco a certified copy of the decree of the court, and having applied for a survey and location of his claim, the Surveyor General found that the claim of Abel Stearns to the Jurupa rancho had been finally confirmed by the court, and directed that a survey thereof be made in accordance with the provisions of the act of Congress of July 1, 1864, c. 194, 13 Stat. 332. The survey was accordingly made in the year 1869, and on February 26, 1872, the plat and field notes thereof were filed with and approved by the Surveyor General for the District of California, and were filed in the office of the Commissioner of the General Land Office. They were entitled, "Field notes of survey of Rancho Jurupa finally confirmed to Abel Stearns." On February 26, 1877, the Secretary of the Interior ordered that a resurvey be made of the Jurupa rancho, and in the following year such resurvey was made; and upon such second survey, and in accordance therewith, a patent was issued on May 23, 1879, to Abel Stearns, and was accepted by him. By the second survey and the patent which was issued thereupon, the west line of the Jurupa rancho was changed, and the northern boundary line thereof was readjusted and established at a considerable distance south of the northern line as located by the first survey. The lands in controversy in this suit lie between the northern lines of the two surveys. They are included in the first survey of the Jurupa rancho, but are excluded from the second. They are also within the place limits of the railroad grant given in aid of the construction of the Southern Pacific Railroad from a point near Tehachapi Pass, via Los Angeles, to the Colorado river at or near Ft. Yuma. In the year 1874 the railroad company filed with the Commissioner of the General Land Office its map of definite location, and constructed its road in accordance therewith. The grant to the railroad company and the definite location of its lines were made in the interim between the first and the second surveys of the Jurupa rancho. The principal question involved in this case is whether or not the lands in controversy were subject to the railroad grant.

In *Southern Pacific Railroad Company v. Brown*, 75 Fed. 85, 21 C. C. A. 236, the controversy concerned lands affected by the

change in the western boundary line of the Rancho Jurupa as made by the second survey and the patent. This court held that the land was sub judice at the date of the railroad grant and at the time of the location of the line of the road, for the reason that it was at those dates included in the first survey of the Jurupa grant. In so holding, the court found and gave effect to parol evidence that Stearns in his lifetime had claimed the land to be within the boundaries of his grant. The appellants seek to distinguish the present case from that, and to present considerations not involved in that decision. They contend that none of the lands in suit were sub judice at the time when the railroad land grant attached, for the reasons: First, that it nowhere appears in the record that either Bandini or Stearns, his successor in interest, ever claimed that the lines established by the first survey were the true lines of the Jurupa grant; second, that at the time of that survey there had been no decree finally confirming the grant, for the reason that an appeal had been taken to, and was pending in, the Supreme Court of the United States, and that until the decree was finally confirmed the Surveyor General had no lawful authority to make such survey under the provisions of the act of July 1, 1864, c. 194, 13 Stat. 332; third, that the first survey and the map thereof were never approved by the Commissioner of the General Land Office as required by the law of 1864, and that the approval thereof by the Surveyor General was without legal significance.

It is true that the record furnishes no information whatever that a claim was ever actually asserted by either Bandini or by Stearns that the lines of the Jurupa grant were the lines established by the first survey. The appellants contend that the lines established by that survey included more than the land described in Bandini's petition to the Board of Commissioners. There is nothing in the record to substantiate that contention. It cannot be discovered by reading the averments of the petition and comparing them with the lines fixed by the first survey that there is variance between them. The whole difference in the surveys, it appears, was caused by different identification by the surveyors of the landmarks and lines described in the grant. The act of 1864, under which the first survey was made, authorized such a survey, and declared it to be the duty of the Surveyor General of California "to cause all the private land claims finally confirmed to be accurately surveyed and plats thereof to be made whenever requested by the claimants." In the *Brown Case* the court answered the contention that Stearns never made actual claim to the land in controversy by referring to the evidence, which proved the contrary. But it is not conceived that that consideration controlled the decision in that case. In order to withdraw the land from the operation of the railroad grant, it was not necessary that Stearns should have expressly claimed in accordance with the first survey. It was sufficient that he never of record repudiated it or denied its correctness. He had made his claim by describing his grant in his petition and seeking its confirmation. The survey which was made in pursuance thereof was the official interpretation of his claim. Until it was dis-

approved it stood upon the files and records of the General Land Office as the assertion of his claim and the basis of his application for a patent. Standing as it did upon the records, it had the effect to withdraw the land therein described from the operation of the railroad land grant. *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459; *Hastings & Dakota Railroad v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; and *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906. In *Hastings & Dakota Railroad Co. v. Whitney* it appeared that, at the time of the filing by the railroad company of its map of definite location, there stood upon the records of the local land office a defective homestead entry. The court said of the homestead entry:

"So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

In *Whitney v. Taylor* it appeared that a pre-emption entry remained uncanceled upon the records of the land office at the time of the railroad land grant, but that the pre-emption entryman had abandoned his claim and had left the country three years before the date of the grant. The court held that the entry, being of record at the time when the grant to the railroad company attached, had the effect to except the land from the operation thereof, and that after the subsequent cancellation of the entry the land remained part of the public domain.

It is urged that at the time of the first survey the Jurupa claim had not been finally confirmed, for the reason that an appeal had been taken to the Supreme Court of the United States from the decree of the District Court of the Southern District of California affirming the decision of the board of Commissioners. The evidence upon that point consists of a single document, a transcript of a mandate of the Supreme Court of the United States issued on January 8, 1875, directed to the District Court of the United States for the District of California, reciting that—

"The United States had prayed an appeal to the Supreme Court from the decree of the District Court, as by the inspection of the certificate of the clerk of the said District Court under the seal of the said court, which was brought into the Supreme Court of the United States agreeable to the act of Congress and the rules of said Supreme Court in such case made and provided, fully and at large appears. And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-four, the said cause came on to be heard before the said Supreme Court, and it appearing that the said appellant has failed to have its cause filed and docketed in conformity to the rules of this court, it is now hereby ordered, adjudged, and decreed by this court that this appeal from the District Court of the United States for the District of California be, and the same is hereby, docketed and dismissed."

From this mandate it would appear that the only step taken by the United States toward taking an appeal to the Supreme Court from the decree of the District Court was to pray for the allowance of an appeal, and that the order of dismissal was obtained by

the claimant in that suit by producing and filing in the Supreme Court a certificate of the clerk of the District Court showing that fact. Such an application for an appeal could have no effect upon the finality of the decree of the District Court. In *Hubbell v. The United States*, 171 U. S. 203-210, 18 Sup. Ct. 828, 43 L. Ed. 136, the court in a similar case said:

"It appears that on August 21, 1885, an application for an appeal was filed by the claimant; but as this appeal was never allowed or perfected, and as it does not appear that a transcript of the record was ever filed in this court, it is obvious that the authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below have no application to this case."

At the time when the application was made for the survey, the decree of the District Court had stood eight years upon the records of the court unaffected by any subsequent proceeding except an application for an appeal—an appeal that, so far as the record shows, was never perfected. There can be no doubt that it was a final confirmation of the claim at the time when the first survey was made.

The fact that the first survey was not approved by the Commissioner of the General Land Office did not impair its effect as an official withdrawal of the lands from the railroad grant. The act of July 1, 1864, c. 194, 13 Stat. 332, provides that if no objection shall be made to the survey the Surveyor General of the state of California shall approve the same and transmit a copy thereof to the Commissioner of the General Land Office at Washington for his examination and approval. The survey and plat in this case remained awaiting approval until 1876, when it was disapproved by the Commissioner. A similar state of facts existed in *Doolan v. Carr*, *supra*, in which it appeared that in 1865 an official survey of a Mexican grant was made under the directions of the Surveyor General, and in the following year was duly approved by him, and that it was never approved by the Commissioner of the General Land Office, but that in 1868 it was set aside, and that in March, 1869, a new survey was made. The court held that the land claimed as a part and parcel of said Mexican grant was reserved as such continually from the date of that grant in 1839 until June 6, 1871, the date when the second survey was approved by the Commissioner of the General Land Office. It was not necessary, therefore, that, in order to withdraw the land from operation of the railroad land grant, there should have been an approval of the survey by the Commissioner of the General Land Office. The claim as surveyed was of record, pending and awaiting such approval. If the approval had been made, the patent would have issued in accordance therewith under the directions of the act of 1864. That it was not so approved, rendered it none the less a withdrawal. *Tubbs v. Wilhoit*, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887.

It is contended that the act of March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], gratuitously and unconditionally confirmed title to the lands which had been mortgaged by the railroad company, and that the Circuit Court erred in setting aside the

patents to these lands. The act so referred to provided that "no patent to any land held to a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." Allusion is made to the fact that the act differs materially from the act of March 3, 1887, c. 376, 24 Stat. 556, which contained the proviso that a mortgage or pledge "of said lands by the company shall not be considered as a sale for the purpose of this act," and it is argued that, by the act of 1896, Congress intended to affirm the title of all the lands mortgaged in good faith by the railroad company. As sustaining this view, reference is made to the language of the decision in *United States v. Winona, etc.*, 165 U. S. 481, 17 Sup. Ct. 373, 41 L. Ed. 789, in which it was said:

"The act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his land should not be vacated or annulled, must be held to include one who, if not in the fullest sense a bona fide purchaser, has nevertheless purchased in good faith from the railroad company."

To this it is a sufficient answer to say that the mortgages in the present case do not by their terms include any of the lands which are involved in the controversy. The first mortgage was made in 1875, and the second in 1893. The lands were not patented to the railroad company until 1894. In neither of the mortgages are the mortgaged lands particularly described. The conveyance is of the sections of land "granted by said acts of Congress." Under such a mortgage the trustees took, for the benefit of the bondholders, such lands only as were included in the grant. They were not, and could not be, bona fide purchasers of any particular tract of land not actually included therein. These particular lands were not specially described in or understood to be included in the mortgage, nor were they, so far as the record shows, within the common intent of the contracting parties.

It is contended, further, that the appellee is not entitled to recover any price for the lands sold by the appellants, because, first, by the act of March 2, 1896, Congress gratuitously and unconditionally affirmed the title thereto; second, the demand for such payment is in *assumpsit* at law; and, third, the railroad company has not received, these lands included, the quantity of land granted it by Congress. It is said that, with full power to cancel the patents and thus recover the lands, Congress chose to affirm the title to purchasers in good faith, which it is conceded it had the power to do; but, it is urged that after such confirmation it had no power to place upon all of said lands the price of \$1.25 per acre, and to declare that the railroad company shall, because of such confirmation, be a debtor to the United States, and reference is made to the fact that some of the lands were sold by the railroad company at less than \$1.25 per acre. Congress, no doubt, had the right to confirm the title to the purchasers who bought in good faith from the railroad company lands which were erroneously patented to it, and it did so. It also had the right to require the railroad company to account, as for money had and received, for the amounts realized by it on the sale of such lands. Instead of so doing, Congress provided that the railroad company should pay the regular minimum

price at which the government had offered similar lands for sale. It is no answer to the asserted right of the government to recover this amount that some of the lands were sold for less than that price. It is not disputed that the railroad company received for all the lands so disposed of a price which would average more than \$1.25 per acre. The transaction is to be dealt with as a whole, and is not to be affected by the fact that some of the tracts may have been sold for less than \$1.25 per acre.

The point is made that an action to recover the value in money of lands sold cannot be joined with a suit to cancel patents for other lands, and that the case proven shows no ground of equitable jurisdiction as to the several tracts of land sold by the appellants. But there was no demurrer to the bill, or plea to the jurisdiction in equity. By answering to the merits the appellants waived any right they may have had to object to the power of the court to deal with the case as one in equity, the court having the power to grant the relief sought. *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Insley v. United States*, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113. See, also, *Southern Pacific Railroad Co. v. United States* (decided by this court at the present term) 133 Fed. 651.

The appellants contend that the money value of the land patented to the railroad company and sold by it to bona fide purchasers cannot properly be recovered from the company without showing that it had already received, those lands excluded, the full quantity granted it by the act; that, where lands have been erroneously patented to a railroad company under a grant of quantity, the proper remedy is to charge the quantity of land thus patented against the quantity granted in final adjustment; and that, since the government price of all such lands is the same, the appellee will sustain no loss or injury if recovery of the price of these lands is denied. The case of *United States v. Winona, etc., R. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, is cited in support of this contention. The suit in that case was brought by the United States for the purpose of canceling certifications of certain lands that had been wrongfully certified to the state of Minnesota for the benefit of the railroad. The railroad company had many years before constructed its road and earned the land granted. It had received no more land than Congress had proposed to grant in aid of the construction of the road. The court, referring to these facts, and to the fact that it did not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for the erroneous certification, said, on page 482, 165 U. S., page 373, 17 Sup. Ct., 41 L. Ed. 789:

"It will hardly be contended that if, simply through a mistake of the Land Department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified, and which have since been disposed of by the government to other parties, so that there is now no way of filling the grant, the government can nevertheless recover the value of the lands so erroneously certified."



That case, it will be observed, differs materially from the present case, in the fact that in the former there remained no lands within the indemnity limits for selection by the railroad company out of which it could have secured the quantity of lands given it by the grant. In the case at bar, while it is true that the railroad company has not yet received within its place limits, including the lands in controversy in this suit, the full quantity of land granted it by Congress, there is no contention that it cannot, out of the indemnity limits, obtain full satisfaction of its grant. It is stipulated in the case that within the indemnity limits of the grant and outside of the 20-mile limits "there now remain more than 50,000 acres of surveyed public lands of the United States for which there has been no selection or application to select made by said company." That the company has not received, exclusive of the lands in controversy, the full quantity of land granted in aid of the construction of its road, is no reason why it should be allowed to retain those lands, or to deny its liability for the value thereof when sold to others. The grant was not a grant of quantity, but a grant of specific lands within certain place limits, with the right, upon conditions, to select indemnity lands in lieu thereof. In brief, the answer to the company's contention is that these lands are not within its grant; that they are lands to which it had no right; and that it must therefore pay the price fixed by the government, and look to the indemnity limits for the satisfaction of its grant.

The decree of the Circuit Court is affirmed.

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#### RANKIN v. CITY OF BIG RAPIDS et al.

(Circuit Court of Appeals, Sixth Circuit. December 20, 1904.)

No. 1,318.

##### 1. JUDGMENTS—ESTOPPEL—PRIVITY.

Where it had been previously determined in a probate proceeding by the receiver of an insolvent national bank to establish a claim for an assessment levied on stock against decedent's estate that she was the owner of the stock, the parties to a subsequent action against decedent's distributees by the receiver's successor to recover a subsequent assessment being in privity, defendants were estopped to relitigate the question of decedent's ownership, though the cause of action in the two proceedings was not the same.

##### 2. SAME—STIPULATIONS—CONSTRUCTION.

Where a stipulation of facts recited that decedent's executor contested the claim of a former receiver of an insolvent national bank for a stock assessment filed against the estate on the ground that the stock stood in the name of decedent's deceased husband, and had never been transferred to deceased, and therefore belonged to his estate, such stipulation should be construed to admit that the defense made was on the ground that deceased never became the owner of the stock, and not that the only question litigated was whether the stock stood in the name of the deceased husband on the books of the bank.

##### 3. ADMINISTRATORS—PROBATE PROCEEDINGS—CONTINGENT CLAIMS—FAILURE TO FILE.

Comp. Laws Mich. §§ 9411-9416, provide for the allowance and payment of claims against a decedent's estate and for the settlement of con-

tingent claims which may become absolute within two years from the time limited for other creditors to present their claims for allowance, and section 9380 declares that claims not presented within the time limited shall be barred. *Held*, that where a contingent claim against a decedent's estate did not become absolute until long after the two-year period had expired and until more than a year after the estate had been finally closed, it was not barred by such sections, though not filed in the probate proceedings.

4. SAME—LIABILITY OF DISTRIBUTEES.

Where a contingent claim against a decedent's estate did not become absolute until after the assets had been distributed and the time for proving the same in the probate proceedings had expired, the creditor, though never having filed the claim in the probate proceedings, was entitled to recover thereon in equity from the distributees to the extent of assets distributed to them.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This is a bill filed by the receiver of an insolvent national bank to collect an assessment levied by the Comptroller of the Currency upon a stockholder of the bank by reason of the extraordinary liability imposed by law, and the collection is sought to be made from a legatee who has received assets from the stockholder sufficient to satisfy the assessment. The circumstances out of which the controversy arose are these: Fitch Phelps was a holder of 11½ shares of the stock of the National Bank of Big Rapids, Mich., and by his will he devised and bequeathed to his wife, Harriet C. Phelps, all his property, real and personal, and made her the executrix of his will. He died January 22, 1890. His will was probated, and Mrs. Phelps accepted the appointment and qualified as executrix. She gave a bond, which recited that she was residuary legatee, but contained no obligation to pay the debts and satisfy the charges upon the estate, such as is required by the laws of Michigan as a condition to the turning over of the assets to her as legatee. She became possessed of the certificates of stock above mentioned, and received dividends thereon, but whether as executrix or legatee is a question in dispute. She died September 12, 1893, without having closed the administration of the estate of her husband. By her will she devised and bequeathed some of her property to John C. Fitzgerald, one of the defendants and appellees, in trust for the city of Big Rapids, the other defendant and appellee, wherewith to found and establish a public library in said city; and she also appointed Mr. Fitzgerald executor of her will. The will was proven in the probate court, and Fitzgerald qualified as executor. On November 7, 1893, commissioners were appointed to hear and determine claims against the estate of Mrs. Phelps, and six months were allowed them for that purpose. On May 7, 1894, they filed their report of the allowance of claims. Mr. Fitzgerald, on July 14, 1900, filed his final account as executor of the estate of Mrs. Phelps, and on August 10, 1900, the account was allowed, the executor discharged, and the estate closed. The shares of stock above mentioned, having proved worthless, were never disposed of, either by the executrix of Fitch Phelps or by the executor of Harriet C. Phelps. While the estate of Harriet C. Phelps was open, and on September 9, 1895, the bank having some time before that time become insolvent, and passed into the hands of a receiver, the Comptroller of the Currency levied an assessment of 60 per cent. on its stock. On January 25, 1896, the former receiver filed in the probate court his petition for the allowance against the estate of Harriet C. Phelps of a claim for the assessment of the 60 per cent. just mentioned. This claim was resisted by the executor of Mrs. Phelps upon the ground that she had never become the owner of the stock, which, as it was claimed, had all the while remained part of the estate of her husband, Fitch Phelps. This contention, however, was overruled by the probate court, and on June 15, 1896, the claim was allowed against the estate of Mrs. Phelps. This claim was paid by her executor. On December 16, 1901, the comptroller levied another assessment of 40 per cent. on the stock of the

bank, payable on or before January 20, 1902. The bill alleges that the receiver made demand upon the defendants for the payment of this assessment upon the stock above mentioned, which was refused. This claim was never proven in the probate court, nor did that court ever make any order relating thereto. There is in the hands of the trustee more than sufficient of the fund received under the bequest of Mrs. Phelps to satisfy the claim of the receiver, and there is also in the hands of the legatee more than enough for that purpose.

This bill was filed December 1, 1902. The only matter of fact in dispute in the lower court or here has been with regard to the alleged ownership of the stock by Mrs. Phelps or her estate. At the hearing in the Circuit Court it was held that the stock had belonged to the estate of Mrs. Phelps, but that the remedy had been extinguished by operation of the probate laws of Michigan as construed by the Supreme Court of the state. The court below held that the legatee was estopped by the decree of the probate court upon the claim founded upon the former assessment to deny that Mrs. Phelps had become the owner of the stock in question so as to charge her estate with the liability resting thereon, but that the remedy sought to be established by this bill was cut off by the operation of the probate laws of Michigan regulating the settlement of estates of deceased persons, and upon this ground dismissed the bill.

Taggart, Denison & Wilson (William Alden Smith, of counsel), for appellant.

Joseph Barton and Walter Drew, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement of the case, delivered the opinion of the court.

The question which we shall first consider is whether the defendants and appellees are concluded by the decree of the probate court upon the claim for the former assessment in respect to the ownership of the shares of stock by Mrs. Phelps, and, in consequence, by the executor of her estate; for, if they are, it precludes all inquiry into the facts bearing upon that question. And we think they are so precluded. The present receiver is the successor in place of the receiver who was the complainant in the former proceeding, and is in privity with him. *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796. And the legatee and its trustee are in privity with the executor who contested the claim for the first assessment. The legacy was of personalty arising from the conversion of her property by the executor. *Freeman on Judgments*, § 163; *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461; *Dandridge v. Washington*, 2 Pet. 370, 377, 7 L. Ed. 454.

It is true, as contended by the appellees, the cause of action is not the same as was the subject of the former proceeding, and therefore the appellees are not estopped from contesting it. But in doing so they are precluded from again litigating any question material to the controversy which was raised and decided in the former suit. And it is evident that the question of the ownership of this stock by Mrs. Phelps then raised was precisely the same as that now raised by the defense that she was not such owner, and that, therefore, her estate now in the hands of her legatee is not chargeable on account thereof. The principles of the doctrine

of estoppels as applied, on the one hand, to the cause of action, and on the other to incidental questions arising upon the trial and material to the controversy, are so fully stated in the case of *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, that we need do no more than to refer to that case for authority. In the statement of the facts agreed upon in the Circuit Court it is stipulated as follows:

"John C. Fitzgerald, executor of the will of Harriet C. Phelps, deceased, contested the claim of John S. Lawrence, receiver of the Northern National Bank of Big Rapids, filed against said estate, which is mentioned in the seventh paragraph of the bill of complaint in this cause. The said Fitzgerald contested said claim on the sole ground that the stock in said bank upon which was made the assessment to collect which said claim was filed still stood in the name of Fitch Phelps on the books of said bank, and had never been transferred to Harriet C. Phelps, and for that reason that Harriet C. Phelps was not the owner of said stock at the time said bank suspended payment, but that said stock at that time was owned by the estate of Fitch Phelps, deceased."

The appellees propose to construe this stipulation as extending only to a contention as to whether the stock stood in the name of Fitch Phelps on the books of the bank. But we think the reasonable and fair construction of it is that the defense made was upon the ground that Mrs. Phelps never became the owner of the stock, and that the fact that the stock stood in the name of Fitch Phelps was relied upon as evidence that it continued to belong to his estate.

We are therefore confronted with the important question in the case whether the remedy which the receiver seeks is barred by the probate laws of Michigan. In chapter 252 of the Compiled Laws of Michigan of 1897 provision is first made for the appointment by the probate court of commissioners to hear and determine claims which have accrued (or may accrue before the commissioners make their report) and are presented for allowance against the estate. The order for their appointment must prescribe the time within which such claims must be presented, at the end of which the commissioners must make their report. The limit of the time which may be allowed for that purpose is two years, but the judge may revive the commission for three months upon the application of a creditor before the estate is closed. At the time of granting letters testamentary or of administration the probate court is required to fix a time within which the assets are to be reduced and the debts and legacies paid, which, in the first instance cannot exceed eighteen months, but which may in certain conditions on the application of the executor or administrator be extended to four years. And in regard to the presentation of claims and the consequence of failure to present them it is provided by section 9380 as follows:

"Every person having a claim against a deceased person, proper to be allowed by the commissioners, who shall not, after the publication of notice, as required in the second section of this chapter, exhibit his claim to the commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever."

From the reading of this section it is manifest that the claims thereby barred are such as are "proper to be allowed by the commissioners." Such claims were those only which were absolutely payable, and which the executor or administrator would be bound to pay to the extent of the assets.

Following all these provisions, and other details which it is not important here to notice, are provisions relating to claims which the commissioners were not authorized to allow, and classed as "contingent claims," as follows:

"(9411) [As it stood at the time when the commissioners in this matter held their appointment.] If any person shall be liable as security for the deceased, or have any other contingent claim against his estate, which can not be proved as a debt before the commissioners, or allowed by them, the same may be presented, with the proper proof, to the probate court, or to the commissioners, who shall state the same in their report, if such claim was presented to them. [The remainder of the section is unimportant here.]"

"(9412) Sec. 46. If the court shall be satisfied from the report of the commissioners, or by the proof exhibited, said court may order the executor or administrator to retain in his hands sufficient estate to pay such contingent claim when the same shall become absolute, or, if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of the other creditors.

"(9413) Sec. 47. If such contingent claim shall become absolute, and shall be presented to the probate court, or to the executor or administrator, at any time within two years from the time limited for other creditors to present their claims to the commissioners, it may be allowed by the probate court upon due proof, or it may be proved before the commissioners already appointed, or before others to be appointed for that purpose, in the same manner as if presented for allowance before the commissioners had made their report, and the persons interested shall have the same right of appeal as in other cases.

"(9414) Sec. 48. If such contingent claim shall be allowed, as mentioned in the preceding section, or established on appeal, the creditor shall be entitled to receive payment to the same extent as other creditors, if the estate retained by the executor or administrator shall be sufficient for that purpose; but if the claim shall not be finally established as provided in the preceding section, or if the assets retained in the hands of the executor or administrator shall not be wholly exhausted in the payment of such claims, such assets, or the residue of them, shall be disposed of by order of the probate court, to the persons entitled to the same, according to law."

From these sections it is seen that any person having a contingent claim, such as this is, might present it, with proof, to the commissioners at the time of making their report of their own determinations. They do not act upon it. They have no power to do so. *Buchoz v. Pray*, 36 Mich. 429; *Campau v. Miller*, 48 Mich. 148, 11 N. W. 845. The judge, if satisfied by the proof, is to order the executor to retain sufficient funds to pay it, or its proper proportion, when it becomes absolute. The rest of the estate is distributed. Then, if within two years the contingent claim becomes absolute, the claimant may present it for final allowance, and it is paid out of the funds which have been retained, and the surplus of such funds is distributed. If the claim has not become absolute within the two years it cannot be thus established, and, if it is not, the assets which have been retained to meet it are distributed to those entitled by law. It is suggested by counsel for the appellees that the words in section 9412, "to retain in his hands sufficient estate to pay such contingent claims when the same shall be-

come absolute," have no limitation as to the time during which the funds are to be retained. But we see no force in this suggestion, for by section 9414 the funds are to be distributed at the end of the two years if the claim has not been established. Moreover, after the estate was closed and the executor discharged, the probate court, as well as the executor, lost all control of the assets as completely as if they had never been in their hands. It is evident, therefore, that this claim could never have been collected under the provisions of the statute thus far recited; for this claim became absolute long after the lapse of the two years from the filing of the commissioners' report, and more than one year after the estate had been closed. It is evident that the purpose of these provisions was to hold the estate open for a limited time to enable a creditor having a contingent claim which might become absolute within that period to come in and share with other creditors before the administration should be closed; and, if it did not become absolute, the estate should be closed without further regard to such claim.

Another provision follows those last recited, as follows:

"(9415) Sec. 49. If the claim of any person shall accrue or become absolute, at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court, and prove the same at any time within one year after it shall accrue or become absolute, and if established in the manner provided in this chapter, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay; and if real or personal estate shall afterwards come to his possession, he shall be required to pay such claim, or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the probate court may prescribe.

"(9416) Sec. 50. When a claim shall be presented within one year from the time when it shall accrue, and be established, as mentioned in the preceding section, and the executor or administrator shall not have sufficient to pay the whole of such claim, the creditor shall have a right to recover such part of his claim as the executor or administrator has not assets to pay, against the heirs, devisees or legatees who shall have received sufficient real and personal property from the estate."

It is a condition required by these sections that the estate shall not have been closed, for the claim must be presented while the probate court still has jurisdiction, and there must be an executor or administrator in office. As already pointed out, these conditions did not here exist, and the claim could not have been established while the estate remained open. There is no other prescribed method than those already exhibited for satisfying such claims. From all this it is manifest that no provision is made which would comprehend a claim which, like this, should not become absolute until after the jurisdiction of the probate court over the estate had ceased, and the question comes to this: Did the Legislature intend by this scheme for settling estates of deceased persons to cut off and leave unsatisfied all claims which were founded on the obligations of the deceased, but which should not become absolute during the administration by the probate court? As has been shown, claims which are absolute, and so capable of being established, are barred, if not presented, by express declaration. But there is no such declaration in regard to claims of the character we are considering. It is urged, however, that by the probate scheme to which

reference has been made all other recourse to the assets of the estate is, by implication, denied, and that this is the effect which the Supreme Court of the state attributes to these statutory enactments. It is not to be denied that, if this is so, the federal courts should administer the statute law of the state as thus construed. *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147.

It is claimed by the receiver, in effect, that the statutory enactments referred to were intended to reach no further than they go, and this extends only to the limit possible in the scheme devised, which, as all agree, was intended to effect a speedy liquidation and settlement of estates; that this legislation went as far as it could consistently with this purpose, and did not pretend to make regulation for cases which are not comprehended or provided for, and did not deny such proper remedies as might be due to cases not comprehended by the statute. And especially is it insisted that the long established principle of equity that the assets of a deceased person, which have come into the hands of heirs, devisees, distributees, or legatees by inheritance or gift, and not by purchase, should be appropriated to the satisfaction of his debts and obligations, was not intended to be displaced. It is therefore necessary to ascertain what interpretation the Supreme Court of the state has put upon these statutes which is relevant to the case in hand. In doing this we should distinguish between those cases where the claim was one which might have been, but was not, presented to and allowed by the probate court, and such as could not possibly have been allowed or satisfied by any proceeding in that court. In *Clark v. Davis*, 32 Mich. 154, the controversy arose over the distribution of an estate, and the case was heard on appeal from the order of the probate court denying an application of the heir to have the assets applied in payment of a mortgage securing notes given by the deceased upon lands which had come to the heir. The mortgagee had not proven the notes against the estate. It was held by the court that the heir should have proven his claim as a contingent one. Judge Cooley said, "The statute knows but two classes of claims—those which are absolute, and those which are contingent—and each at the proper time must be proved in a proper proceeding instituted for the purpose, and with the right of appeal, or it is barred." That was a proceeding in the probate court, and what was said had reference to such a proceeding. The estate was not yet closed. The claim might become absolute before that court should lose its jurisdiction. If it should not, the claim was beyond the power conferred by the statute. It was fitting to say that "the statute knows but two classes of claims—those which are absolute and those which are contingent." But that is not an affirmation that a claim which is not provided for by statute cannot, in any circumstance, be established in any other way. There is no indication that such a question was in the mind of the court. *Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011, was also on appeal from an order of the probate court, and the question was whether an administrator, who had paid all the debts allowed by the commissioners, and distributed the surplus according to law, should be compelled to pay a claim which had been subsequently allowed by the court. It was held that

he should not, and that a creditor coming in at that late date must take the estate as he finds it. The claim was an absolute one, and nothing which was said has any relevancy to the question before us. The next case cited in the order of dates is *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988. This was an action of ejectment to recover land which had been the homestead of the plaintiff, who was a widow, but which had been sold under license of the probate court to pay debts of her deceased husband. It was held that the homestead right did not pass by the sale. Judge Cooley, in discussing the question whether it was in contemplation of the statute that the land should be sold subject to the homestead, or that the whole estate in it should be sold and the homestead right protected in dealing with the proceeds, in stating the argument for the first conclusion and referring to the probate laws, said:

"Those provisions require estates to be closed and the personal representatives to be discharged in a very short period; allowing only eighteen months at first (Comp. Laws, § 4450), and permitting extensions to four years only in all (Comp. Laws, § 4451). All claims against the estate are barred which are not presented and proved before the administrator is discharged (*Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011, just decided); and we have no statute and no precedents for afterwards pursuing the estate in the hands of distributees or others who have succeeded to it."

The appellees lay much stress upon the latter part of this quotation. It is possible that the learned judge, in saying that there were no precedents for pursuing the estate in the hands of those succeeding to it, meant that the law of Michigan did not sanction it. But we do not think that was his meaning, but, rather, that there had been no decisions in Michigan to the effect stated, which was quite correct at that time, although, as we shall presently see, it could not be said now. It would seem that the language of the judge was guarded. That there were no statutes authorizing it is positively stated, and has at no time been doubted. The case of *Shannon v. Shannon*, 48 Mich. 182, 12 N. W. 42, was that of a bill "to enforce payment from an estate under a contract with decedent," as the reporter states. The defendants were the widow and heirs of a deceased brother of the complainant to recover upon an agreement between the brothers for the joint support of their mother. An allowance had been made by the commissioners for the support of the mother up to the date of the allowance, and this suit was for the purpose of relief touching what had accrued since and might thereafter accrue. The bill was dismissed on demurrer, and the decree was affirmed upon an opinion by Judge Campbell, who said:

"The case is not one for specific performance, and there is no authority to decree payment from distributees by a creditor at large. Debts which are not secured on property must be enforced under the probate laws. We need not consider what remedy may exist in that forum in the present condition of affairs. It is very certain that the present suit is anomalous, and not maintainable."

The opinion is short, and the case is rather scantily reported. We infer that the estate had not yet been discharged from the probate court, for, although Judge Campbell says that the "estate has been closed by distribution," we must suppose that he refers to that stage of the matter when the debts have been paid and the remaining assets have



been distributed, which precedes the time when the administrator files his final report and is discharged, as was the case in *Brown v. Forsche*, supra; otherwise there could have been no use in the suggestion of a possible remedy in the probate court. Besides, it is hardly credible that, if the bill were filed after the probate court had lost jurisdiction to obtain satisfaction of a claim which had since become absolute, that learned judge would have characterized the suit as "anomalous," for the ancient doctrine of equity had been recognized in many state decisions as well as by the federal courts as supplementing the local probate systems. In *Aldrich v. Annin*, 54 Mich. 230, 19 N. W. 964, there had been no administration, and a creditor filed a bill against the widow to collect a debt out of assets of the deceased in her hands. Judge Cooley, delivering the opinion of the court, said:

"Creditors of a deceased person are to enforce their claims against his estate through proceedings in the probate court, and the statute makes ample provision for the purpose. If other parties interested fail to take out letters of administration, the creditor himself must do so, and such proceedings will then be taken as will adjust all equities on the principle of relative equality. If the creditors might severally go into equity for the enforcement of their demands, the purpose of the statute of distribution would be defeated, and estates might be eaten up in litigation. It may be that in this case complainant is the only creditor, and the allowance which it is sought to reach the only asset; but the way to ascertain who are interested, and what the assets are, is to take the statutory proceedings." 54 Mich. 231, 19 N. W. 965.

We are unable to perceive any relevancy in that case or the language of the court to the question here. Another case which is relied on is *Willard v. Van Leeuwen*, 56 Mich. 15, 22 N. W. 185, which was an action by a creditor against an executor who had not yet been discharged to compel him to pay a deficiency on a mortgage foreclosure. The assets had been distributed, and the claim had never been proven. The court held that the executor could not, in such circumstances, be held liable as for his own debt; Judge Champlin saying:

"In such case, if a creditor, after a great lapse of time, establishes a claim against the estate, he must take the estate in the situation in which he finds it, and cannot hold the executor liable as for his own debt."

This presupposes that it had been possible for the creditor to have established his claim, and had been guilty of laches in neglecting it. In *Armstrong v. Loomis*, 97 Mich. 577, 56 N. W. 938, the action was in assumpsit by a creditor to recover against an heir who had disposed of lands of the deceased to compel him to pay a debt which had been allowed by the probate court. The claim was an absolute one. It was held the action would not lie; Judge Grant, in the opinion, saying:

"Chapter 229, How. Ann. St., provides the only methods by which claims against the estates of deceased persons and the expenses of administration can be allowed and collected. If the personal estate is insufficient for those purposes, then the real estate may be sold, under the decree of the probate court. There is no law in this state for pursuing the estate in the hands of heirs or distributees"—citing *Showers v. Robinson*, 43 Mich. 508, 5 N. W. 988.

The case was one entirely within the scope of the probate laws, and was governed by their provisions. The language of the learned judge

is to be understood as referring to such conditions. Other Michigan cases are referred to in the brief for the appellees. We have referred to the more pertinent cases, and cannot prolong our opinion by further references. It must suffice to say that in none of the cases cited in support of the appellees' contention was the question which we have before us presented. There are, it is true, some expressions of judges which, taken by themselves, and without regard to the subject of decision, might be construed into a recognition of the proposition for which the appellees contend, namely, that there is no law recognized in Michigan for the enforcement of the obligations of deceased persons other than those comprised in its statutory probate system, and that that system affords no remedy for an obligation which does not become absolute before the limit of time during which the probate court is given power to afford a remedy. We are not aware of any decision elsewhere which attributes to the probate system of any state such a consequence, although many of them contain provisions from which an intention to exclude all other remedies could be as reasonably implied as from those in Michigan. But, recurring to the decisions of the state court, a later case than those we have canvassed is *Allen v. Conklin*, 112 Mich. 74, 70 N. W. 339. That was a bill filed by one who had been a ward against the executor and heirs of her deceased guardian to obtain an accounting and to establish a lien upon the decedent's lands in the hands of the heirs for the satisfaction of a liability of the guardian for the fraudulent conversion to his own use of moneys belonging to the ward. The bill was filed 12 years after the appointment of commissioners to hear claims, but the complainant excused herself by alleging that the facts had been concealed from her by the guardian, and she had only recently discovered them. There were no assets in the hands of the executor. It was claimed for the defendants that the time allowed by the statutes for the presentation of claims had long since elapsed, and that the probate court could not allow the claim, nor could it license the sale of the land, and that therefore the claim was barred; and the cases of *Brown v. Forsche* and *Willard v. Van Leeuwen*, supra, were cited. But the court said that those cases did not meet the case stated in the bill, and further said:

"Suppose it is true that so much time has now elapsed since the death of Richard Low (the guardian) that complainant could get no relief in the probate court, does it follow that equity cannot aid her? \* \* \* Unless the statute of limitations has cut off her remedy, she has stated a case entitling her to the aid of a court of equity."

Reference is then made to a statute (How. Ann. St. § 8724) which reads:

"If any person who is liable to any of the actions mentioned in this chapter shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within two years after the person who is entitled to bring the same shall discover that he has such cause of action, although such action would be otherwise barred by the provisions of this chapter."

And thereupon Judge Moore, speaking for the court, said, "If the allegations of the bill are proven, we think a bill in equity will lie to reach the property still in the hands of the heirs, devisees or legatees

of Richard Low, deceased;" citing what is now section 9419 of the Compiled Laws of 1897, which enacts that "the creditor may have any proper action or suit in law or equity, and shall have a right to recover his claim against a part or all of such heirs, devisees, or legatees, to the amount of the estate they may have respectively received; but no such action shall be maintained unless commenced within one year from the time the claim shall be allowed or established;" and citing also the case of *Chewett v. Moran* (C. C.) 17 Fed. 820, in which Mr. Justice Brown, then District Judge for the Eastern District of Michigan, maintained the suit of a creditor to recover a contingent claim which had become absolute, from lands in the hands of the heirs of the obligor. Some criticism is bestowed by counsel in the present case upon the assumption in the case of *Chewett v. Moran* that a federal court in equity would adhere to its own rules in such a case, and was not bound by the limitations of the local law—an assumption which has since been dispelled. But the Supreme Court of Michigan cited the case as an authority for the more general doctrine that equity will aid a creditor in such circumstances, and applied it to a case where the claim had not come to light during the progress of the estate in the probate court, notwithstanding the contention that by the probate law the claim was barred. The relief given by the statute to one whose cause of action has been fraudulently concealed is essentially the same as that generally afforded by courts of equity. The provision is not found in the probate law, but is one of general application. We think the case of *Allen v. Conklin* must be regarded as refuting the contention that the probate laws afford the only remedy a creditor may have in Michigan for the recovery of a claim against the estate of a deceased person, and as establishing the proposition that, when those laws do not avail to protect equities arising from special circumstances, its equity courts will give relief by applying the principles and remedies peculiar to that jurisdiction. And such is the course of decisions in other states in reference to their probate systems and the jurisdiction of courts of law and equity when the probate laws are not adequate to give a remedy. *Hall v. Martin*, 46 N. H. 337; *Bullard v. Moor*, 158 Mass. 418, 33 N. E. 928; *Mann v. Everts*, 64 Wis. 372, 25 N. W. 209; *McKeen v. Waldron*, 25 Minn. 466; *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *Dugger v. Oglesby*, 99 Ill. 405; *Payson v. Haddock*, 8 Biss. 203, Fed. Cas. No. 10,862; *Security Co. v. Hansen*, 104 Iowa, 264, 73 N. W. 596; *Blair v. Allen*, 55 Ind. 409; *Walker v. Byers*, 14 Ark. 246; *Hendricks v. Keese*, 32 Ark. 714; *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800.

Of course, a bill of this character ought to be filed within a reasonable time after the claim has matured, and unreasonable delay would constitute laches which would bar the suit. The cause of action here accrued January 20, 1902, and the bill was filed December 1st of the same year. It is not contended that the suit was unreasonably delayed.

It is unnecessary to go into argument to vindicate the principle of equity to which the complainant appeals. "Legatees," says Story, "are always compellable to refund in favor of creditors; because the latter

have a priority of right to satisfaction out of the assets." 1 Eq. Jurisp. § 92. In *Noel v. Robinson*, 1 Vern. 90, 94, the Lord Chancellor said: "The common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel a legatee to refund." The legatee ought not to hold as a gift from the estate that which belongs to the creditors.

We appreciate what the learned judge said in delivering his opinion in the court below that "there ought to be a time when the assets of a deceased person should cease to be impressed with a trust for the payment of decedent's debts, and should become the absolute property of the heirs, devisees, distributees, and legatees." But the superior rights of creditors are also to be regarded, and, whatever his disappointment, the legatee has no just ground for complaint if the creditor makes his claim within such reasonable time as the law in the circumstances of the case allows him.

We are of opinion that the decree should be reversed, and the cause remanded, with direction to enter a decree for the complainant for the amount of the assessment of 40 per cent. stated in the bill, with interest from January 20, 1892, and that the appellant recover his costs in the court below and in this court.

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### KANE v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1904.)

No. 1,324.

#### 1. CONSTITUTIONAL LAW—CONSTRUCTION OF STATE CONSTITUTION—QUESTION FOR STATE COURT.

The question of validity, under the Constitution of a state, of a state law, is one the determination of which properly belongs to the Supreme Court of that state.

#### 2. SAME—PRESUMPTIONS.

Where the constitutionality, under a state Constitution, of a state law, is questioned in a federal court, and the matter has never been determined by the Supreme Court of the state, and its lower courts are divided on the question, the weight of their authority being in favor of the constitutionality of the act, every possible presumption should be indulged in favor of its validity until its invalidity is shown beyond a reasonable doubt.

#### 3. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS.

Prior to the passage of 87 Ohio Laws, p. 150, § 3, a railroad was not responsible to an employé for injuries resulting from the negligence of a fellow servant, except where one employé was put under the control of another, in which case the railroad was liable to the former for injuries caused by the negligence of the latter when both were acting in the common service.

#### 4. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—PROVISIONS OF STATE CONSTITUTION.

Section 2 of the Bill of Rights of the Constitution of Ohio, providing that all political power is inherent in the people, and that government is instituted for their equal protection and benefit, is not less broad in its scope than the clause of the fourteenth amendment to the federal Constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the law.

**5. SAME—CLASSIFICATION.**

The General Assembly of a state, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on created classes, according to its view of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be a reasonable ground for the classification made.

**6. SAME—BASIS OF CLASSIFICATION.**

A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment.

**7. MASTER AND SERVANT—FELLOW SERVANTS—LEGISLATION—EVASION OF LAW.**

A railroad cannot evade the liability imposed upon it by 87 Ohio Laws, p. 150, § 3, providing that every person in the employ of a railroad, having power or authority to direct or control any other employé, is not the fellow servant, but a superior, of such other employé, and is also the superior of subordinate employés in any other branch of the service, by putting a dummy in nominal charge of every other employé on the train, but in such case the court will look through the evasion in order to determine the real grades of the service.

**8. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—RAILROAD FELLOW SERVANTS' ACT.**

87 Ohio Laws, p. 150, § 3, which provides that in actions against a railroad for injuries to employés it shall be held, in addition to the liability now existing by law, that every employé having authority to direct any other employé is not a fellow servant, but superior, of such other employé, and also that every person having charge of employés in a separate branch or department shall be held the superior of subordinate employés in any other department, and which merely extends the classification previously made by the Supreme Court, under which a railroad was liable for injuries to an inferior caused by the negligence of a superior acting in the same service, by imposing on the railroad a liability for injuries caused to an inferior in one branch of the service by the negligence of a superior in another branch, is not repugnant to section 2 of the Bill of Rights of the Constitution of Ohio, which provides that all political power is inherent in the people, and government is instituted for their equal protection and benefit.

**9. SAME—POLICY OF LAW.**

The validity of an act passed by the Legislature must be tested alone by the Constitution. Courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 128 Fed. 474.

T. McNamara, Jr., Geo. F. Arrel, and J. P. Wilson, for plaintiff in error.

Cushing & Clarke, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

¶ 8. Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

**RICHARDS, Circuit Judge.** This was a suit to recover damages for the wrongful death of the plaintiff's intestate, a fireman on a switching engine at work in the yards of the defendant company at Niles, Ohio, which resulted from a collision charged to have been due to the negligence of the engineer of another train, also at work in the yards. The suit could not have been maintained under the law as it stood in Ohio prior to the passage of the act of April 2, 1890 (87 Ohio Laws, p. 149), for under that law the negligence relied on was that of a fellow servant, for which the company was not liable. The suit, therefore, was based upon section 3 (page 150) of the act referred to, which reads as follows:

"Sec. 3. That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow servant, but superior of such other employe, also that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

Several years ago the case was tried and judgment recovered, which was reversed by this court for reasons stated in the opinion delivered by Judge Cochran, and reported in *Erie Railroad Co. v. Kane*, 118 Fed. 223, 55 C. C. A. 129. No question was raised at that time as to the constitutionality of the act. We did pass upon its construction, holding that, under the second clause of section 3, an engineer, having control of but a single employe, might be the constructive superior of the fireman of another train having control of none. When the case came on again for trial below, objection to the introduction of any testimony was sustained on the ground, among other things, that the provisions of section 3 relied on violate the Constitution of Ohio. Whether this holding was correct is the question before us now for determination.

We approach the consideration of the validity, under the Constitution of Ohio, of an Ohio law, with some reluctance; for the question is one whose determination properly belongs to the Supreme Court of Ohio. *Pelton v. National Bank*, 101 U. S. 143, 144, 25 L. Ed. 901. Unfortunately, although the law has been in force for 14 years, and several times before the Supreme Court of Ohio (*R. R. Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11; *R. R. v. Erick*, 51 Ohio St. 146, 37 N. E. 128; *Railway Co. v. Shanower*, 70 Ohio St. 166, 71 N. E. 279), the validity of the provisions now assailed has yet to be determined by that tribunal. The lower courts of Ohio are divided on the question, the weight of authority being in favor of the constitutionality of the act. Under these circumstances, the well-settled rule that, where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and continues until the contrary is shown beyond a reasonable doubt, laid down by the Supreme Court of the United States and the Supreme Court of Ohio, is peculiarly applicable. *Sinking Fund*

Cases, 99 U. S. 700, 718, 25 L. Ed. 496; *Railroad Co. v. Clinton Co.*, 1 Ohio St. 82, 83; *State v. Cincinnati*, 20 Ohio St. 33; *Marmet v. State*, 45 Ohio St. 64, 12 N. E. 463; *State ex rel. v. Jones*, 51 Ohio St. 492, 504, 37 N. E. 945.

Prior to the passage of this act the general rule in Ohio was that a railroad company was not responsible to an employé for injuries resulting from the negligence of a fellow servant, with the qualification, however, that where one employé was put under the control of another the company was liable to the former for injuries caused by the negligence of the latter, when both were acting in the common service. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416; *Railroad Co. v. Keary*, 3 Ohio St. 201. In the latter case Judge Ranney pointed out that the risk assumed on entering the employment of a railroad company is only that resulting from the carelessness of those engaged in a common employment, and said (page 211): "No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other." So important was this Ohio rule, rendering a railroad company liable to a subordinate for injuries caused by the negligence of his superior, deemed to be, that it was held in the case of *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467, 58 Am. St. Rep. 833, that it was not competent for a company to stipulate with its employés that this liability should not attach. It was pointed out that the liability was not created for the protection of the employés simply, but had its reason and foundation in a public necessity and policy. Page 479, 44 Ohio St., page 470, 8 N. E., 58 Am. Rep. 833.

So it appears that, under the Ohio rule as it existed when this act was passed, the relation of the negligent to the injured employé determined the liability of the company. If the negligent employé was in control of the injured one, the company was held liable, because then the two were not deemed fellow servants, engaged in a common employment, but one was regarded as the superior of the other. Recognizing this ground of distinction as existing in Ohio, section 3 not only gives it statutory force, but extends the liability of the company by broadening the class of superiors in the service and narrowing that of fellow servants. It provides that in all actions against the railroad company, for personal injury or wrongful death, it shall be held, "in addition to the liability now existing by law"—

(1) "That every person in the employ of such company, actually having power or authority to direct or control any other employé of such company, is not the fellow servant, but superior, of such other employé;" and,

(2) "Also that every person in the employ of such company having charge or control of employés in any separate branch or department shall be held to be the superior and not fellow servant of employés in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

As said by Judge Davis in the recent case of *Railway Co. v. Shanower*, 70 Ohio St. 166, 169, 71 N. E. 279, 280:

"It [the act of April 2, 1890] declares that it is intended to add to the liability already recognized by law. It does this in two particulars: First, it

makes obligatory upon the courts of this state the superior servant rule, which was first announced in this court in *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415, and which was afterwards approved and followed in a number of other cases in this and other states, although it has been repudiated in many others; second, it creates by force of the statute a relation of superior and subordinate where none exists in fact, and brings it within the operation of the rule mentioned."

The exercise of authority by one employé over another is thus made the test. Any employé who exercises authority over another is "not the fellow servant, but superior," of such other, and every employé who exercises authority over another in his own branch or department is "the superior, and not fellow servant," of an employé in a separate branch or department who exercises no authority there. If the negligent employé is, by virtue of this enactment, the superior, and not fellow servant, of the injured employé, the latter did not assume the risk of his negligence, and the company is responsible.

It is to be observed that the basis of the new classification made by the Legislature is none other than that of the old made by the Supreme Court of Ohio. The class is merely broadened by a logical extension of the rule. Under the old, the company was liable for the negligence of one who exercised authority over the employé injured through his negligence (*B. & O. R. R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, 243); under the new, it is liable not only for the negligence of one who exercises authority over the employé injured, but of one who, exercising authority in one branch or department, by his negligence causes the injury of an employé in another who exercises no authority there.

The contention is that the act violates the second section of the Bill of Rights of the Constitution of Ohio, which provides that "all political power is inherent in the people; government is instituted for their equal protection and benefit;" and which, as held in the case of the State ex rel. v. Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, is not less broad than that clause of the fourteenth amendment, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." It is strongly urged that the statute, by conferring upon some employés a right to recover which is denied others, unjustly discriminates among those engaged in the same occupation, creating a favored class, and denying to those outside of it the equal protection of the law.

The doctrine is well settled that the General Assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made. *Wagoner v. Loomis*, 37 Ohio St. 571; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *State ex rel. v. Jones*, 51 Ohio St. 492, 506, 37 N. E. 945; *State v. Nelson*, 52 Ohio St. 88, 101, 39 N. E. 22, 26 L. R. A. 317; *Cincinnati v. Steinkamp*, 54 Ohio St. 285, 290, 43 N. E. 490; *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. 1046; *France*



v. State, 57 Ohio St. 1, 25, 47 N. E. 1041; State v. Gardner, 58 Ohio St. 599, 606, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785; State v. Guilbert, 70 Ohio St. 229, 250, 71 N. E. 636; Fidelity & Casualty Co. v. Freeman, 109 Fed. 847, 855, 48 C. C. A. 692, 54 L. R. A. 680; Missouri Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis & St. Louis Ry. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Chicago, Kansas & Western R. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; Gulf, Colo. & Santa Fé R. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; St. Louis, Iron Mountain & Southern Ry. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; Tullis v. Lake Erie & Western R. R., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400.

Of the above cases, Missouri Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis & St. Louis Ry. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Chicago, Kansas & Western R. R. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; and Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192—sustain the validity of laws either abrogating or modifying the common-law rule of fellow servants as applied to railroad employés.

The sole question in the case, therefore, is whether the exercise of authority in the service affords a reasonable ground for the classification of railroad employés. A valid classification for legislative purposes "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, Colo. & Santa Fé R. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Billings v. Illinois, 188 U. S. 97, 102, 23 Sup. Ct. 272, 47 L. Ed. 400. It must be grounded upon "a reason of a public nature," and "the act must affect all who are within the reason for its enactment." Judge Shauck in Miller v. Crawford, 70 Ohio St. 207, 214, 71 N. E. 631.

The court below based its holding that the act is unconstitutional upon the ground that the classification was wholly arbitrary; that there is no real distinction in the railroad service between an employé who exercises authority and one who does not—for instance, between an engineer and a fireman—yet, under the law, if both, while running a train, were injured through the negligence of the engineer of another train, the fireman, having no one under him, would have a right to recover, while the engineer, being in control of the fireman, would not. The court thought this placed the power of classification in the hands of the company, and suggested that it could substantially relieve itself from all liability by placing on each train a boy who, by its rules, would be in the charge or control of every other employé on the train. As to the

suggestion, obviously the company could do nothing of the kind. By no trick of that sort could it evade the law and escape liability. The court would look through the sham to the real grades of the service. *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 380, 13 Sup. Ct. 914, 37 L. Ed. 772. But passing this, the court in its supposed case lost sight of the positions, relative to one another, occupied in the service by an engineer and a fireman. Under the old law the engineer was deemed the superior, and not the fellow servant, of the fireman if both were on the same engine. Now, this was a reasonable distinction, because the Supreme Court of Ohio itself made it. Is it any less reasonable to say that an engineer is the superior of a fireman, although they are on different engines? This is what the new law says. If the distinction made by the old law is reasonable, why call that made by the new arbitrary?

In each case there was an attempt to define who should be regarded as fellow servants by a process of exclusion. The old law excluded the direct superior of the injured employé; the new excludes in addition the indirect superior. The ground is the same, that they are not in a common service.

Take a practical illustration. A fireman or brakeman may fairly be said to assume the risk of injury through the negligence of another fireman or brakeman. Being acquainted with the work, he can estimate the danger, and not unreasonably may be expected to keep an eye on those engaged in the same work, thus guarding both himself and the company against negligent fellow servants. Is it unreasonable or arbitrary to say that these things are not true of the relation of a fireman or brakeman to an engineer or conductor—to say that the characteristics of a common service are not present, and that those who only carry out the orders of others ought not to be held to have assumed the risk of the negligence of those in authority over them, whose commands they must obey?

On the other hand, why should not the railroad company be held responsible for an injury to a brakeman or fireman, resulting from the negligence of a conductor or engineer, whether in his own branch or department having control over him, or in another branch or department, exercising authority there? May not such a superior be reasonably treated as the representative of the company, in a sense a vice principal, for whose negligence the company is rightly responsible, unless the person injured be a fellow servant of the negligent employé? Finally, looking at the policy of the act, is not the effect of the new rule to make railroad companies especially careful in selecting their superior employés, those who exercise authority, who give commands, and upon whose skill and judgment the safe operation of these highways of commerce largely depends?

The act of April 2, 1890, has been before the Supreme Court of Ohio at least three times (*Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11; *Railroad Co. v. Erick*, 51 Ohio St. 146, 37 N. E. 128; *Railway Co. v. Shanower*, 70 Ohio St. 166, 71 N. E. 279); and before this court twice (*Railroad Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, 243; *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280). In all these cases, except that of *Peirce v. Van Dusen*, the constitutionality of the act was

assumed and its construction alone considered. In that case the court passed upon the constitutionality of the act, but only the first clause of section 3 was involved. As to that, Mr. Justice Harlan, who delivered the opinion of the court, said (page 291, 24 C. C. A., page 704, 78 Fed.):

"We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its nature; and, as it applies to all of a given class of railroad employes, it operates uniformly throughout the state."

By the inferior courts of the state the act has been held unconstitutional by the court of common pleas of Ashtabula county, in *Maltby v. Railroad Co.*, 13 Ohio Dec. 280, and by the court of common pleas of Lucas county, in *Froelich v. Railroad Co.*, 13 Ohio Dec. 107; and constitutional by the court of common pleas of Huron county, in *Roe v. Railroad Co.*, 13 Ohio Dec. 260 (affirmed by the circuit court of the Sixth District, 25 Ohio Cir. Ct. R. 628); by the circuit court of the same circuit (overruling the common pleas of Lucas county), in *Froelich v. Railway Co.*, 24 Ohio Cir. Ct. R. 359; and by the circuit court of the Fifth Circuit, in *Railway Co. v. Hottman*, 25 Ohio Cir. Ct. R. 140. It will be observed that the decided weight of authority is on the side of the constitutionality of the law.

Believing that the Legislature had valid and substantial reasons for extending the Ohio "law of superiors," and that the decided weight of authority in the state is in favor of the constitutionality of the law, we hold that the provisions of section 3 involved in this case do not violate the Constitution of Ohio. Whether the law is open to just criticism as a piece of legislation is of course a matter upon which we can express no opinion. As was said by Judge Burket in *Probasco v. Raine*, Auditor, 50 Ohio St. 378, 390, 34 N. E. 536:

"The validity of an act passed by the Legislature must be tested alone by the Constitution; the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy."

The statute being a valid one, it should have been treated by the court below as applicable in the case presented. *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 230, 284.

The judgment of the lower court is reversed, and the case remanded for proceedings not inconsistent with this opinion.

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KYLE LUMBER CO. v. BUSH et al.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1905.)

No. 1,413.

1. BANKRUPTCY—PROCEEDINGS—TRANSFER—JURISDICTION—REVIEW.

Bankruptcy proceedings having been instituted against a corporation in Alabama, New Jersey, and Tennessee, and the proceedings pending in New Jersey having been removed and consolidated with the proceedings in Tennessee, an application to remove the proceedings pending in Alabama to Tennessee was also granted. *Held*, that the court sitting in

Alabama having jurisdiction to direct such removal in case it found that the Tennessee court had jurisdiction, as authorized by Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 534 [U. S. Comp. St. 1901, p. 3434], an erroneous finding on such issue was reviewable only by appeal from the removal order, and not on a petition to review an order denying an application to the Alabama court to revoke such order and reassume jurisdiction of the cause.

### In Error to the District Court of the United States for the Northern District of Alabama.

The record in this case shows certain proceedings leading up to the matter now before this court for review. On the 17th day of July, 1903, at 2:35 p. m., Robert S. Armstrong & Bro. and others filed in the District Court of the United States for the Southern Division of the Northern District of Alabama a petition in involuntary bankruptcy against the Southern Car & Foundry Company. On the same day, at 4:45 p. m., the Ross-Meehan Foundry Company, a corporation, and other creditors, filed a petition in involuntary bankruptcy against the Southern Car & Foundry Company in the United States District Court for the Eastern District of Tennessee. In addition to this, a petition in involuntary bankruptcy was filed against the Southern Car & Foundry Company in the United States District Court for the District of New Jersey, and the company was there, on July 23, 1903, adjudged a bankrupt. On July 23, 1903, Thomas A. Gillespie and Thomas G. Bush were by the District Court of Alabama appointed receivers of the property of the Southern Car & Foundry Company, and took possession of its property in Alabama. On the same day the petitioning creditors in the Tennessee case filed a petition in the District Court in Alabama setting up the fact of the filing of the petition in Tennessee, and the appointment of a receiver, who had taken possession of the property of the Southern Car & Foundry Company in Tennessee, and praying, in the alternative, that their petition be treated either as original or as ancillary. On September 5, 1903, the Pennsylvania Malleable Company filed its petition in the District Court for the Southern Division of the Northern District of Alabama, representing that it was a creditor of the Southern Car & Foundry Company having a provable claim against said company exceeding \$20,000, and representing to the court that, in addition to the proceedings pending in that court, proceedings were also pending in the Eastern District of Tennessee, and further representing that on August 31, 1903, the District Court for the Northern District of New Jersey had made an order transferring the bankruptcy proceedings in that court, including the adjudication made therein, to the District Court of the United States for the Eastern District of Tennessee, and had directed that the record be certified accordingly, as provided by the acts of Congress in bankruptcy. This latter petition, asking a removal of the Alabama proceeding in bankruptcy to Tennessee, came on to be heard before Hon. Thomas G. Jones, United States Judge for the Northern District of Alabama, on September 7, 1903, whereupon the following order was entered:

"This matter coming on to be heard on petition of the Pennsylvania Malleable Company, filed September 2, 1903, praying an order transferring the bankruptcy proceedings pending in this court against the Southern Car & Foundry Company, and it appearing to the court that the District Court for the Eastern District of Tennessee can proceed with the bankruptcy proceedings against said Southern Car & Foundry Company for the greatest convenience of all the parties in interest, it is ordered, adjudged, and decreed that the proceedings in involuntary bankruptcy pending in the Eastern Division and in the Southern Division of the District Court for the Northern District of Alabama, and all matters pending therein, be, and the same are hereby, transferred to the District Court of the United States for the Eastern District of Tennessee, and that this court does relinquish jurisdiction of said proceedings, and of all matters pending therein, to said District Court of the United States for the Eastern District of Tennessee."

The remainder of the order is relative to costs and certain interventions not material here.

On April 30, 1904, the Kyle Lumber Company filed its petition in the United States District Court for the Northern District of Alabama, Southern Division, setting up the fact that the Southern Car & Foundry Company was indebted to it in the sum of \$12,000 or more; that the same was due, and that the petitioner had instituted suit in the city court of Gadsden, Ala., against the Southern Car & Foundry Company for the recovery of said claim, and said suit was, upon the petition of defendant, duly removed to the Circuit Court of the United States at Anniston, and that the said suit was then pending and undetermined in said Circuit Court; and that petitioner had not filed or proved its claim in any court in bankruptcy. It then set out the different bankruptcy proceedings referred to; the order of Judge Jones in transferring the case to Tennessee; that since the order of transfer the Tennessee court had assumed the administration of the entire estate of the bankrupt, including the property located in the state of Alabama, through the receivers appointed in Alabama, and Orion L. Hurlbut, a receiver appointed by the District Court of Tennessee, and that nothing has been done in the District Court of Alabama since the making of the order of transfer; that the petitioner was on the 5th of November, 1903, by the District Court in Tennessee, restrained from prosecuting its suit in the Circuit Court at Anniston against the Southern Car & Foundry Company; and that it had taken no further action in said suit. The premises considered, the petitioner prayed that the order of transfer of the proceedings in involuntary bankruptcy in Alabama to the District Court in Tennessee be set aside and annulled, and that the Alabama court assume jurisdiction of the case.

Subsequently, in August, 1904, the Kyle Lumber Company amended its petition, in which it sets up that the Southern Car & Foundry Company is, and was at all the times herein referred to, a corporation organized and existing under the laws of the state of New Jersey, and that for the six months, or the greater portion thereof, preceding the date of the filing of each of the several petitions in bankruptcy as hereinbefore alleged, said corporation had its domicile in the state of New Jersey, and its principal place of business in the state of Alabama, and during such time had not its domicile and place of residence, or principal place of business, in the state of Tennessee; that the petitions in involuntary bankruptcy in New Jersey and Tennessee were filed after the petition in the District Court for Alabama; that no adjudication in bankruptcy had been entered in the District Court of Alabama upon the petition of Robert S. Armstrong & Bro. and others, or on any other petition; that the petitioner is advised and avers that the District Court of the United States for the Eastern District of Tennessee was and is without jurisdiction to adjudicate the Southern Car & Foundry Company a bankrupt, because petitioner avers the fact to be that said Southern Car & Foundry Company had neither its principal place of business, residence, nor domicile in the state of Tennessee for the six months, or the greater portion thereof, preceding the filing of the petition in bankruptcy; and that said order of September 9, 1903, made by the District Court in Alabama, transferring the bankruptcy proceedings to Tennessee, was void for want of jurisdiction, and ought to be set aside and vacated.

To this petition the trustees in bankruptcy, viz., Thomas G. Bush, Thos. A. Gillespie, and Orion L. Hurlbut, demurred on the following grounds, to wit:

"(1) For that in and by said petition it is shown that the proceedings had in the said several District Courts of the United States in said petition mentioned, in respect to transferring the proceedings in bankruptcy in said cause to the District Court of the United States for the Eastern District of Tennessee, were legally transferred, and that said proceedings are now pending in said District Court of Tennessee.

"(2) For that it is shown in and by said petition that this court had the power and jurisdiction to make the order of transfer in said petition mentioned, that said order had been made, and that said District Court for the Eastern District of Tennessee has taken jurisdiction of the bankruptcy proceedings in said cause.

"(3) For that the order made by this court which is sought to be vacated and set aside was not void, and that the same has been acted upon, and

that by reason thereof, and the other matters set forth in said petition, said District Court for the Eastern District of Tennessee has assumed jurisdiction of said bankruptcy proceedings, and has proceeded to administer the same.

"(4) For that said petitioner has no standing in this court to obtain the prayer of his said petition.

"(5) For that said District Court of the United States for the Eastern District of Tennessee is the proper court in which to file said petition, and is the only court having authority to grant the same.

"(6) For that the effect of the granting of said petition would be for this court to assume jurisdiction of the proceedings in bankruptcy of said cause, notwithstanding the fact that the said District Court for the Eastern District of Tennessee has assumed jurisdiction, and is now exercising the same, and that, as a matter of comity between courts, this court should not grant the relief therein prayed.

"(7) For that it is not shown in and by said petition that said petitioner has a claim which gives him any standing in this court to petition this court, as by his said petition he has prayed."

The hearing of this demurrer came on before Judge Jones on August 9, 1904, whereupon the following order was entered:

"The Kyle Lumber Company, claiming to be a creditor of said bankrupt, having heretofore filed in this court its petition seeking to have set aside and annulled a certain order heretofore made by this court transferring the bankruptcy proceedings in this court to the District Court for the Eastern District of Tennessee, and said petition having been set down for hearing, and due notice thereof given to the bankrupt and other parties in interest, and said hearing having been, at the instance of the attorneys for the trustees, continued to this day, and the parties not appearing by counsel, the court proceeds to hear the said petition, and, on motion of petitioner, leave is granted the petitioner to amend its petition, which petition is ordered filed by the clerk of this court on the 6th day of August, 1904, but the clerk has failed to indorse certain exhibits thereto 'Filed,' the judge of this court, the clerk not being present, indorses the said exhibit filed as of the date of the filing of said amendment; and to said petition as amended the trustees this day file their demurrer, and, said demurrer being argued by counsel and understood by the court, it is considered that said demurrer to said petition as amended be, and the same is hereby, sustained, and the said petitioner declines to plead over. It is further considered that said petition be, and the same is hereby, dismissed at the cost of the petitioner."

On September 24, 1904, the Kyle Lumber Company filed in this court its petition to review the order last named, sustaining the trustees' demurrer and dismissing its petition.

Wm. L. Martin and Wm. J. Boykin, for petitioner.

J. J. Willett and Jno. P. Tillman, for respondents.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge, after stating the case as above, delivered the opinion of the court.

We are to determine, on this petition for review, whether the judge of the District Court erred in sustaining the demurrer and dismissing the petition.

Section 2 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], grants to the District Courts, among other powers, the power "to transfer cases to other courts of bankruptcy." Section 32 of the bankruptcy act (30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]) is as follows:

"In the event petitions are filed against the same person, or against different members of a partnership in different courts of bankruptcy each of

which had jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by one of such courts which can proceed with the same for the greatest convenience of parties in interest."

The District Court in Alabama, in the order transferring the case to Tennessee, found that the District Court of the Eastern District of Tennessee "can proceed with the bankruptcy proceeding against the Southern Car & Foundry Company for the greatest convenience of parties in interest," and thereupon transferred the case and relinquished jurisdiction to the Tennessee court. No effort was made to review this action of the District Court in Alabama transferring the case to Tennessee. The order went into effect apparently without objection, and the Tennessee court has been since that time, and is now, engaged in administering the entire estate of the bankrupt.

The question presented by this record is whether the District Court in Alabama had jurisdiction to make the order transferring the case to Tennessee, and not whether the Tennessee court had jurisdiction of the case. The original petition of the Kyle Lumber Company sets up that the order transferring the case to Tennessee was improvidently made, and is void for want of primary jurisdiction in the said District Court for the Eastern District of Tennessee. In its amended petition the same averment is made, and further that the order of transfer was and is void for want of jurisdiction, and ought to be set aside and vacated. The contention of the petitioner, as we gather it, is that the action of the District Judge in Alabama in transferring the case to Tennessee was void for want of jurisdiction, because the Tennessee court had no jurisdiction to entertain the case in bankruptcy against the Southern Car & Foundry Company.

We think the two propositions are separate and entirely distinct. The district judge in Alabama might well find and determine that the Tennessee court was a court having jurisdiction of the bankruptcy proceeding, and be in error in so determining, and yet he would have had jurisdiction to make the order. Jurisdiction to make an order is one thing, and the correctness of the order so made is an entirely different thing. By the very terms of the act, the district judge in Alabama had jurisdiction to transfer this case to the District Court in Tennessee, as another court having jurisdiction, and where it would be to the greatest convenience of the parties to have it proceed. Having jurisdiction to entertain the motion and make the order of transfer, the action of the court, even if the Tennessee court had no jurisdiction of the case, would not be void, but erroneous, and subject to review and correction on proper proceedings for that purpose.

We may assume that the judge of the District Court in Alabama, before making the order of transfer, considered the question of the jurisdiction of the Tennessee court. He could only transfer the case, by the express terms of the bankruptcy act, to another court "having jurisdiction," and a necessary part of the action transferring the case was to find that the Tennessee court had jurisdic-

tion of the bankruptcy proceeding. Where a court reaches a conclusion like this from the record presented, and makes an order based thereon, the proper method of correcting this action, if erroneous, is not by motion to vacate or annul, but by review of the order itself in a proper way in the proper appellate court.

Corporations may be created in one state, and have places for transacting business in several other states. They may have a manufacturing plant, as in this instance, in states other than that of their incorporation. In such cases it may often become necessary to determine where the principal place of business of the corporations, outside of the state of their creation, is. Such an issue, when presented to the court for determination, becomes largely a question of fact—at least, a mixed question of law and fact; and, when decided and judgment entered, such judgment can no more be set aside and vacated because erroneous, than any other judgment involving law and fact.

The New Jersey court undoubtedly had jurisdiction of the case. The effect of the order there, transferring the proceedings to the Tennessee court, need not be considered, further than to say that it was before Judge Jones, and was an order of a court of competent jurisdiction, relinquishing jurisdiction to the Tennessee court, when he made the order in Alabama. The order of the New Jersey court set out in the petition presented in Alabama involved, so far as is now material, precisely the question for determination there; that is, whether the Tennessee court was a proper court to which a transfer of the bankruptcy proceedings should be made, and jurisdiction relinquished for the greatest convenience of the parties in interest. The action of the New Jersey court, therefore, was before the Alabama court as a decision of a court of undoubted jurisdiction upon the same question, and, indeed, upon the same subject-matter.

We do not mean, in what has been said, to express any opinion as to whether or not the District Court in Tennessee had jurisdiction of this proceeding in bankruptcy. We rest our decision upon the ground that the District Court in Alabama had jurisdiction to make the order of transfer, and that the correctness of its order transferring the case cannot be brought before this court for review by the method adopted here.

Considerable progress must have been made in the District Court of Tennessee in the administration of this estate in bankruptcy, in view of the time which has elapsed since the proceeding was instituted there, and the cases from the other courts transferred to that court. Two courts have found that it was for the greatest convenience of all the parties in interest that the estate should be administered there. It does not seem that it would be beneficial to any one that the further progress and complete administration of the estate in that court should be interfered with. There should, therefore, not be such interference unless the law absolutely requires it. We find no such legal requirement here.

The petition to revise the action of the District Court is denied.



## NATIONAL UNION v. FITZPATRICK.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1905.)

No. 1,396.

## 1. INSURANCE—SUICIDE—BENEFIT CERTIFICATE—ACTIONS—EVIDENCE—HARMLESS ERROR.

Where defendant contested liability on a benefit certificate on the ground that insured committed suicide, and claimed that his motive was a certain defalcation discovered against him, it was not reversible error for the court to permit insured's father-in-law to answer whether, with his property and credit, witness could have borrowed the sum specified.

## 2. SAME—BURDEN OF PROOF.

Where a benefit society resisted payment of a certificate because insured was alleged to have committed suicide, within an exception in a certificate, the burden was on it to establish such fact.

## 3. QUESTIONS FOR JURY.

In an action on a benefit certificate, whether insured committed suicide, within an exception in the certificate, was for the jury.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

This was an action by Eleanor Fitzpatrick against the National Union on a policy or benefit certificate for \$5,000 issued on January 25, 1900, on the life of her husband, David Fitzpatrick, in which she, as his wife, was named beneficiary. The defense was based upon a provision in the application for a policy or benefit certificate to the effect that no benefit should be paid if the applicant should, within two years after becoming a beneficial member, commit suicide. The issue thus made was submitted to a jury, which returned a verdict in favor of the plaintiff. Judgment was entered on the verdict, and the National Union brings this writ of error.

David Fitzpatrick, the assured, was found dead in one of the rooms of the Commercial & Industrial Association, a social organization in the city of Montgomery, between 5 and 6 o'clock in the afternoon of December 3, 1900. The deceased, Fitzpatrick, went into the rooms of the Commercial & Industrial Association between 11 and 1 o'clock—probably near noon. Soon after going to the rooms of the association, he appears to have gone into what was called the "committee room"—a small room used for committee meetings—in which there was a telephone. The first thing Fitzpatrick did after going into the room was to use the telephone. After this he was seen by an employé of the association, several times, sitting in a chair, with his feet in another chair, apparently asleep. Between 5 and 6 o'clock, Vickers, the employé who had frequently seen deceased sitting in that position during the afternoon, informed Gilbert, the secretary of the association, that Fitzpatrick had been in that attitude a long time; and thereupon Gilbert opened the door of the committee room, which was closed, but unlocked, and found that Fitzpatrick was dead. The hands of the deceased were lying in his lap. They were not folded, but in his right hand was a pistol. There was an overcoat over his lap. There was a wound in the left breast of the deceased. He had apparently been dead several hours.

A number of witnesses testified that, on Sunday before the Monday of Fitzpatrick's death, they saw him at the home of his father-in-law; that he was in good spirits, and was cheerful and jovial. He was at home all day. One witness testified that he was with Fitzpatrick and his wife for an hour, and that they were telling jokes; that witness would tell one, and Fitzpatrick would tell one; and that there was nothing unusual in his conduct.

¶ 1. Suicide as a defense to a life insurance policy, see notes to *Ætna Life Ins. Co. v. Florida*, 16 C. C. A. 623; *Fidelity & Casualty Co. v. Egbert*, 23 C. C. A. 284.

On the morning of the day of his death, Fitzpatrick was at home, assisting the girls in framing some pictures, and had a glass cutter to cut the glass for the pictures, which was too small. When he left home he said he had an engagement with Mr. Safford, and that when he returned he would bring a larger glass cutter with him. Before starting down town he played with the children about the house, and with the dog, and also fed a kitten on the back porch. Mrs. Vass, his mother-in-law, heard him laughing with her younger daughter. Before leaving home, he said he would send a box in which to pack some bric-a-brac which was to be packed in the box, and it came to the house about 1:30 or 2 p. m.

A. A. Walker testified that Fitzpatrick, on the morning of his death, came to see him about a policy which had lapsed in the Penn Mutual; that Fitzpatrick was evidently laboring under some great excitement, but that he was not intoxicated; that he went to witness' office twice that morning. Witness' best recollection was that, on the second visit, deceased stated to him, in substance, that it was too late now. Witness was not positive that he used the expression, "No; never mind now; it is too late," but his best recollection is that he did.

Fitzpatrick had been for several years in the employ of the Standard Oil Company as chief clerk and cashier in the City of Montgomery, Ala., in which capacity he handled between two and three thousand dollars a day. He was under bond to the Standard Oil Company, his surety being the Fidelity & Deposit Company of Baltimore. On the 31st day of July, 1900, deceased had resigned his position with the Standard Oil Company. Some two or three months before the death of Fitzpatrick, he was informed by one A. J. Mapes, local manager for the Standard Oil Company in Montgomery, that he was short with the company; that he (Mapes) was very much surprised at it; and Fitzpatrick was asked what he was going to do about it, and, in reply, Fitzpatrick said that he would see that it was properly fixed up, and the money returned. Mapes did nothing more towards the collection of this alleged shortage, and it was not paid. Some two or three weeks before Fitzpatrick's death, William A. Safford, who was agent of the Fidelity & Deposit Company in Montgomery, received a letter from the surety company containing a statement of the shortage which had been made by the Standard Oil Company against Fitzpatrick and the surety company. This letter instructed Safford to call upon Fitzpatrick, and ask him to make good the amount shown in the statement to be short. Safford wrote a note to Fitzpatrick, and afterward had a conversation with him. Fitzpatrick came to the office of Safford on Thursday or Friday preceding the Monday on which he died. When he came into the office, Safford turned over to him for inspection the letter and statement from the surety company. The instructions were rather peremptory, and Fitzpatrick, after reading the letter from the company, and looking over the various items in the statement, told Safford that he would endeavor to make the amount good, and would come in the next day, or the second day thereafter, and see Safford about it, if he would grant him that time. Safford then granted him the time. On Saturday preceding the Monday on which Fitzpatrick died, he went back to the office of Safford, and stated that he had made an effort to raise the money to reimburse the Standard Oil Company, but had failed to get it. Safford says that Fitzpatrick then looked very despondent, and said he did not know what to do. He asked Safford if he thought the surety company would permit him to go to Kentucky to see his brother, with a view of raising the money there. Safford said he did not know, but he believed the disposition of the company would be to give him all the time necessary. Fitzpatrick then remarked that he did not know whether this would avail him anything or not, but he would think the matter over, and see Safford again on the succeeding Monday at 12 o'clock. Safford in this interview asked Fitzpatrick if he had said anything to Mr. Vass, his father-in-law, about his trouble, Fitzpatrick replied that he had not, and first declined to do so, but, before leaving the office, said he believed he would see Mr. Vass about the trouble the next day—Sunday. In one of the conversations Fitzpatrick had with Safford, he was informed by the latter that he would be compelled to carry out the instructions of the surety company given in the letter, which

was to arrest him, unless the shortage was made good within a reasonable time. In the conversation on Saturday, Fitzpatrick said he had endeavored to borrow the money from his brothers, but had not been able to get it from them. He also stated that he was very hard pressed for money. Safford told Fitzpatrick that he thought the company would wait on him; that he knew they would be willing to do that, and also to let him go to see his brothers in Kentucky. Fitzpatrick said nothing to Vass on Sunday about his trouble. Safford had a conversation with Vass (Fitzpatrick's father-in-law) on Monday, and probably after the death of Fitzpatrick, about deceased's shortage, and Vass told him he was very much surprised to hear it; that he had never heard anything of the kind; and told Mr. Safford most assuredly, there would be no difficulty in settling the matter.

There was some conflicting evidence as to the habits of the deceased with reference to the use of intoxicants, but it is clear that there was sufficient evidence to justify the jury in finding that his habits in this respect were not bad, or sufficiently so, at least, to be of material importance in the case.

Counsel for plaintiff in error in their brief say: "There was testimony pro and con upon the question of Fitzpatrick's use of intoxicants. As the jury might have found upon the testimony that Fitzpatrick did not use intoxicants excessively, the truth of this fact is assumed for the purpose of this argument, and the consideration of the testimony on this point is for this reason omitted."

The above is substantially the evidence in the case. The court was requested to instruct the jury to return a verdict for the defendant, but declined to do so. The correctness of this action of the court in refusing to direct a verdict for the defendant makes the main issue here. There is an assignment of error relied on by counsel for plaintiff as to a question asked by the court of its own motion of the witness D. N. Vass with reference to his financial condition. This last alleged error, and that of the refusal of the court to direct a verdict for defendant (although there are other assignments of error), are the only two matters insisted upon by counsel in their brief filed in this court.

Robert E. Steiner, Horace Stringfellow, and Charles J. Kavanagh, for plaintiff in error.

Crum & Weil and J. M. Chilton, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge, after stating the facts as above, delivered the opinion of the court.

Conceding that the question asked by the court of T. N. Vass, the father-in-law of the deceased, whether, "with the property and credit you had, could you have borrowed \$259.62," and the answer elicited, were irrelevant, and that the question should not have been asked, nor the answer permitted, it could not really have any material effect on the minds of the jury one way or the other. There can be little, if any, doubt, under the evidence, of Vass' ability to have assisted Fitzpatrick in arranging satisfactorily the comparatively small amount of shortage to the Standard Oil Company, and especially in view of the apparent lenient disposition of the representative of the surety company. The only matter upon which any stress might be laid is as to Fitzpatrick's apparent unwillingness to call upon his father-in-law for assistance. In this view of the matter, the admission of Vass' answer as to his ability to raise \$259.62, even if error, could not have sufficiently influenced the verdict for it to be regarded as reversible error here.

The main question here is whether, under the evidence in this case, it was the duty of the court to have directed a verdict in favor of the defendant. Did the evidence require such a verdict and no other, or was the case such that the court was justified in submitting it to the jury for determination?

There is no error in the charge of the court, or in its action on the requests to charge. The case, on the law, was submitted fully and fairly to the jury.

The plaintiff having shown the death of Fitzpatrick, and the defendant claiming that the cause of death was one excepted from the operation of the policy or benefit certificate, it was incumbent on it to show, to the reasonable satisfaction of the jury, this fact. *Home Benefit Association v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Union Mutual Life Ins. Co. v. Payne*, 105 Fed. 172, 45 C. C. A. 193; *Fidelity & Casualty Co. v. Love*, 111 Fed. 773, 49 C. C. A. 602.

The jury was instructed by the presiding judge to this effect: that is, that the burden was on the defendant to show that the cause of death came within the exception of the policy as claimed. The duty of the trial judge in a case like this was before this court in the case last named (*Fidelity & Casualty Co. v. Love*), and in that case Circuit Judge Shelby, speaking for the court, says:

"Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partly dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show almost, if not quite, conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting. Whether it was accidental or intentional is a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. The evidence is presented in detail and at length in the record, and it would serve no useful purpose to state it. In a case very much like this one in many of its features, the Supreme Court has recently held that the trial court did not err in submitting the question of suicide to the jury." *Supreme Lodge v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741.

In the case of *Supreme Lodge v. Beck*, suicide was the defense; and Mr. Justice Brewer, in the opinion, discussing the alleged error of refusal to direct a verdict, and after stating the facts in that case, uses this expression: "Under these circumstances, it is impossible to say that, beyond dispute, he committed suicide." And it was then determined that there was no error in the trial court's refusal to direct a verdict, and submitting to the jury the question of whether Beck committed suicide. Under the evidence in this case "it is impossible to say that, beyond dispute" Fitzpatrick committed suicide. If it were necessary to do so, much could be cited from the evidence in favor of the fact that Fitzpatrick did not intentionally kill himself. He was a young man, apparently in good health, happily married. His relations with his wife and with her family—they all living together—appear to have been ex-

cellent. Even if he had ever used intoxicants to excess, he certainly did not do so at the time of his death—at least, not to such an extent as to justify despondency. His shortage to the Standard Oil Company is not shown to be a criminal one, and the amount was not such, in view of the attitude of the agent of the surety company in the matter, as to make him at all hopeless about arranging it. However this may be, and in any view of the facts, they were not such, in our opinion, as to require the court to direct a verdict in favor of the defendant.

The presiding judge saw the witnesses on the stand, heard the evidence delivered, and refused to direct a verdict; considering it a matter for the jury to determine. The jury, having a like opportunity to see and hear the witnesses, found a verdict for the plaintiff. Under these circumstances, we would not be justified in interfering with the conclusion reached.

The judgment of the Circuit Court is affirmed.

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BENTLEY et al. v. REID.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1904.)

No. 1,316.

1. PROCESS—ORDERS—JURISDICTION.

Where, by the neglect of the clerk, process was not annexed to the petition and issued in time for service at the return term after the petition was filed, the court had jurisdiction to make an ex parte order reciting such failure, and ordering that defendant be served with a copy of the petition and process in time for the succeeding term.

2. LIMITATIONS—COMMENCEMENT OF ACTION—TIME.

Code Ga. 1895, §§ 4960, 4973, declare that all suits are by petition to the court, and when filed the clerk shall indorse the date of filing, which shall be considered the commencement of the suit. Section 4974 requires the clerk, when a petition is filed, to annex process directed to the sheriff, requiring defendant's appearance at the return term. A petition having been filed, the clerk failed to annex process so that the same could be served for the next term; whereupon the court entered an ex parte order reciting such failure, and directed that defendant be served for the succeeding term to commence on a date specified. Service being so made, defendant appeared and pleaded to the merits without objection to the process or its issuance. *Held*, that defendant having thereby waived all irregularities of the process or service as provided by Code, § 4981, the commencement of the action for the purpose of tolling limitations was the date the petition was filed, and not the date process was issued on the court's order.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

William H. Bentley and six others, all being citizens of other states than Georgia, brought this suit against Henry W. Reid, a citizen of Georgia, for the recovery of five-sixths undivided interest in a tract of land of the value of more than \$2,000. The petition or declaration was filed in the court below September 16, 1901. The petition concluded with prayer for process. The record does not show that the clerk annexed process to the petition requiring the appearance of the defendant at the return term of the court, as required by section 4974 of the Code of Georgia of 1895. On April 4, 1902,

the trial court made this order: "It appearing to the court that the petition in the above stated cause was duly filed in the office of the clerk of this court, and that there was a failure to perfect service of the said petition and process on the defendant in time for the term of court then next ensuing, it is thereupon ordered and adjudged that said defendant be served with a copy of said petition and process in time for the next term of said court to be held in and for said district on the 3d Monday of May, 1902." This order was indorsed "Filed" in the clerk's office on the day of its date by the clerk. On May 2, 1902, the clerk issued process in due form, requiring the defendant, Henry W. Reid, to personally or by attorney appear at the next term of the court, on the third Monday in May, 1902, to answer the complaint. On the 19th of May, 1902, the defendant, Henry W. Reid, appeared by attorneys, and filed an answer to the complaint. The answer is addressed to the merits of the case, admitting some of the allegations of the complaint and denying others. It denies the plaintiffs' alleged title to the land sued for, and asserts title in the defendant. It also presents the defense of the statute of limitations of seven years. Code Ga. 1895, § 3589.

The plaintiffs offered evidence tending to show their title to the real estate sued for. The defendant offered evidence tending to sustain his plea of the statute of limitations of seven years. It became a material question in the case as to when the statute of limitations ceased to run against the plaintiffs. The following is an excerpt from the bill of exceptions: "Counsel for defendant announced that he desired to submit a motion to the court to direct a verdict in favor of the defendant, but preliminary to this motion he desired to invoke the ruling of the court as to the period of time at which the running of prescription in favor of the defendant would stop. Counsel called attention of the court to the fact that the suit was filed on the 16th day of September, 1901, returnable to the October, 1901, term of court, but that no service was made in time for the October term, and on the 4th day of April, 1902, the court, on motion of plaintiffs' counsel, granted an order that service be perfected on defendant in time for the next term of the court, and under authority of this order the clerk issued process bearing date 4th day of May, 1902, requiring the defendant to appear at the May term, 1902, to wit on the third Monday in May, and the record showed that service of petition and process was made on the defendant on the 5th day of May, 1902. At the May term, 1902, the defendant, through his counsel, filed an answer to the merits of the plaintiffs' petition, but filed no demurrer or motion of any kind by reason of any defect in the service or filing or in the process. After hearing the argument on the point thus presented, the court held and decided that the suit as originally filed was invalid for the want of proper service until it was given validity by the issuance of process by the clerk on the date aforesaid, and the court therefore held and ruled that prescription did not cease to run in favor of the defendant until the date of said process, to wit, 4th day of May, 1902." The plaintiffs excepted to this ruling of the court. The court, on motion of the defendant, directed the jury to return a general verdict in favor of the defendant, and to this action of the court the plaintiffs excepted.

Eldridge Cutts (John W. Haygood, on the brief), for plaintiffs in error.

Price Edwards, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

In some actions in England, at common law, it was held that the suit was not commenced until the writ was served on the defendant and returned. The rule in the action of ejectment was that the service of the declaration and notice on the tenant in possession of

the premises sued for was the commencement of the action. *Johnson v. Farwell*, 7 Greenl. (Me.) 370, 22 Am. Dec. 203. In this country the usual rule, in the absence of statute, was that the action was begun at the suing out of the writ with the intention of having it served. There are conflicts in the decisions that treat the subject from the common-law standpoint, and this conflict, together with the legislation in the states limiting the time in which every action may be brought, has made it important to fix the time with certainty when a suit is to be considered commenced, for the running of the statute of limitations is arrested by the commencement of the action. There has been legislation in nearly all the states intended to fix the time when a suit will be considered commenced. These statutes, with occasional modifications, may be classified as providing that the action is commenced when the declaration or petition is filed, or when the process is issued, or when the process is served on the defendant.

In Georgia all suits are by petition to the court, signed by the plaintiff or his counsel (Code 1895, § 4960); and "upon every petition the clerk shall indorse the date of its filing in office, which shall be considered the time of the commencement of the suit" (Id. § 4973).

When the clerk has filed the petition the law imposes on him another duty. "To every petition the clerk shall annex a process (unless the same be waived), signed by the clerk or his deputy, and bearing test in the name of a judge of the court, and directed to the sheriff or his deputy, requiring the appearance of the defendant at the return term of the court." Id. § 4974.

After the enactment of the statute (Code 1895, § 4973), whatever the rule of the common law may have been, it is not the issuance of the writ nor its service that is to be looked to as the date of the commencement of the suit, but the date of the filing of the petition is to be considered as the time of the beginning of the suit. *Wynn v. Booker*, 22 Ga. 359; *Graves v. Strozier*, 37 Ga. 32. But this statute is construed in connection with other statutes, and, when so construed, the mere filing of the declaration, nothing more being done, no service of process being made or waived, would not be the commencement of an action. *Ferguson v. Mfg. Co.*, 51 Ga. 609; *Gray v. Hodge*, 50 Ga. 263. What the statute means is that when the suit is perfected by service on or waived by the defendant its commencement shall date from the filing of the declaration, as shown by the indorsement of the clerk. *McClendon & Co. v. Hernando Phosphate Co.*, 100 Ga. 219, 28 S. E. 152. If, after the declaration is filed, no service is had, and service is not waived and the declaration is dismissed, the proceeding amounts to nothing. But if service is had or waived the suit is perfected, and the statute fixes the date of the filing of the declaration as its commencement.

The petition in this case was filed and indorsed filed on September 16, 1901. It does not appear that the clerk annexed process to the petition at that time. Later, April 4, 1902, the court ascertained and decided that the petition in the cause had been duly filed, and that there was a failure to perfect service of the "petition and

process" on the defendant in time for the term of court then next ensuing. It was therefore ordered that "said defendant be served with a copy of said petition and process in time for the next term of said court to be held for said district on the third Monday in May, 1902." Process was then issued under this order, and a copy thereof and of the petition theretofore filed served on the defendant.

It may be that the court was not required by law to make this order of April 4, 1902, but it unquestionably had jurisdiction to make it. *Peck v. La Roche & Son*, 86 Ga. 314, 12 S. E. 638. Although it is an ex parte order, "the legal presumption is that good and sufficient reasons were shown the court for its action." *Dobbins v. Jenkins*, 51 Ga. 203; *Allen v. Mutual Loan & Banking Co.*, 86 Ga. 74, 12 S. E. 265. The order, as we have said, was ex parte; but, after service on the defendant brought him into court, he had full notice of the order, the petition, and the process.

The question is not before us for decision, but it may be conceded for the purposes of this case that, if the defendant had made a timely motion to vacate this order and the service of the process and to dismiss the case, the motion would have prevailed. *Nicholas v. B. A. Assurance Co.*, 109 Ga. 621, 34 S. E. 1004.

But when the defendant appeared in obedience to the process he made no objection to the petition filed, the failure of the clerk to duly annex and issue process, nor to the order of the court, process thereon, and service. He filed an answer going to the merits of the case, denying the plaintiffs' alleged title, and asserting title in himself, and pleading the statute of limitations of seven years. No suggestion is made as to want of or defect in process. The case was tried on the issues made by the petition and the answer. On the trial of the issue on the plea of the statute of limitations, it became necessary for the court to determine when the statute ceased to run; that is, "to determine the date of the commencement of the suit." The plaintiffs claimed that the date was fixed by the filing of the petition, September 16, 1901. The defendant contended, and the court held, that the suit was not commenced until May 4, 1902, the date of the process issued on the order of the court made April 4, 1902.

The defendant, to sustain his contention, relies on the failure of the clerk to annex and issue the process when or soon after the declaration was filed. We would be reluctant to visit the negligence of the clerk on the plaintiffs, who were not shown to be wanting in diligence (*Ware v. Swann & Billups*, 79 Ala. 330-335); but the case does not depend on that consideration.

What was the effect of the defendant's entering a general appearance and pleading to the merits? Section 4981 of the Code of Georgia of 1895 provides that "appearance and pleading shall be a waiver of all irregularities of the process, or of the absence of process, and the service thereof." In *Savannah, etc., Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010, the court held that the "absence of process was immaterial" where the defendant appears and pleads to the merits. See, also, *Burnett & Co. v. Blackmar & Chandler*, 43 Ga. 56<sup>e</sup>. In *Blalock v. Tidwell*, 56 Ga. 517, the court held that



"even before the adoption of the Code appearance and pleading to the merits waived service." The same rule is established by the Supreme Court. *Creighton v. Kerr*, 87 U. S. 8-12, 22 L. Ed. 309. And in *Henderson v. Carbondale, C. & C. Co.*, 140 U. S. 26, 11 Sup. Ct. 691, 35 L. Ed. 332, it was held that when a party who is ordered to appear in a pending suit voluntarily appears and answers, setting up his claims, it is too late for him to object that there was error in the order.

It is clear that if there had been no order of the court to issue and serve process, and the defendant had appeared as he did and answered, then want of process would have been waived. No question being raised about process, or its issuance or its service, the trial being on the merits, what other date have we by which to fix the date of the commencement of the suit except that designated by the statute—the date of the filing of the petition? If we abandon the statute, should we not resort to the common-law rule in ejectment? That cannot be done on account of the change in procedure.

Issue was joined May 19, 1902, on the petition filed September 16, 1901. The defendant should not be permitted to waive process and all irregularities, and, after the lapse of time sufficient probably to bar the action, avail himself of the defects in or want of process or service.

The United States Circuit Court of Appeals for the Eighth Circuit decided a question much like the one here. The Kansas statute provides that an action should be deemed commenced at the date of the service of summons on the defendant. When the first summons was served the defendant appeared for that purpose only, and moved to vacate the service for irregularities. Pending the motion a new summons was served. Thereupon the defendant entered a general appearance and answered. The limitation of the right of action expired after the service of the first summons, and before the service of the second. The court held that it was immaterial, as, by pleading to the merits, the motion to vacate service was waived, and the statute was arrested at the date of the first irregular service. *German Ins. Co. v. Frederick*, 58 Fed. 141, 7 C. C. A. 122. In the case just cited it will be observed that the defendant did make a motion to reach the irregularity or defect in procedure, but abandoned it and answered the declaration. In the case at bar the defendant did not even make the motion; he answered at once. In both cases the defect of process or procedure was waived. In this case, as in that, we think the statute fixing the date for the commencement of suits should control. We have found no case construing or referring to the Georgia statute that fixes the date of the issuance of process as the commencement of a suit to arrest the running of the statute of limitations.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

NOTE. The following is the opinion of Newman, District Judge, on overruling the motion for a new trial:

"The interesting legal question arising on the trial of this case was whether title by prescription would arise under written evidence of title, and con-

structive possession, by actual possession of a part of the tract, when the written evidence of title relied upon had not been recorded. The law of Georgia controlling this question is contained in Code 1895, §§ 3586, 3587, 3589; that is, if section 3587, which was inserted by the codifiers in the Code of 1895, and therefore made law by the adopting act of December 15, 1895, should be considered here, in view of the fact that the prescription in this case commenced to run before said date. It is not denied that the rule in Georgia has always been, certainly up to the decision in *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904, that written evidence of title need not be recorded in order to work constructive possession of a tract of land, while there was actual possession of a part. The decision in *Carstarphen v. Holt* is expressly to that effect. One sentence from the opinion of the court will be sufficient to show this: 'Prescription upon a definite tract of land, of which the prescriber is in actual possession of a portion, is not dependent upon the registration of the deed; but the possession itself is the evidence of an adverse claim, which will mature, after an occupancy for the term prescribed by law, a prescriptive title.'

"It is contended that in certain recent decisions of the Supreme Court of the state, and especially in *Baxley v. Baxley* (decided February 7, 1903) 43 S. E. 436, a different rule is stated, and it is held that record would be necessary. In *Baxley v. Baxley* the former decisions on the subject are not referred to, although it is fair to say that the court seems to assume the law to be that the record of the deed would be necessary. One of the principal difficulties to my mind about holding that the record of the deed is necessary in order to work prescription as to the part of the tract of which there is no actual possession is that it would be necessary, during the period as to which the prescription is claimed, that a deed properly executed so as to be admitted to record should be the basis for a prescriptive title. This difficulty is pointed out by Judge Atkinson, in *Carstarphen v. Holt*, in this way: 'In order to admit a deed to record, it must be, in point of execution, perfect in all its details, and executed in strict conformity with the law. Failing to come up to this standard of excellence, under the view taken by the trial judge, the paper relied upon as such could not amount to color of title, and nothing short of a perfect deed could be the basis of a prescription. The Code, however, and the construction placed upon its provisions by this court, both recognize as color of title which will suffice as the basis of a prescription any written evidence of title, however inartistic in form or imperfect in point of execution, which serves to define the extent and limit of the prescriber's claim. Indeed, papers which would not under any circumstances be admitted to record have been distinctly held sufficient as color of title.'

"My own opinion would be that the language used by Judge Lamar in *Baxley v. Baxley* would hardly be deemed sufficient to overturn the settled rule in Georgia, announced in so many decisions before that time. But I do not think it is necessary in this case to decide what the law in Georgia on that subject at present is. The lot of land in controversy in this case was one lot. There was entry upon it, and a home built, several acres cleared and inclosed, and this enclosure was subsequently enlarged. On the corner diagonally from that on which the home was located was a home occupied by a tenant, who had supposed himself to be on a different tract of land, but was found to be on the tract embraced in the conveyance here. The occupant of this house, after the survey, attorned to the defendant's grantor. There was real occupancy of the woodland embraced in the tract, by the cutting of wood and keeping off trespassers. I do not think the facts make simply constructive possession. They are sufficient to constitute actual possession of this tract, in my judgment. Code Ga. 1895, § 3585, is as follows: 'Actual possession of lands is evidenced by enclosure, cultivation or any use and occupation thereof which is so notorious as to attract attention of every adverse claimant, and so exclusive as to prevent actual occupation by another.' I think the facts sufficient to show actual possession under this law.

"A verdict was directed upon both grounds—that the court's view of the law was that there being actual possession of a part of this tract under written evidence of title worked constructive possession as to the remainder of the tract, and, even if this was not true, in the opinion of the court such

actual possession was shown as would work a prescriptive title. This is the only question which is really seriously contested in this case, and, the court being of the opinion that there was no error on the trial, the motion to set aside the verdict and grant a new trial is overruled."

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JOHNSTON v. HUFF, ANDREWS & MOYLER CO.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 530.

1. **BANKRUPTCY—PREFERENCES—ORDERS—DATE OF PRESENTATION.**

One who had a contract with a railroad to furnish board to a track gang entered into an arrangement with a supply firm whereby it was to extend him credit, and he in turn gave it an order on the railroad, directing it to pay to the firm any sums due from the railroad to him. It was agreed between the contractor and the firm that the latter was not to present the order unless the former did not keep up his payments. In pursuance of this agreement the order was not presented for over a year, and then just one day before the contractor, being insolvent, filed a voluntary petition in bankruptcy. *Held*, that the order did not operate as an equitable assignment as of the date when it was given, but was effective as a transfer only when presented to the railroad, and therefore constituted a preference, within section 60 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], declaring a transfer of property by an insolvent, the effect of which is to enable any creditor to obtain a greater percentage of their debts than any other creditors of the same class, a preference.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg, in Bankruptcy.

Roy B. Smith and H. T. Hall, for appellant.

C. B. Moomaw and A. P. Staples (Robert E. Scott, on the brief), for appellee.

Before MORRIS, BRAWLEY, and PURNELL, District Judges.

PURNELL, District Judge. In 1901 John A. White entered into an arrangement with the Norfolk & Western Railway Company by which he became what is known as a "boarding boss." By the arrangement White, as boarding boss, was to furnish board and other supplies to the employes of the Norfolk & Western Railway Company, who were engaged in making repairs to the roadbed of said company. The railway company was to furnish White with the necessary cars for the preparation of food, and to store and ship from place to place the supplies necessary to be kept on hand by White for the use of the men employed by the railway company. The railway company further agreed to deduct from the wages of the men employed by it to whom White furnished board and other supplies the amount due by each of them to White, and to pay the amount so deducted to him.

The wages of the men working for the railway company were payable monthly. The wages earned in one month were due and payable about the 25th of the next month. At the end of each month White made out a statement of how much each employé

of the railway company owed him for board and supplies, and the railway company deducted the amount from the wages due each employé, and paid the amount to White, less 3 per cent. commission on the amount so collected and paid over. It became necessary for White to arrange with some one to extend to him the necessary line of credit to enable him to conduct this business. With that end in view he approached the appellee on the 30th day of January, 1902, and, after giving references, telling his business and requirements, asked that the appellee company furnish him the goods which he would need in his business, and gave as security for his purchases an order, of which the following is a copy:

"Roanoke, Va., January 30th, 1902.

"Treasurer or Paymaster N. & W. Ry. Co., Roanoke, Va.—Dear Sir: You will please pay to Huff, Andrews & Moyler Co., for value received, any and all moneys that may now be due me, or may hereafter become due me as boarding boss on your line of road.

"[Signed]

John A. White.

"Witness: Susie Chafin."

This order was held by Huff, Andrews & Moyler Co. from the day of its date, and was not presented or made known to the railway company until the 26th of December, 1902, and during that time White collected from the railway company over \$13,000 for his own use. On the 27th of December, 1902, John A. White filed his petition in bankruptcy. When the pay rolls for the month of December, 1902, were made up, some time between the 1st and the 25th of January, it was ascertained that there was coming to White as of the date when the order was presented the sum of \$1,292.27 due for earnings in December, 1902, and a small balance from the preceding month. It had been mutually agreed between Huff, Andrews & Moyler Company and White, when he gave them the order, that it should not be presented unless White did not keep up his payments and Huff, Andrews & Moyler Company were, for that reason, obliged to close his credit, and White collected the amounts payable by the railway company to him from January to December without objection on the part of Huff, Andrews & Moyler Company. It was well known to both that the railway company objected to orders being given on it, and that if the order was presented the railway company would remove White from his position of boarding boss.

During the progress of the hearing of White's bankruptcy proceedings before the referee in bankruptcy, Huff, Andrews & Moyler Company, the appellee, filed its petition in the case, in which petition, and the testimony taken before the referee, the foregoing facts appear, and asked that the above-named sum of \$1,292.57 be paid to it as having been assigned to it by the above order, which prayer was granted by the referee, and the order entered by him was confirmed by the judge of the District Court. The appeal is from this order.

The plaintiff assigns two grounds of error: (1) Because Huff, Andrews & Moyler Company, under the evidence, is not entitled to a preferential claim to said fund; (2) because the order was not

an equitable assignment of said money due by the said Norfolk & Western Railway Company to the said John A. White, for the reason that the said order was not given for the purpose of being presented to the said Norfolk & Western Railway Company unless the said John A. White should subsequently consent to its being so presented, or the said Huff, Andrews & Moyler Company should wish to terminate the arrangement between it and the said John A. White of extending him credit, all of which is shown by the evidence in this cause, and the court committed error in allowing the said Huff, Andrews & Moyler Company a preferential claim by reason of said order against said bankrupt's estate.

"An agreement to pay out of a particular fund," says Justice Swayne in delivering the opinion in *Christmas v. Russell*, 14 Wall. 84, 20 L. Ed. 762, "however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice. A bill of exchange or check is not an assignment pro tanto of the funds of the drawer in the hands of the drawee." This language of the learned judge is supported by ample authority cited in a footnote to the opinion. As to this ruling this case is cited with approval in *Dillon v. Barnard*, 21 Wall. 440, 22 L. Ed. 673; *R. R. Co. v. Meyer*, 100 U. S. 457, 25 L. Ed. 593; *Laclede Bank v. Schuler*, 120 U. S. 516, 7 Sup. Ct. 644, 30 L. Ed. 704. In this last case the court says: "In order to perfect his title the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice." In the case at bar, it was expressly agreed the order should not be presented, and the assignor was permitted to collect funds for nearly a year—the funds now claimed to have been assigned. The order could not take effect or bind the fund until presented to the Norfolk & Western Railway Company, which was done on the 26th day of December, the day preceding the filing of the petition in bankruptcy.

That it was the understanding and intention that the order should not put the funds payable by the railway company out of the control of White until some financial emergency arose is perfectly obvious, not only from the appellee's own testimony, but from the fact that no notice was given to the railway company until it was known to the appellee that the petition in bankruptcy was about to be filed, and by the fact that notwithstanding the order White continued to collect his money from the railway company without let or hindrance from the appellee.

It is a case, we think, in which, in proceedings in bankruptcy, the order should not be held to be effective until it was presented, and should be deemed to be as of that date a transfer of the debtor's property.

By section 60, Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], it is provided:

"A person shall be deemed to have given a preference if being insolvent he has within four months \* \* \* made a transfer of any of his property and the effect of the \* \* \* transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other such creditor of the same class."

In *Wilson v. Nelson*, 183 U. S. 191-198, 22 Sup. Ct. 74-77, 46 L. Ed. 147, it is said: "The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact." In the case just cited an irrevocable power of attorney to confess judgment as a security for money loaned was given by the bankrupt to the creditor thirteen years before the application in bankruptcy, but the judgment was actually entered within four months. It was held that the bankrupt act of 1898 intended to prevent a creditor from holding such a warrant of attorney by which he could at any time, upon the insolvency of his debtor, obtain a preference to the exclusion of other creditors. The present case is similar, in that the creditor having the order on the railway company kept it undisclosed until the debtor was insolvent, and then presented it, claiming to take for the payment of its debt a fund which is substantially the bankrupt's only asset. We think the transfer is to be regarded as of the date when the order was made effective by being presented. *Matthews v. Hardt*, 9 Am. Bankr. R. 373-383, 80 N. Y. Supp. 462; *In re Klingaman* (D. C.) 101 Fed. 691.

As the creditor delayed the presentation of his assignment or order, and the petition in bankruptcy was filed on the day following, and, as we think, it could only take effect on the day of presentation, it was a transfer on that day for a pre-existing debt; hence a preference within four months. Chapter 3, § 3, Bankrupt Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. The creditor has jeopardized and forfeited all rights under such order, and the fund ordered to be paid over to Huff, Andrews & Moyler Company on said order by referee and district judge became vested in the trustee for the benefit of the general creditors. At the time the order became effective it was a preference and void. At this time the creditor knew of the proposed bankruptcy proceedings and of the insolvency of White.

Upon the grounds which have been considered, the decree of the District Court must be reversed, and the fund ordered to be paid to the trustee in bankruptcy for the benefit of the general creditors, and it is so ordered.

Reversed.

**BUROW et al. v. GRAND LODGE OF SONS OF HERMANN OF TEXAS.**

(Circuit Court of Appeals, Fifth Circuit. January 3, 1905.)

No. 1,370.

**1. BANKRUPTCY—EXEMPTIONS—HOMESTEAD—INTERVENTION—APPEAL.**

Where, in a proceeding to determine a bankrupt's homestead exemptions, the creditor secured by a deed of trust of property, claimed by the bankrupt as a business homestead, intervened, on the ground that the bankrupt was not entitled to a business homestead exemption, and prayed that all the property covered by the deed of trust be adjudged subject thereto and be ordered sold to satisfy the debt, which exceeded \$2,000, a judgment of the District Judge reversing a referee's decision and holding that the bankrupt was not entitled to a business homestead, and directing that the property covered by the deed should be applied to its satisfaction, was appealable to the Circuit Court of Appeals, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], § 25a, subd. 3, authorizing appeals in bankruptcy to such court from a judgment allowing or rejecting a debt or claim of \$500 or over.

**2. HOMESTEAD—RURAL RESIDENCE—BUSINESS HOMESTEAD—EXEMPTION.**

A bankrupt resided in a town of 275 inhabitants, which had not been incorporated, and of which no plat had ever been recorded. He owned certain lots in a block of an addition on which his residence was situated, and an adjoining tract of  $21\frac{55}{100}$  acres, a part of which was called "Farm Lots" on the map of the addition kept in the county assessor's office. For nearly 10 years prior to and including the time of bankruptcy such property was occupied by the bankrupt, who was married, both as a residence and a place of business. The residence was originally built and used as a residence by a person who did business in town, and was assessed by the bankrupt as acreage county property. *Held*, that a finding that such residence was rural and not urban, and that the bankrupt was therefore not entitled to a business homestead exemption, was justified.

Appeal from the District Court of the United States for the Western District of Texas.

George E. Shelley and John T. Duncan, for appellants.

George Willrich, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On September 4, 1903, the appellant Wilhelm F. Burow was adjudged a bankrupt. On November 17, 1903, the trustee duly filed his designation of exempt property to which the bankrupt was entitled, including the homestead claimed by the bankrupt, embracing certain lots and parcels of ground claimed as his residence homestead in the village of Ellinger and certain other lots claimed as a business homestead. On November 28th the referee made an order reciting that he was not satisfied that the lots claimed as a residence homestead do not constitute a rural homestead, and directed that there be a hearing in regard to the matter before him on December 19th, and that a true copy of this order be mailed to the bankrupt, another copy to his wife,

¶ 1. Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. A. 9.

another copy to the trustee, and another copy to the attorneys of the bankrupt, and that the creditors of the estate be given notice of such hearing, and that the bankrupt and his wife, at the time and place designated, show that the property claimed as exempt is in fact exempt under the laws of the state of Texas. On the day named the appellee presented its petition for intervention, and attached thereto its proof of claim in the sum of \$2,000, besides interest and attorney's fees, evidenced by a promissory note dated February 23, 1899, and by a deed of trust of same date, referred to and attached as part of the proof of claim. The deed of trust embraced the lots claimed as business homestead and other lands, but not the lots claimed as residence homestead. The petition stated the intervener's cause, and prayed that all of the property mentioned in the deed of trust be adjudged subject thereto, and that the same be ordered sold to satisfy the debt claimed. When the matter came on for hearing before the referee he approved the report of the trustee, and declared appellee's lien, so far as it embraced the lots claimed as a business homestead, was null and void, and disallowed the same as a lien thereon, for the reason that the premises constituted the business homestead of the bankrupt, and were not subject to such a lien under the laws of the state of Texas. On application of the appellee the matter was duly certified to the District Judge, who reversed the judgment of the referee as to appellee's lien, and found that the residence homestead of the bankrupt is rural property, and that therefore the bankrupt is not entitled to any business homestead, and the appellee is entitled to a foreclosure of its lien on the so-called business homestead; that the order of the referee, which sets aside as exempt property the lots claimed as a business homestead, be reversed; and that the order of the referee declaring null and void the deed of trust, to the extent that it embraces these lots, is reversed, and that these lots are subject to the deed of trust; that the order of the referee to the effect that the security on the other property covered by the deed of trust is valid security is affirmed; and that all of the property described in the deed of trust is subject to sale as applied for by the beneficiary. Thereupon the appellants excepted to so much of the foregoing order as declared the residence homestead property of the bankrupt to be rural, and holds that the bankrupt is not entitled to a business homestead, and that the security of the order of the Sons of Hermann upon the same is a valid lien, and prays to be allowed an appeal, which was thereupon, in open court, allowed.

The appellee presents a motion to dismiss the appeal upon the ground, first, that this court has no jurisdiction to entertain this case on appeal, as the same is not appealable under any of the provisions of section 25a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]; second, because no assignment of errors was filed when the appeal was allowed; third, the errors assigned are too general; fourth, the errors assigned are in effect that the court erred in deciding the case in favor of the order of the Sons of Hermann. Of these, the second, third, and fourth relate to practice and procedure, and need not be consid-



ered. The first requires attention. In support of this assignment the appellee cites *In re Whitener*, 105 Fed. 180, 44 C. C. A. 434. That case involved a dispute as to the title of property which had not been surrendered by the bankrupt, who represented that it did not belong to him, but to another person named, which other person had come in to claim it. The property had been brought into the possession of the court of bankruptcy on an order of the referee declaring it to be a part of the bankrupt's estate, and the proceeding which it was sought to review was to recover the property from the trustee as property that belonged to the adverse claimant. We held that the proceeding in the court of bankruptcy was a proceeding in the administration of the bankrupt's estate, and was in no proper sense a proceeding to allow or reject a debt or claim against the estate, within the meaning of subdivision 3 of section 25a. This decision was rendered November 20, 1900. At that time the District Court had not general jurisdiction to hear and determine controversies between adverse parties. In Texas homestead property is designated by its actual use as such. In the country it may embrace 200 acres in one or more parcels, and in a city, town, or village includes the place actually used as a place of business by the head of the family, limited by the value of the ground at the time of designation. If the property claimed by the bankrupt as his homestead was in a village, and used only for the purposes of a home and as a place of business, it was exempt from judicial seizure for ordinary debts, and did not vest in the trustee by the adjudication of bankruptcy. Moreover, if such was the location and use of the property, the husband and wife, either or both of them, had no power to charge it or any part of it, as they attempted to do in the deed of trust given to secure the appellee's debt. If such were not the conditions in fact, and the appellee's mortgage was valid, it could be enforced according to the terms of the instrument creating it or by resort to a court of equity. The adjudication of bankruptcy did not affect its validity. It may be that without proving its debt under section 57, Bankr. Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], the appellee could have exhibited its bill or presented a petition in the nature of a bill in equity in the court of bankruptcy to have its mortgage declared valid and to obtain foreclosure. If the latter course had been pursued, the court of bankruptcy as a court of equity might have decreed substantially as it has adjudged in the decree from which this appeal comes, and in that case it can hardly be questioned that the parties appellant here would have had the right to appeal from the decree or such parts thereof as aggrieved them. The intervener did not proceed in that way, but made proof of its claim, attaching thereto the note and mortgage. In this case, as in many others, the lien claimed, though merely an incident of the debt, is to the appellants the most vital part of the claim adjudged. It seems also to be a vital part of the claim to the appellee. This case does not come within our ruling in *In re Whitener*, 105 Fed. 180, 44 C. C. A. 434. In our opinion, the construction of subdivision 3 of section 25a, Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901,

p. 3432], that would exclude this case, would be a narrow construction of the language of that section.

The distinguished counsel for the appellants submits in his printed brief that the principal question to be here determined is as to whether lots 7 to 11, in block A, and farm lots 8 and 9, which constitute the residence homestead of appellants, is rural or urban in character. If it be rural, then lots 11 to 20, in block 13 of Ellinger, Tex., are not exempt, and are therefore subject to appellee's debt and lien. On the other hand, if the residence lots are urban, lots 11 to 20, in block 13 of Ellinger, are exempt to appellants, and the lien of appellee is void in so far as that property is concerned. There is no controversy about the facts as shown by the testimony adduced upon the trial of this question before the referee in bankruptcy, and the findings of fact filed by the referee present a true and full synopsis of the evidence, and for this reason will be here substantially copied:

"The town of Ellinger, in Fayette county, was laid out on the railroad about 1881 or 1882, when the railroad was built through that locality. The White-Bradshaw-Meerscheidt addition to the town of Ellinger was laid out in about 1882. Neither the town nor its addition was at any time incorporated. No town plat of the town proper is recorded, but a map is kept in the county assessor's office. No plat of the addition is recorded, excepting that it appears in a deed from the originators of the addition to one Hall, which deed is of record. The bankrupt owns lots 11 to 20, inclusive, in block No. 13 of the original town of Ellinger, and a steam gin and mill used for a number of years by the bankrupt in his avocation as miller, and so used by him long prior to the execution of intervener's deed of trust, is situated on that property. The bankrupt has owned for a number of years lots Nos. 8, 9, 10, and 11, in block A of the addition on which his residence is situated, and at the same time he acquired those lots he also acquired a tract of  $21\frac{5}{100}$  acres, part of what is called on the map of the addition farm lots, and being directly connected with the residence lots. For about ten years previous to and including the time of bankruptcy the above-described property was occupied as a residence and for residence purposes and as a place of business for the bankrupt, who at all times was and is now a married man.

"What is designated as block 13 on the map (which is omitted) is the block on which the gin and mill of the bankrupt is situated. East of that block are several other blocks, which go as far east as the depot platform. The main business houses of the town, representing more than 15 businesses, are situated between block 13 and the railroad platform, and they go within probably 500 feet of the business property of the bankrupt. Immediately west of block 13 is a part of a block owned by some person who has fenced it up to within four feet of the east line of Meerscheidt street. Hotman street, north of block 13, comes to an end where the residence lots of the bankrupt are situated, and the street north of these lots is fenced up, and was fenced up by the bankrupt. The street, called White street, is used by the bankrupt in part as pasture and as a storing place for cotton. The north and south railroad streets and Spangler street are fenced up. So are the streets running north and south in the addition. A deep ravine prevents access to the bankrupt's residence by means of the railroad reserve, and the only access is through Hotman street, which runs east of the center of the town proper. South of the bankrupt's residence is one other residence, and north of him there are three residences, the first one about 200 yards from the bankrupt's. West, south, and northwest of the bankrupt's residence is woodland and hilly ground, and there are no residences excepting those mentioned. The land (west, south, and northwest of bankrupt's residence) is used for timber and farm land, small farm tracts being scattered throughout. The residences of the town of Ellinger are in a circle around the town proper, most of them in the southwestern part of the town, and most of the

residences have little farms of about ten acres attached to them. The distance from the bankrupt's residence to the southeast corner of his mill and gin lot is about 200 feet. One thousand and eighty feet is about the distance from the depot to the east line of the bankrupt's residence. The bankrupt's residence was originally sold to one Hall, who built a residence thereon and did business in town. It is admitted that the homestead exemptions of the bankrupt, if they are urban, are in no way in excess of the value allowed by law. West and south of the bankrupt's residence are no streets excepting the country road, all other streets having been fenced up.

"There are about 800 lots in the original town of Ellinger. All of the property claimed by the bankrupt as residence, including the adjacent streets, is fenced up. It is used for a garden, for the purpose of growing foodstuff, and for pasturage. The bankrupt assessed the lots on which his mill and gin property is situated as town lots, but he has never assessed his residence lots and the adjacent acreage property as town property, but always assessed it as acreage country property. The population of Ellinger is about 275."

On the foregoing facts the referee adjudged that the designation of the homestead exemptions as made by the trustee under date of November 17, 1903, and which sets apart as the residence property of the bankrupt 21<sup>55</sup>/<sub>100</sub> acres, part of the farm lots Nos. 8 and 9, and lots 7, 8, 9, 10, and 11 in block A of the White-Bradshaw-Meerscheidt addition to the town of Ellinger, and which sets aside lots 11 to 20, inclusive, in block 13, in the town of Ellinger, all in Fayette county, Tex., be, and the same is hereby, approved and confirmed. The decree appealed from recites, among other things, that:

"The court having inspected the record of said matter attached to the certificate of the referee, and the claim of the said order of the Sons of Hermann, together with the deed of trust attached thereto, which stands as security for said claim, and which said claim was filed and allowed on the 19th day of December, 1903, and having duly considered said record, and having heard the argument of counsel, is of the opinion that the residence homestead of the bankrupt is rural property."

Whether land is located in a city, town, or village does not depend on the fact of incorporation. It may come to be within the corporate limits of a town without losing its character as a rural homestead, or it may be located within the limits of a town or village, and thus have the legal character of an urban homestead, although the town or village is not incorporated. *M. H. Lauchheimer & Sons v. Saunders* (Tex. Sup.) 76 S. W. 750; *George Wilder & Company v. Isaac McConnell*, 91 Tex. 600, 45 S. W. 145. It is not disputed in this case that lots 11 to 20, inclusive, in block 13, in the town of Ellinger, are urban within the meaning of the constitutional provision. It would appear from all the proof that the bankrupt's business was to operate that property, and that his residence was located with a view to operating the same, and that the ground which he claimed as his residence homestead was used for the purposes of a home, and all of it was embraced within the limits of the addition to the town of Ellinger, which addition was laid out many years before the bankrupt bought the lots which constitute his residence homestead. The mortgage given the appellee does not embrace these lots. It does embrace lots 11 to 20, inclusive, in block 13, all of which are admitted to be in the town of Ellinger. We must assume that the appellants acted in good

faith in giving that mortgage, but we should also guard our minds against any tendency to give to that act of theirs the force of an estoppel, as it would manifestly be futile for the Constitution to provide that a husband and wife cannot mortgage a homestead if the courts may hold them estopped from setting up against the grantee the fact that the property was homestead. It does, however, tend to show that the grantors, if acting in good faith, as we assume, believed that their home was a country home, which did not and could not include a place of business in the town or village. And this element of the proof may be allowed to turn the scale in the evenly balanced state of the inferences to be drawn from the other evidence in the case, and authorize us to conclude that the homestead of the bankrupt is in the country.

We therefore affirm the decree.

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LIVERPOOL & L. & G. INS. CO. v. N. & M. FRIEDMAN CO.

(Circuit Court of Appeals, Sixth Circuit. November 30, 1904.)

No. 1,320.

**1. INSURANCE—CAUSE OF LOSS—FIRE—INSTRUCTIONS—REFUSAL OF REQUEST.**

Where, in an action on a policy, the court charged that plaintiff must show that fire existed in the building before it fell, and that in determining such question the jury should consider all the evidence bearing on the subject, and that, if they were not convinced from the evidence that there was fire in the building before it fell, their verdict must be for the defendant, it was not error for the court to refuse to charge that the jury could not find such a fire by conjecture simply because there were combustible materials in the building at the time, nor because there were conditions in the building at the time it fell which might possibly have produced a fire, and that plaintiff, in order to recover, must show by a preponderance of the evidence that there was a fire consuming the building or its contents before it fell; his showing that there might have been such a fire not being sufficient.

**2. SAME.**

Where plaintiff in an action on a policy claimed that the building fell as the result of a progressive fire, and not from an explosion, unless caused by such progressive fire; and the court charged that if an explosion occurred, which was not caused by a progressive fire, and the explosion was the cause of the collapse, plaintiff could not recover, but, if there was a fire in the building before, which was progressing at the time some explosion occurred, that, under the terms of the policy, would be a fire loss for which defendant would be liable—such instruction covered a request that an explosion, to render defendant liable, must be caused by a fire in the building or its contents, and that exploding of gas by a spark (there being no fire at the time consuming the building or its contents) would not render defendant liable, there being no evidence tending to show that there was any damage from an explosion caused by a spark.

**3. FEDERAL COURTS—STATE PRACTICE—CONFORMITY—SUBMISSION OF CAUSE—DELIBERATION OF JURY.**

U. S. Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], requiring federal courts in civil causes, other than equity, to conform as near as may be

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¶ 3. Conformity of practice in common-law actions in federal courts to that of state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.

to state practice, etc., does not require federal judges to conform to state regulations in the submission of cases and the control of the deliberations of juries; such proceedings being governed by the common law.

**4. SAME—SEPARATION.**

Where, in an action on a fire policy, all of the members of the jury lived outside the city where the fire occurred and the trial was held, a verdict was not vitiated by the court's permitting the jury, in the absence of counsel, to separate after the case had been submitted to them, and go to their homes for Thanksgiving Day; no misconduct, improper influence, or prejudice on the part of any member of the jury during the separation being shown, and it not being claimed that the jury, or any member thereof, was improperly influenced or prejudiced by reason of the separation.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Crane, Norris & Drew, for plaintiff in error.

Knappen, Kleinhans & Knappen, G. A. Wolf, and J. H. Tatem, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This case grew out of the destruction early on the morning of July 18, 1901, of a four-story brick building in Grand Rapids, Mich., known as the Luce Block. The defendant in error conducted a department store in the building, and the policy sued on was upon his stock and fixtures. The occurrence resulting in the destruction of this building and its contents was before us in the case of *Phoenix Insurance Company v. Luce*, 123 Fed. 257, 60 C. C. A. 655, in which we affirmed a judgment on a policy of insurance on the building. In that case, as in this, it was a question whether there was a fire in the building before it fell; and we held that the testimony tending to prove there was such fire was both material and substantial, and justified the trial judge in declining to direct a verdict for the defendant upon the ground there was no evidence warranting a submission of the case to the jury.

The policy sued on contained, among others, the following conditions:

"This company shall not be liable for loss caused directly or indirectly, by invasion, insurrection, riot, civil war or commotion \* \* \* or (unless fire ensues, and in that event for damage by fire only) by explosion of any kind."

"If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

In this case, as in the *Phoenix Case*, the defendant contended there was no fire in the building before it fell, and it fell from structural weakness due to certain alterations then going on. There was a verdict for the plaintiff; the jury finding, in answer to questions, that there was a fire burning in the building before and at the time it fell, and that no part of it fell except as the result of fire. The case went to the jury about 2 o'clock on the afternoon of the day before Thanksgiving Day. At 5 o'clock that afternoon the

trial judge sent for the jury, and, no agreement having been reached, permitted them to separate and go to their homes for Thanksgiving; cautioning them not to talk to any one or permit any one to talk to them about the case, and directing them to return at 2 o'clock on the afternoon of the day following Thanksgiving and resume their deliberations. This was done in the absence of counsel, and, when counsel for the defendant were advised of it, they took an exception, which was allowed.

It is claimed, first, the court erred in refusing to give certain charges; and, second, in permitting the jury to separate after the submission of the case.

1. As to the refusals to charge. The second and third requests, which were refused, were as follows:

"Second. Such a fire you are not authorized to find by conjecture, simply because there were combustible materials in the building at the time, nor because there were conditions in the building at the time it fell which might possibly have produced a fire.

"Third. The plaintiff, to recover, must show by a preponderance of the evidence that there was a fire consuming the building or its contents before it fell. His showing that there might have been such a fire is not sufficient to authorize plaintiff's recovery."

The charge given by the court in this case was substantially that approved by us in the Phoenix Case. The court clearly charged the jury that it was incumbent upon the plaintiff, by a preponderance of the evidence, to satisfy them that fire existed in the building before it fell, and that in determining this question they should consider all the evidence bearing upon the subject; that if they were not convinced, and could not say from the evidence, that there was fire in the building before it fell, then their verdict must be for the defendant. This was sufficient. It advised the jury they were to consider not simply the matters referred to in these requests, but all the evidence, in determining whether there was or was not a fire in the building before it fell. For the court to have mentioned certain evidence, and instructed the jury they were not to conjecture from it that there was a fire in the building, would not only have discredited the evidence mentioned, but led the jury to believe there was no other evidence upon that point. Now, we held in the Phoenix Case that, looking at the entire record, the evidence tending to show there was fire in the building before it fell was both material and substantial. The same evidence is present in this case. A finding based upon such evidence could not, even prospectively, be treated as a mere conjecture. The requests were properly refused.

The sixth request was as follows:

"Sixth. An explosion, to render defendant liable, must be caused by fire in the building or its contents. The exploding of gas by a spark, there being no fire at the time consuming the building or contents, would not render defendant liable."

The claim of the plaintiff, as shown by the record, was that the building fell as the result of a progressive fire, and not from explosion, unless caused by such progressive fire. While the jury was instructed that an explosion caused by a progressive fire would

be a fire loss, within the meaning of the policy, it was also instructed that there could be no recovery, even though the building was on fire before it fell, unless it fell as a result of such fire, and that a collapse caused by an explosion not resulting from fire would defeat a recovery. Upon this point the court said:

"If an explosion occurred which was not caused by a progressive fire, and that explosion was the cause of the collapse, the plaintiff cannot recover. If you find there was fire in the building before, and if you find from this fire, which was progressing at the time, some explosion occurred, that, under the terms of the policy, would be a fire loss, and the defendant would be liable for the loss which ensued."

We think this covers all of the request which was based upon the evidence. It is now suggested that an explosion caused by a spark might have occasioned damage to the stock, and that there was no evidence distinguishing this damage from that caused by a subsequent fire, and therefore could be no recovery. But there is nothing in the record tending to show there was any damage from an explosion caused by a spark. The suggestion, coming after the trial, is at best a "mere conjecture." The court was right in refusing the request.

2. This brings us to the separation of the jury. It is contended that section 914, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684], required the court to follow the Michigan practice, and that under it, and by the common law, the separation of the jury after the submission of the case, although by permission of the judge, vitiated the verdict. It is not necessary to determine what is the rule in Michigan, for section 914 no more places federal judges under state regulations in controlling juries than in charging them. The power of federal judges, as defined by the common law, in the submission of cases and the control of the deliberations of juries, still remains. Indeed, it is a question whether Congress can, under the Constitution, abrogate or abridge such power. As was said by the Supreme Court in *Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286:

"The identity required [by section 914] is to be in 'the practice, pleadings and forms and modes of proceedings.' The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as found in the context."

In *Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898, it was held (page 300, 93 U. S., 23 L. Ed. 898) that "matters relating merely to the mode of submitting the case to the jury" do not come within section 914; and in *Chateaugay Iron Company v. Petitioner*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, the court said (page 554, 128 U. S., 9 Sup. Ct. 150, 32 L. Ed. 508) that "the object of section 914 was to assimilate the form and manner in which parties should present their claims and defense, in the preparation for the trial of suits in the federal courts, to those prevailing in the courts of the state."

Section 914 having no application, did the mere separation of the jury after the submission of the case vitiate the verdict at common law? We are clear it did not. All the members of the jury lived

outside Grand Rapids, where the fire occurred and the trial was held. No improper conduct on the part of any member of the jury during the separation was shown or charged. It is not claimed that the jury, or any member of it, was approached or tampered with, or in any way improperly influenced or prejudiced, by reason of the separation. Conceding that a new trial may properly be granted where it is shown that prejudice resulted from the separation, no occasion for the exercise of such power was shown in this case. *Walton v. Wild Goose Mining Company*, 123 Fed. 209, 60 C. C. A. 155, 157; 12 Enc. Pl. & Pr. 579, and cases cited; *Thompson & Merriam on Juries*, §§ 310, 315, 316.

In conclusion, it is proper to point out that, in permitting the separation complained of, the trial judge but continued the practice pursued by him in *McEvoy v. Mangold Milling Company*, 124 Fed. 1018, 59 C. C. A. 681. That case was before us upon the very question involved in this case, namely, whether the judge had the power to permit the jury to separate after the case had been submitted, was fully argued, and the judgment affirmed on October 18, 1902, although without a written opinion. It is now sought to distinguish it on the ground that the case was one in bankruptcy, where the rules governing juries in common-law actions do not apply; but the bankruptcy act of July 1, 1898, provides (section 19a, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), "A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his solvency," etc.; and the Supreme Court held in *Elliott v. Toeppmer*, 187 U. S. 327, 332, 23 Sup. Ct. 133, 47 L. Ed. 200, that when, under this provision, "a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law."

The judgment of the lower court is affirmed.

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RECEIVERS OF VIRGINIA IRON, COAL & COKE CO. et al. v. STAAKE  
et al. FIRST NAT. BANK OF BALTIMORE v. SAME.  
STAAKE et al. v. WATTS et al. (two cases).

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

Nos. 531, 532, 533, 538.

1. BANKRUPTCY—TITLE OF TRUSTEE—LIENS INVALID AS TO CREDITORS.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors.

2. SAME—ATTACHMENTS—PRESERVATION OF LIENS.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], provides that attachments and other liens obtained against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, and the property affected by such attachments or liens shall be released from the same, and pass to the trustee as part of the estate of the bankrupt, unless the court shall order the lien to be preserved for the benefit of the estate. Creditors of an insolvent attached, under the Virginia law giving them that right, property which the insolvent had conveyed, but deeds to which had not been recorded. After the attachment the



deeds were recorded, and within four months from the attachment the insolvent was adjudged a bankrupt. *Held*, that the attachment liens could be preserved for the benefit of the bankrupt's estate, although the property subject thereto did not belong to the bankrupt, except as to the attaching creditors, and could not have been reached by the trustee, except for the attachments.

3. SAME—COUNSEL FEES.

It was proper for the bankruptcy court to allow attachment creditors who had obtained liens on property which the trustee could not have otherwise reached a reasonable compensation for attorney's fees, on ordering the attachment liens preserved for the benefit of the estate.

Purnell, District Judge, dissents from paragraph 2.

Petitions to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg, in Bankruptcy.

Cross-Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg.

For opinion below, see 126 Fed. 845.

The facts in these proceedings have been agreed upon, and are as follows: Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia, known as the West End Furnace Property, and, as of said date, he sold it to the Roanoke Furnace Company, subject to certain existing incumbrances, and executed a contract in writing, and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract; to wit, shares amounting to \$500,000 of the capital stock of the said Roanoke Furnace Company. Under the contract of sale, the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased; but no deed to the company was executed by Baird until November 5, 1900, when a proper deed was executed, and promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over \$40,000, against Baird, as a nonresident of Virginia, were issued at the instance of certain of his creditors, and were levied upon the furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the furnace company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired, as against Baird and the furnace company, a lien upon the property so levied upon. Code Va. 1887, §§ 2463, 2464, 2465, 2472. Within four months from the levying of the attachments, to wit, on December 24, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company. Under orders of court, the property conveyed by Baird to the furnace company was sold, and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the court below by express consent of all the parties. Upon the issues made by the petitions and answers, the court below ruled that the attachments against Baird, having been obtained through legal proceedings against him when he was insolvent, and within four months prior to the filing of the petition in bankruptcy against him, were null and void, under section 67f of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], so far as they would give a preference to the attaching creditors, but that the liens should be preserved for the ben-

est of the bankrupt's estate, and that they should pass to and be preserved by the trustee for the benefit of the estate, and directed that the trustee of the bankrupt estate be subrogated to the rights of the attaching creditors, and authorized and empowered to enforce said attachment liens with like force and effect as the said attaching creditors might have done, had not the bankruptcy proceedings interfered. The District Court also ruled that the trustee took these liens subject to the claim for compensation of the attorneys who procured the attachments, and directed that, out of the fund derived from the attachments, the reasonable fees of the attorneys representing the attaching creditors should be paid. The grounds upon which the learned District Judge based his rulings are ably stated in his opinion filed in the case. These two rulings are the subject of the present cross-petitions for revision.

Wm. Gordon Robertson, S. Hamilton Graves, and A. P. Staples, for petitioners.

Arthur G. Dickson, John Dickey, S. & M. Griffin, and Samuel W. Cooper, for respondents in Nos. 531 and 532.

Samuel W. Cooper and Arthur G. Dickson, for Staake, trustee.

Wm. Gordon Robertson and A. P. Staples, for respondents and appellees in Nos. 533 and 538.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

MORRIS, District Judge (after stating the facts). Section 67f (Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent, and that the court has, on due notice, ordered that the right under the attachments shall be preserved for the benefit of the estate, and pass to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. It is contended, however, that as the first clause of the section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom, and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter part of the clause of 67f can have reference only to liens on property, which, if the liens were annulled, would pass to the trustee of the bankrupt re-

leased from the lien. We think this is narrowing the more obvious meaning of the words. The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien, if the court should so order, for the benefit of the estate, and vesting it in the trustee.

A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality and prevent preferences. The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. This distinction is clearly stated in the following citation from *In re New York Economical Printing Company*, 110 Fed. 514, 49 C. C. A. 133, quoted by the Supreme Court of the United States in *Hewit v. Berlin Machine Works*, 194 U. S. 302, 24 Sup. Ct. 690, 48 L. Ed. 986:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undistributed. If it is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and, by virtue of the attachments, might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy, and under section 67f the lien is preserved for the benefit of his estate. In the case of *In re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, above cited, Judge Wallace, speaking of the right of a trustee in bankruptcy to treat as invalid a chattel mortgage which was not filed in compliance with the laws of New York, and which, under the decisions in that state, could be treated as invalid only by creditors who had obtained judgments and acquired a lien, proceeded further to say:

"Subdivision 'b,' § 67, Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 8449], preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor, by an execution or a creditors' bill, has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but, if acquired at any time within the four months it would be null and void, under subdivision 'f' of the section, except as preserved for the benefit of the estate, as provided in that subdivision and in subdivision 'b.'"

It is urged that, by giving to the trustee of the bankrupt's estate the benefit of the attachments, the court is taking from the attaching creditors property which did not belong to the bankrupt, and could not have passed to his trustee, but which was a right which the law of Virginia, because of a policy of its own, gave to the creditors in a property which did not in fact belong to the bankrupt. We think that the Virginia law may well be considered as giving the right to the attaching creditor, because, quoad the attaching creditor, the law regards the property so attached as to that extent still remaining the property of the bankrupt, because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all.

We consider the language of section 67f so mandatory and imperative that we arrive at the conclusion that the ruling of the court below must be sustained.

The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors, and whose proceedings produced the fund which now is to pass to the trustee of the bankrupt. The attaching creditors, in good faith, and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure, and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee. The equity of the claim for compensation to be paid out of the fund is very strong. It is clearly a case in which, by an appropriation which the bankrupt law makes of a fund which came into existence and was preserved by the legal proceedings instituted by the attaching creditors, all the common creditors, without distinction, are benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors. The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should, in its discretion, allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits. *Trustees v. Greenough*, 105 U. S. 527-534, 26 L. Ed. 1157.

The court below carefully considered the amounts proper to be allowed, and, with all the facts before it, fixed the allowances. We do not find that injustice has been done either to the counsel of the attaching creditors or to the estate of the bankrupt by the amounts allowed by the District Court, and we approve the allowances as fair and just.

The orders of the court below are affirmed.

PURNELL, District Judge (dissenting). I cannot concur in the foregoing opinion. Upon the facts agreed and the law stated, it is evident to my mind that Congress did not mean by section 67f of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], to provide for the maintenance or preservation of liens such as those set out in this case. If the attachments were void, no lien was acquired thereunder, and, if void for one purpose, they were void for all purposes. They were not in favor of the bankrupt, but for debts due by him, and I cannot agree that even under the act of Congress a court of bankruptcy can convert a debt or liability into an asset. The trustee, under the bankrupt law, takes only such property as the bankrupt is entitled to. He was not only entitled to nothing under these attachments, but he was the debtor whose property was attached.

And as to the other question, to wit, the allowance of reasonable compensation to attorneys who represented attaching creditors, and whose proceedings produced the fund, if the fund is to be retained in the bankrupt court, I concur in the opinion that there should be allowance of reasonable compensation; but as to the other question I most respectfully dissent.

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TEXAS & P. RY. CO. v. SHEFTALL et al.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1904.)

No. 1,362.

1. PARTIES—ACTIONS FOR TORT—DISMISSAL AS TO JOINT DEFENDANT.

The dismissal of a suit as to one of two joint tort feorsors is not error in the absence of any circumstances enhancing the damages because of the suit having been brought against both of them, or of any joinder in pleading by them, or of any prayer for relief by one of them against the other.

2. SAME—EFFECT ON PLAINTIFF'S CLAIM.

The dismissal of a suit as to one of two joint tort feorsors on the ground that it was not a necessary party, or was an improper party, does not discharge plaintiff's claim against the other defendant, if it is otherwise liable.

3. DISMISSAL OF SUIT—MOTIONS—TIME OF MAKING.

A case is in the control of the trial judge pending the term and at the time of the hearing of a motion for a new trial, and a motion made at that time to discontinue the suit as to one defendant is timely, although verdict and judgment have been entered.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Cooper Sheftall, defendant in error, was conductor of a freight train of the Texas & Pacific Railway Company, plaintiff in error. His train was at Ferguson Switch, near Big Sandy, Tex., and was being operated over a track at that place which connected the railroad of the plaintiff in error with that of the St. Louis Southwestern Railway Company of Texas, commonly known as the "Cotton Belt." This connecting track was known as "the long transfer track," and was used by both companies for transferring cars from one rail-

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¶ 2. See Dismissal and Nonsuit, vol. 17, Cent. Dig. §§ 44, 46.

road to the other. Sheftall, in the regular discharge of his duty, was passing by the side of his train, which was then moving on this transfer track, when he stumbled over a post or piece of timber lying by the side of the track. He was moving rapidly, or running, at the time he stumbled and fell prostrate, and, thinking he was going under the car, threw his hand out to catch the side of the car. His hand missed the car and went under it on the rail, and before he could move it the car ran over it. He brought suit against the plaintiff in error and the Cotton Belt Road jointly and severally. He alleged his employment by the Texas & Pacific Company, and that the transfer track connected the tracks of the two railroads together, and was used by each of the companies and by the train crews of each in transferring cars of freight from one to the other; that when either of the companies had cars of freight for delivery to the other such cars were placed on this transfer track, and the train crews of the other company obtained them by operating their cars and engines upon the transfer track, going in upon it for the cars; that he was required by the company to operate defendant's trains upon this transfer track in the transaction of defendant's business, and was so engaged at the time he received his injury; that it was the duty of each of the companies to maintain and keep the transfer track in a reasonably safe condition; that each and both of the companies negligently caused and permitted the post or piece of timber to be and to remain in dangerous proximity to the track; that it was nighttime, and dark, and that he did not know that the post or piece of timber was there; that he was in the discharge of his duty and in the exercise of due care at the time he stumbled over the post or timber, suddenly, and before he could or did see it, and fell and was injured as a result of the negligence of each of the defendant companies. The defendants answered separately, each setting up in substantially the same words, the general issue, contributory negligence of the plaintiff, his assumption of risk, and that the obstruction complained of was not the proximate cause of his injuries. The Cotton Belt had an additional plea that it had no contractual relations whatever with the plaintiff, and owed him no duty whatever with respect to his injuries. The trial resulted in a verdict and judgment for plaintiff against both defendants. Upon the coming on of a motion for new trial by the Cotton Belt Company, Sheftall filed a dismissal and discontinuance as to that company, as follows: "Comes now the plaintiff, by his attorney, and, with leave of the court had, dismisses his said judgment against the St. Louis Southwestern Railway Company of Texas, one of the defendants herein, and only as to the said named defendant, but not as to the defendant the Texas & Pacific Railway Company, and says that as to the said St. Louis Southwestern Railway Company of Texas he will no longer prosecute, but as to the defendant the Texas & Pacific Railway Company he retains his suit and judgment herein recovered. And the plaintiff further says that the aforesaid dismissal is not by reason of nor upon any payment, satisfaction, or collection of said cause of action or judgment, either in whole or in part, for that plaintiff has not received satisfaction or settlement of said claim or suit or judgment, either in whole or in part, from either of said defendants, or from any other source." On the filing of this motion to dismiss the plaintiff in error filed its exceptions and objections to such dismissal and discontinuance of the suit as to the Cotton Belt Company, resting the objection on the ground that the suit was brought and judgment rendered jointly against each of the two defendants; that verdict and judgment had been had thereon, and that the discontinuance is too late to operate to any other effect than a dismissal of the entire suit against both the defendants, and to the great prejudice of the plaintiff in error, and thereupon moved the court to dismiss the entire suit as to both defendants, and, before the court had made any order dismissing the same, filed its pleading over against the Cotton Belt Company, alleging that, if either of the defendants were guilty of negligence as charged, it was the Cotton Belt Company, and not the plaintiff in error; that the Cotton Belt Company, at and prior to the accident in question, undertook and assumed to control and maintain the track at the point where the accident occurred; and praying judgment over against the Cotton Belt Company for any amount finally adjudged against the plaintiff in error in favor of the plaintiff. These objections and motions were overruled. The motion by the Cotton Belt for a new trial

was granted, and, the Cotton Belt Company making no objection, the suit and the judgment rendered, in so far as it affects the Cotton Belt Company, was dismissed, and the judgment ordered to stand as a judgment against the Texas & Pacific Railway Company alone, and that company brought this writ of error.

John M. Duncan and T. J. Freeman, for plaintiff in error.

Cone Johnson, H. B. Marsh, and Jas. M. Edwards, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, McCORMICK, Circuit Judge, delivered the opinion of the court.

Twenty-one errors are assigned. We do not deem it necessary or profitable to discuss them separately, or at all at any length, for we consider that none of them are well taken. Seventeen of them are expressly directed to the action of the court in giving instructions excepted to, by the plaintiff in error and in refusing the requested charges presented by the plaintiff in error. Another of the errors assigned is substantially directed at similar action of the court in refusing to direct a verdict for the defendant. The eighteenth, nineteenth, and twentieth errors assigned are addressed to the action of the court in granting a new trial as to the Cotton Belt Company, and in permitting the plaintiff to discontinue his suit against that company, and in holding the judgment against the plaintiff in error alone. We have examined the cases relied on by the plaintiff in error, namely, *Washington Gaslight Company v. Landsden*, 172 U. S. 543, 19 Sup. Ct. 296, 43 L. Ed. 543; *Albright v. McTighe et al.* (C. C.) 49 Fed. 817; *Strand v. Griffin* (C. C.) 109 Fed. 597; *Levy et al. v. Gill* (Tex. Civ. App.) 46 S. W. 84; *Hume et al. v. Schintz* (Tex. Civ. App.) 40 S. W. 1067; *Schintz v. Morris* (Tex. Civ. App.) 35 S. W. 516; *San Antonio v. Dickman*, 34 Tex. 650—and are of the opinion that they do not support the contention of the plaintiff in error in these last-named three assignments. The defendants answered separately. They did not seek relief against each other. There was nothing in the joining of the defendants that tended to enhance the damages which could be recovered in the plaintiff's case. There was nothing in the nature of that case that would call upon the jury to find a greater verdict against two than the testimony compelled them to find against one if one alone had been sued. If, as the trial judge seems to have concluded, the Cotton Belt had been improperly joined, and therefore was not a necessary party, or should not have been a party at all, the dismissing of the suit against it could not discharge the plaintiff's claim against the other defendant, if it were otherwise liable. There is nothing in the contention that the motion discontinuing the suit as to the Cotton Belt came too late after verdict and judgment entered. The case was entirely in the control of the trial judge pending the term, and at the time his action was taken. We think these views are fully supported by *Minor v. Mechanics' Bank*, 26 U. S. 74, 7 L. Ed. 47; *United States v. Linn*, 42 U. S. 103, 11 L. Ed. 64; *Gaslight Co. v. Montgomery*, 86 Ala. 372, 5 South. 735; *Railway*

Co. v. Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; Miller v. Sullivan, 89 Tex. 408, 35 S. W. 362.

The judgment of the Circuit Court is affirmed.

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THE WORTHINGTON.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,040.

1. MARITIME LIENS—ADVANCE FOR LOADING VESSEL IN FOREIGN PORT.

One who advanced money in a foreign port to the owner of a vessel who was without funds, to be used in loading the vessel in that port, and under an agreement that it was furnished on the credit of the vessel, is entitled to a maritime lien therefor.

2. SAME—ESTOPPEL OF OWNER.

The owner of a vessel who was without funds and borrowed money in a foreign port on the credit of the vessel, upon his representation that it was necessary to pay for loading the vessel in that port, is estopped to deny that it was so used for the purpose of defeating the right of the lender to a lien therefor.

Appeal from the District Court of the United States for the Northern District of Illinois.

In Admiralty.

The Ashland National Bank filed its libel against the steamer *Worthington*, of the port of Chicago, Ill., to recover the sum of \$300, advanced at the port of Ashland, Wis., for the use of the vessel. The Chamberlain Transportation Company, a corporation of the state of Illinois, the owner, intervened, and bonded the vessel. The steamer was due at the port of Ashland on May 29, 1902, where she was to take on a cargo of lumber to be transported to Chicago, or to some port in the state of New York. The owner was without funds to pay the necessary expense of loading, and by direction of the owner its secretary on that day applied to the Ashland Bank for the loan of the sum of \$300 upon the credit of the vessel, stating that the money was needful for and would be used to pay the necessary cost of loading the vessel at that port. The money was thereupon loaned by the bank upon the credit of the vessel for the purpose indicated; the secretary of the owner giving to the bank a draft upon the owner at Chicago, as he was authorized by the transportation company to do, which draft was accepted, but never paid. At the hearing no evidence was offered by the libellant to show that the money so loaned was actually used to pay the expense of loading the vessel, and the offer of the owner to show that it was diverted from the purpose for which it was loaned was overruled. The court below pronounced for the libellant, and from a decree for the amount loaned an appeal is taken to this court by the owner, the Chamberlain Transportation Company.

Joseph McInerney, for appellant.

Charles E. Kremer, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). Within the ruling of the Supreme Court of the United States in the cases of *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651, *The Kalorama*, 10 Wall. 204, 19 L. Ed. 941, and *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683, it

¶ 1. See *Maritime Liens*, vol. 34, Cent. Dig. § 18.



is clear that there was an implied hypothecation of the steamer. The vessel was due at the port of Ashland—a foreign port—to load and to continue her voyage. The owner was without funds. At the request of the owner, the libellant advanced the necessary funds for the purpose of loading the vessel, and upon the credit of the vessel. That the services of a stevedore in loading or unloading a vessel in a foreign port constitute a maritime contract for which a lien is given upon the vessel is no longer doubtful. *The Canada* (D. C.) 7 Fed. 119; *The Hattie M. Bain* (D. C.) 20 Fed. 389; *The Director* (D. C.) 34 Fed. 57; *The Gilbert Knapp* (D. C.) 37 Fed. 209; *The Main*, 2 C. C. A. 569, 51 Fed. 954; *Norwegian Steamship Company v. Washington*, 6 C. C. A. 313, 57 Fed. 224; *The Hattie Thomas* (D. C.) 59 Fed. 297; *The Sirius* (D. C.) 69 Fed. 226; *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. 685. Such services constituting a maritime lien, moneys advanced to pay for them are also entitled to a maritime lien; certainly if they were in fact expended for such purpose. There is here a sufficient showing of circumstances of exigency, of the supplying of the funds upon the credit of the vessel, of the necessity for the credit, and of implied hypothecation.

It is said and it was sought to be shown that the moneys thus procured upon the credit of the vessel upon representation by the owner that they were necessary for the lading of the vessel were not in fact expended for the purpose for which they were borrowed, but were diverted to some other purpose, and it is insisted that therefore no maritime lien exists. The cases upon which this doctrine is sought to be lodged are cases of supplies furnished upon the order of the master. The authority of the master to pledge the credit of the owner or of the vessel is limited, and the one dealing with him is bound to take notice of such limitation. The master's authority so to pledge the owner's credit or the vessel in a foreign port is dependent upon necessity, and that alone, and therefore the actual receipt by the ship of supplies and repairs or the actual expenditure of money procured for the benefit of the vessel is essential to the creation of a maritime lien. But when the owner in person orders supplies for his vessel in a foreign port, and upon the credit of the vessel, he being without funds, he is estopped to say, as against one furnishing supplies or money represented by him to be necessary for the ship, that the supplies or money so procured were diverted from the purpose for which they were obtained, and were not applied to the service of the ship. *The E. A. Barnard* (C. C.) 2 Fed. 712, 716; *The Mary Chilton* (D. C.) 4 Fed. 847; *The Robert Dollar* (D. C.) 115 Fed. 218, 220.

In *The Schooner Freeman*, 18 How. 182, 15 L. Ed. 341, the applicability to the admiralty of this doctrine of estoppel is recognized. There the owner had contracted to sell, and in pursuance of such contract had delivered possession of the schooner to one Holmes. The latter gave to his son its entire control and management. The son procured the master, appointed by him, to certify to bills of lading for merchandise never delivered to the vessel. Upon libel filed by holders of the bills of lading for a valuable consideration and in good faith, it was ruled that, while the general owner was not estopped, because not a party to the transaction, the special owner was estopped to deny

that the merchandise specified in the bill of lading was shipped upon the vessel.

The Wyoming (D. C.) 36 Fed. 493, 496, is relied upon as holding to the doctrine that, to establish a lien, it must be shown that the supplies were actually used for the benefit of the ship. The facts of the case are not fully reported, but it would seem to have been a contest between various libelants and intervening petitioners of the one part and the intervening mortgagee of the vessel of the other part. The question of estoppel did not arise, and was not considered. It may well be that, while the owner might be estopped to assert that supplies secured upon his representation that they were necessary for and were to be used for the vessel were in fact not so used, the estoppel would not bind materialmen who had furnished supplies that were in fact used on and for the vessel. As between them and one who had furnished supplies which were not in fact so used, a superior equity might arise in favor of the former. But that is not this case. Here are no intervening lienholders. It is a contest merely as between the owner of the vessel and one supplying means for the use of the vessel in a foreign port, upon the credit of the vessel, and upon the representation of the owner, who was without means, that the advances were necessary for the use of the ship.

We hold that the owner in such case is estopped to assert that advances so procured were by him diverted from the purpose for which they were obtained.

The decree will be affirmed.

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### CONTINENTAL TOBACCO CO. V. LARUS & BRO. CO.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 536.

#### 1. UNFAIR COMPETITION—TAGS—EVIDENCE.

Where the method of putting up complainant's plug tobacco was shown to be in common use and not distinctive, defendant's use of a yellow tin label or tag circular in shape, and about an inch in diameter, but containing printed matter essentially different from that used on complainant's label, was insufficient to establish unfair competition.

#### 2. SAME—TRADE-MARKS—PRIOR APPROPRIATION.

Where tin tags of all colors, including yellow, of various sizes, had been used by tobacco manufacturers for several years, and a yellow tag similar in appearance to that used by complainant had been in use, without complainant's objection, by another manufacturer for 10 years, the size and color of such tag was not of itself such a distinction as either complainant or defendant could appropriate as a trade-mark.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

A. H. Burroughs and J. Parker, for appellant.

John Pickrell and John A. Coke, Jr., for appellee.

§ 1. Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

MORRIS, District Judge. This is an appeal from a decree of the Circuit Court refusing to grant to the complainant an injunction against the defendant, restraining alleged unfair competition in trade by the defendant selling its plug smoking tobacco of its brand known as "Richmond Best Navy" in competition with complainant's plug smoking tobacco of the brand known as "Master Workman."

The complainant is the owner of the brand of plug tobacco, mostly used for smoking, and principally sold in New England, which was originated about the year 1884 by J. Wright & Co., the complainant's predecessor in title, and widely known as "Master Workman." The defendant in like manner is the owner of a brand of the same class of plug tobacco originated by Larus & Bro., its predecessors in title, about the year 1898, and known as "Richmond Best Navy." The gravamen of the complaint is that by reason of the use by the defendant of a tin tag of the same size and color as the complainant's tin tag, affixed to each section of the pound plug of tobacco of the same size and appearance as the complainant's, the defendant has put on the market a plug smoking tobacco which, by the similarity of the tin tag, in connection with the other similarities, produces confusion and deceives consumers, so that the defendant is unfairly and deceitfully palming its tobacco on unobservant purchasers who desire to get the complainant's tobacco, to the injury of complainant's business.

This class of tobacco is usually manufactured into plugs weighing about a pound, and in shape about twelve inches long by three inches broad and three-quarters of an inch thick. The complainant's plug is indented across at intervals of about two inches by indented lines, marking the plug into six pieces for convenience in cutting it up for the consumer. Each of these pieces is marked with the words "Master Workman" by indented letters impressed into the surface of the tobacco, and on the reverse side of each piece is indented the name of the original proprietors of the brand, "J. Wright & Co."

The defendant's pound plug is divided by indented lines into five pieces, each of which is in like manner indented with the words "Richmond Navy Best," and on the reverse side of each piece appears in raised letters the words "Richmond Navy Best." This method of putting up plug tobacco is shown to be in common use, and not distinctive. In addition to these marks upon each piece of the plug so marked off for convenience in cutting, there is affixed on the tobacco both of the complainant and the defendant a yellow tin label or tag, circular in shape and about one inch in diameter, and it is the use of this yellow tin tag which is the real substance of complainant's charge of unfair competition. The lettering, however, upon the respective tin tags is distinctively dissimilar. Upon the complainant's tag appears in black letters around its circumference the words "Master Workman," and across the diameter in red letters the word "Genuine." Upon the defendant's tag appears in black letters around the circumference the words "Richmond Navy," and across the diameter in very large red letters the word "Best." At the distance at which anything

at all can be read on these labels, the lettering is easily distinguishable the one from the other.

The charge of similarity rests upon the size of the circular tag, which is somewhat larger than the tag most customarily used for the purpose, and the yellow color, which was the color of the tag which complainant from the first adopted. It is shown, however, by the proofs, that tags of all colors, yellow included, are used on plug tobacco by manufacturers, and that their sizes vary. There was produced as an exhibit by the defendant a plug of smoking tobacco, of the same size and similar in appearance to that of both the complainant and defendant, manufactured and put on the market by the R. A. Patterson Tobacco Company, on which is affixed a yellow tag of just the same size as both that of the complainant and defendant, with the words "Honest Labor" in black letters around the circumference, and a picture of a workman's arm in red in the center. The proof is that this label has been in use for about 10 years. It may possibly be charged by the complainant that this, too, was a deceitful imitation of the complainant's tag, but if such a charge could be justly made, it is strange that during 10 years it never has been made. The depositions speak of two other brands similarly marked by the defendant as far back as 1881, viz., "Fairplay" and "Luxury." Tin tags and paper tags of a similar appearance, of various shapes, sizes, and colors, the witnesses say, have been in common use on plug tobacco for at least 20 years, and this is matter of common knowledge.

From an inspection of the exhibits, in connection with the weight of evidence, we think it clearly appears that the matters in which the defendant's plug of tobacco is similar to complainant's—that is to say, the size and shape of the plug, the indented marking to assist in cutting off the smaller piece, the use of the indented name of the manufacturer, the use of a yellow tag lettered with the name of the brand—are in common use, and in the present case the manufacturers' names are easily read, and are so dissimilar that there appears to us no ground for the contention that there is an unfair imitation likely to deceive.

As to actual deception, the proof is not at all convincing; the most that is established is that the plugs look alike, and, if the illiterate and inattentive purchaser was guided by the color and size of the circular tag alone, he might mistake one for the other, but that is quite true of almost all forms of manufactured tobacco. The answer of the defendant, sworn to by the originator of the "Richmond Best Navy" brand, swears that there was never any purpose or intention to imitate the complainant's "Master Workman" brand, or to attempt in any way to appropriate the trade of the complainant by creating any confusion as to their respective brands.

It is urged that the illiterate persons, such as those who mostly use this kind of smoking tobacco, look only at the color and size of the tag; but this is not good ground for relief, for we find from the proofs that the color and size of the yellow circular tags is not of itself a distinction which either manufacturer can appropriate.

We think the Circuit Court rightly decreed that the complainant is not entitled to relief, and the decree is affirmed.

**PETTIBONE, MULLIKEN & CO. v. PENNSYLVANIA STEEL CO.**

(Circuit Court, E. D. Pennsylvania. December 5, 1904.)

No. 23.

**1. PATENTS—INFRINGEMENT—CHANGE OF FORM.**

Infringement is not avoided by a mere change of form or location of parts, if the same principle is used through the same mode of operation, to accomplish the same result, even though an additional beneficial result is attained through the change.

**2. SAME—PRIOR USE—EVIDENCE TO ESTABLISH.**

Under the rule that prior use to defeat a patent must be proved beyond a reasonable doubt, the testimony of a single witness, who depends entirely on his memory for the date, and is not corroborated by any facts or circumstances shown, is not sufficient.

**3. SAME—ANTICIPATION—FOREIGN PATENT.**

A foreign patent, to constitute an anticipation which will defeat a subsequent American patent granted to one who had no knowledge of the foreign invention, under Rev. St. § 4923 [U. S. Comp. St. 1901, p. 3396], must describe the invention in such full, clear, and exact terms as to enable any person skilled in the art to construct the device patented.

**4. SAME—INFRINGEMENT—SWITCH-STANDS.**

The Strom patent, No. 498,196, for a railroad switch-stand, the essential feature of which is a construction and arrangement of the parts such as to break the force of the wheel thrust of cars when the switch is operated automatically, and prevent the breaking of the gearing, was not anticipated, and discloses invention. Also *held* infringed.

In Equity. On final hearing.

Dyrenforth, Dyrenforth & Lee, for complainant.

Walter C. Pusey and Joshua Pusey, for respondent.

HOLLAND, District Judge. This is a suit brought by the complainant for infringement of letters patent No. 498,196, granted by the United States, May 23, 1893, to Alex A. Strom, assignor to the Strom Manufacturing Company of Chicago, who assigned the same to the complainants on the 21st day of November, 1900, "together with all rights of action and claims for damages and profits arising out of or occasioned by infringement of said letters patent prior to the twenty-first day of November, 1900."

The defense set up by the answer is: (1) That, in view of the well-known prior state of the art, complainants' device involves no invention and is without patentable novelty; (2) the patent is invalid by reason of anticipation by certain prior patents and by reason of certain prior knowledge and use by others; and (3) noninfringement.

Prior to the date of the complainants' patent in suit automatic switch-stands were in use. The one most extensively utilized was known as the "Mansfield Switch-Stand," and manufactured more or less extensively by both complainants and defendant. Certain defects, however, manifested themselves in the use of switch-stands of this character; and while the specification of the patent in ques-

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 372, 373.

tion does not name the Mansfield stand, yet it is practically conceded by both parties to this suit that the Mansfield type was referred to by the patentee in the second and third paragraphs of his specification in describing the defects to be obviated in his patent, which are as follows:

"My invention relates to an improvement in the class of switch-stands in which there is employed a vertical target-shaft having a crank-connection with the rod connecting the switch-stand with the switch and a gear-connection between the target-shaft and a horizontal rotary shaft carrying a weighted arm, the starting of which by a wheel-thrust against a switch-rail causes it to be thrown in a vertical plane through a half circle, thereby completing the throw of the switch, while it effects only a quarter turn of the crank.

"As switch-stands of the particular variety referred to have hitherto been constructed, the full force of any excessive wheel-thrust against the switch is transmitted through the connecting rod not only to the crank on the target-shaft, but also to the gear connection thereof with the weighed arm. Thus two disadvantages ensue: First, fracture of the crank under the force of such excessive thrusts renders useless the gearing of the stand, of which the crank forms an integral part; and, moreover and particularly, the full strain of such excessive wheel-thrust is exerted both against the crank and the gear, whereby teeth of the latter are broken or at least so worn as to impair the operation of the gearing by causing them to work with lost motion."

These automatic switch-stands were manufactured to be used in connection with what is known as a point or split switch, and while intended to be operated by hand, yet so arranged that they will work automatically, in cases of emergency, by force of the flange on the wheels of a train passing through the switch "trailing"; that is, from heel to point.

The Mansfield stand consists of a case and base inclosing the segment gear, a vertical target shaft, upon which a horizontal segment gear is rigidly fixed, and which meshes with a vertical gear fixed to a horizontal bar extending back and out of the case, to which is attached an arm weighted at the end. The stand is bolted firmly to the ties outside the track, the connecting rod is pivotally connected to the lateral extension upon the horizontal segment gear, designated "the crank lug on segment gear," and at the other end it is secured in the usual manner of connecting rods to the rails of the point or split switch that is to be operated. The switch is operated either by hand by an attendant or automatically. When by the former, he raises the weighted arm, and throws it over to the opposite side, in which operation it described a half circle of 180 deg. This turning of the weighted arm turns the arm shaft, and with it the vertical gear, through a half circle, and by reason of the relative radii of the vertical gear and horizontal gear it moves the latter through an arc of 90 deg. The segment gear being rigidly fixed to the target shaft, the latter, and with it the target shown toward its upper end, is correspondingly turned through an arc of 90 deg. Manifestly, therefore, the turning of the weighted arm in a half circle, which turns the segment gear through an arc of 90 deg., draws the connecting rod, attached to this segment gear, with it, and thus shifts the switch rail to which the connecting bar is secured. To reset the switch, it is only necessary to return the

weighted arm to its original position. Secondly, should the switch be set against a train passing through trailing, and no attendant to turn the switch, it is intended to be operated automatically by the foremost wheels of a locomotive or car passing through the switch. In this event, the flange of the wheel strikes the switch rail and thrusts it over against the stock rail with a force measured by the speed of the train. The blow struck by the wheel against the rail is transmitted by the connecting rod directly to the crank lug; the segment gear is turned by the thrust through an arc of 90 deg.; and the vertical beveled gear, and with it the arm shaft and weighted arm, is thrown over through an arc of 180 deg. The shock thus produced upon the parts is evidently very great, as it requires two seconds to move the weighted arm by hand through this arc of 180 deg., whereas, when operated automatically, it is thrust through the half circle in about one-eighth of a second, and this time is lessened in proportion to the increase of the velocity of the train passing. The initial effect of the impact of the flange of the wheel with the switch rail must be to overcome the inertia of the weighted arm, and it is to this, mainly, that the destructive shock to the various parts of the switch-stand is found to be due, frequently fracturing the crank, which rendered useless the gearing of the stand, and even breaking the gear teeth, and some times knocking the top of the stand off the lower parts, and frequently loosening the stand from its fastenings.

As has been said, these stands were intended to be operated by hand, but are arranged to work automatically only in cases of emergency, so that it is plain that they are automatically operated in cases where otherwise there would probably be an accident, and it is apparent that frequently trains would pass through them with very great rapidity.

This full description of the Mansfield stand is important to show the defects of the old style of stand, which the patentee claims to have obviated by the invention of his device.

The Strom device, instead of attaching the connecting rod to the segment gear, introduces a crank section in the target shaft at a point somewhat removed from the segment gear, for the purpose of avoiding the shock being communicated directly through the solid and unyielding segment gear in cases of automatic use of the switch, but, on the other hand, allowing the shock to be imparted to the crank section of the vertical target shaft, thereby obtaining a cushion effect or a springiness resulting from the torsional elasticity of the crank and that portion of the target shaft between the segment gear and the crank; and another benefit derived was the fact that, should the crank be broken, the segment gear would still be intact; in other words, a very inexpensive part of the switch-stand would be injured and easily repaired.

The patentee aptly expresses his object in the description as follows:

"My object is to provide a construction of switch-stand in the aforesaid class whereby both of the objections referred to shall be obviated; and this I do by providing the crank as a section in the vertical target shaft, and pro-

viding thereon, for co-operation with a beveled gear on the rotary horizontal shaft carrying the weighted arm, a gear or gear segment, secured on the target shaft so far above the crank section therein as to allow for a degree of springiness in the shaft below the gear thereon, which will tend to take up any excessive wheel-thrust transmitted to the crank from the switch through the connecting rod, and thus shield the gear from the effect thereof; \* \* \* and though the thrust may be successfully excessive in its force to break the crank section, it will not injure the gear, and will only require repairing of the target shaft, which is a comparatively easy and inexpensive matter."

The patent in suit, or the Strom patent, places the crank below the segment gear, but inside the case, and immediately above the lower journal of the target shaft. The only change in this arrangement made by the alleged infringing switch-stand of the defendant is the placing of the crank lower down, to wit, below the lower journal of the target shaft and outside of the case of the switch-stand. It is claimed by the defendant that this enables him to entirely close the case of the stand and prevents clogging from sand or snow. This is no doubt an advantage, but it in no manner affects the question of infringement. What the complainants claim to have patented is the application of the crank to a target shaft in this automatic switch-stand in such a way as to break the force of the wheel thrust of cars when operating the switch automatically, and the defendant's device simply changes the location of the crank, but makes the application of the same principle in its use. This slight change in form and location of the crank is such a plain adaptation of the complainants' device that it is difficult to see how the defendant can escape the charge of infringement, if the complainants' invention accomplishes the new and useful result claimed for it. It is, however, disputed by the defendant that any new or useful result is accomplished, and that the crank was only applied to the defendant's switch-stand below and outside of the casing for the purpose of enabling them to entirely close the case to prevent its being clogged by sand or snow, and that practically there is no difference between the operation of the switch-stand of complainants' and defendant's construction on the one hand and the Mansfield switch-stand upon the other; in other words, that in neither the complainants' or defendant's device is there any springiness to cushion a wheel thrust resulting from torsional elasticity in the crank and target shaft, as claimed, and that the use of a crank on the target shaft is the use of a device well known to the art from time immemorial, applying no new principle in these switch-stands and bringing about no new result.

I cannot agree with this contention of defendant. It is true all the parts of this automatic switch-stand are old and well known in the art prior to the issuing of this patent, but I find from the evidence that the complainants' application of the crank to the target shaft does bring about the result claimed for it in its specification. The defects found in the Mansfield switch-stand are overcome by the new construction and a new result accomplished. The defendant cannot be permitted to deny its existence for the purpose of showing a lack of invention, and excuse itself from using it upon the ground that its use is for



another purpose. It is so well settled that a mere change of form or location of the parts is not without a patent if the same principle be introduced through the same mode of operation and accomplishing the same result, even though an additional beneficial result is attained through the change, that it is only necessary to refer to *Winans v. Denmead*, 56 U. S. 330, 14 L. Ed. 717.

To sustain the allegation that the patent is invalid in view of the prior state of the art, one witness is called to show an alleged prior use of a crank section in connection with a target shaft of automatic switch-stands manufactured by the defendant company prior to 1890. The witness called for that purpose, Mr. George W. Parsons, superintendent of the defendant company, has been in entire charge of the business of manufacturing frogs, switches, and signal appliances since July 1, 1883, from which time to the present they have been manufacturing the Mansfield stand. He testified that they had made another pattern of stand, the same as defendant's alleged infringing stand, prior to 1890, and stated that while manufacturing the old form of Mansfield stand by the old company they had occasion several times to furnish stands with the crank below the case, in order that the stand could be placed so that the switch connecting rod could be covered or brought below the surface of station platforms, and that this was done by simply making the target shaft longer, with a crank on the lower end of the shaft beneath the case, leaving the segment gear and pinion in the same position as in the Mansfield stand. The aperture in the stand was generally left open, but upon one occasion it was closed; and further claims that at that time no importance was attached to placing the crank upon the target shaft; that later on the Lake Shore had experienced a great deal of trouble by stands becoming clogged with sand in the summer time and snow in the winter time, and that led the defendant company to get up another pattern of frame adopted for inclosing the gear, having a crank below the case on the proper level for attachment to the switch connecting rod. One of the companies for which the defendant made some of these switch-stands was the elevated railroad in Brooklyn, the corporate name of which at the time the witness could not recall, and he "thought" that there were others made for a party in Baltimore. The witness further stated:

"I have no record of the year, but am sure that it was before 1890. No mention of these modifications were recorded. They were considered incidental, and were not at the time adopted other than for special instances where their use was necessary. 'I therefore,' he said, 'have only my memory to rely upon in making this statement. I am enabled to state that it was before 1890 mostly by relation of dates. I remember that at the time we were also making interlocking switch and signal appliances. I also recall that we sold out that business to the Union Switch & Signal Company in 1887, and that the old company had their establishment at Steelton, and these stands were made there and nowhere else.'"

I am not convinced that this witness is certain as to his dates, as he fixes it by the fact that they were made at the same time they were making interlocking switch and signal appliances, and that that business was sold in 1887. Just how the making of interlocking switch and signal appliances should enable him to say at the same time they were making this new device or switch-stand does not appear, and I

do not see that the fact they were making these articles in their shop would fix upon his mind the exact date when the new pattern of switch was made, if made at all, as he depends entirely upon his memory for the fact that they were both made at the same time, and he is as apt to be mistaken as to that as he would be as to the date when they actually began to make this sort of device. At any rate, this defense when set up must be established beyond a reasonable doubt, and the testimony offered to sustain it does not measure up to that requirement. It is so easy for witnesses honestly to color testimony in their own behalf, when interested in a patent, when the testimony lies entirely in their own recollection, as in this case, that it should not be permitted to outweigh the presumption of validity attached to the patent, especially so where there are no corroborative facts offered in support of the oral evidence submitted, and when that oral evidence is somewhat vague and uncertain. The witness does not know the names of the corporations to which these switch-stands were furnished. They were not even noted in the books of their company, and not one bit of corroborating evidence submitted, and no corroborating circumstances shown to support his bare recollection. When we remember the infirmities of the mind in matters of memory, and the liability of witnesses to be mistaken in matters of dates, we are inclined to assign the time when they began the manufacture of the infringing stand to a date after its advantage had been discovered by the complainants.

In support of the proposition that the defense of prior use and knowledge must be clear, convincing, and beyond every reasonable doubt, it is only necessary to cite *Merrimac Mattress Mfg. Co. v. Brown* (C. C.) 122 Fed. 87; *Young v. Wolf* (C. C.) 120 Fed. 956; *Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co.* (C. C.) 116 Fed. 974; and *Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154.

The answer alleges the claims of complainants' patent are anticipated by four United States patents, two British patents, and two German patents. There has been, however, only one United States patent, viz., the Weir patent, No. 294,100, issued February 26, 1884, the Hawkshaw patent, issued in England in 1838, and the German patent, issued to Schmidt in 1887, insisted upon as anticipations.

It is not seriously contended that the Weir patent anticipates, as the strain of lifting the weighted lever is transmitted from the switch rod to the lever from the gears in the defendant's switch-stand, whereas, in the Weir stand, the switch rod is attached directly to the lever, and the gears have nothing whatever to do with lifting the weight, and from the drawings in evidence I cannot find that it would operate automatically.

The Hawkshaw device was not intended to operate automatically. It is shown on the drawings submitted to be applied to a stub switch, and in the specifications we find that:

"In order to move the switch and to bring the main feature of the improvement into operation, the railway attendant has to depress the lever into the horizontal position and hold it while the train is passing from the main-line upon the diversion, which will bring the parts into position. \* \* \* Now when the train passes from the main line to the diversion, the instant the attendant releases his hold on the lever, this combination of mechanism,

that is the connection of the balance weight, the bevel wheels, and the eccentric, immediately bring the rail or switch into their former position, and thus always preserve the right direction of the line for the principle or through traffic."

It will thus be seen that is a similar operation to what is called the snap-back switch, and is different from the switch of the complainants, it being a complete throw switch. It is also evident that the arrangement of the parts in this mechanism was not intended and is not adopted for automatic use, such as the uses to which the complainants' stand has been successfully devoted, and the fact that it might be altered to do the work that the complainants' device performs does not make it available as an anticipation of the patent in suit.

Neither was the Schmidt German patent intended to perform the same function as the complainants' patent. It is constructed with a view of automatically keeping the main track open, except when a train is passing from the side track onto the main track, and in a train so passing the switch is operated by arms coming in contact with the cars as they pass, and by that means the switch is opened, and after the cars have been switched on the main track, in passing beyond the switch, they come in contact with another arm, which results in closing the switch and opening the main track. There is a crank used on the lower end of the target shaft in this particular switch, but, as has been shown by the evidence, not in combination with the same arrangement as the complainants' switch; and the testimony is that if a mechanic were to change by substituting for the target shaft of the Mansfield stand the target shaft and the crank of the Schmidt patent, and connecting the switch rod to the crank in the way shown in the Schmidt patent, it would not affect the purpose of the complainants' patent; but, if arranged as in the Strom patent, it would affect the operation claimed for the Strom patent, which was not theretofore known, and therefore accomplishing a new and useful result.

Strom was not aware of the existence of the Schmidt patent at the time his was issued. He is therefore only charged with constructive knowledge of the publication in Germany. But even if it be in fact similar to that of the complainants, it could not defeat his patent, because as to prior use the law limits the inquiry to this country. A prior use in a foreign country will not defeat the patent here, and, as the patent has not been "described in a printed publication" in a full and intelligible manner required by section 4923 of the Revised Statutes [U. S. Comp. St. 1901, p. 3396], it cannot be regarded as an anticipation.

The description as published is as follows:

"Patented in the German Empire, counting from October 25, 1887.

"With the present switch at the union of mine railway tracks it shall be possible to reliably set the switch by means of the mine cars.

"The switch-tie-rod, 'a' is connected with one arm 'b' of a bell-crank lever; the other arm of this bell-crank lever 'c' is connected to the levers 'f' and 'g' by means of the connecting rods 'd' and 'e.' The levers 'f' and 'g' carry the arms 'h' and 'i,' which, as can be seen from the drawings, are located in front and rear of the switch.

"The operation of the switch is as follows:

"Assuming the switch is closed (as shown in Fig. 1), and a car is moving on track 11 in the direction of the arrow, the arm 'i' will be moved by the

body of the car into the position shown by dotted lines, thereby opening the switch. As the arm 'f' is connected with arm 'h' by the connecting rods 'd' and 'e' it follows that the arm 'h' is also moved into the position shown by dotted lines. After the car has passed the switch, it comes into contact with the arm 'h' and closes the switch again, so that trains of cars may pass over the track 'f' without interference.

"It is obvious that light signals or electrical contact appliances for giving signals may be connected with this switch in well-known manner.

#### Patent Claim.

"In switches, which transfer automatically cars from a side track on to the main track, and reinstate the main track, the combination of the two levers 'h' and 'f' contacting with the car body, and the split rails, with the rods and levers 'a,' 'b,' 'c,' 'd,' 'e,' 'f,' 'g.'"

We do not think that any one could construct the Schmidt device from this description.

In order to defeat a subsequent patent, it is necessary that the description of a prior publication must contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention patented. It must be an account of a complete and operative invention, capable of being put into practical operation. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Cohn v. Corset Company*, 93 U. S. 366, 23 L. Ed. 907; *Badische Anilin & Soda Fabrick v. Kalle et al.* (C. C.) 94 Fed. 163; *Bowers v. Bridge Company* (C. C.) 91 Fed. 381; *Powder Co. v. Parker*, Fed. Cas. No. 625.

There was also a drawing submitted of what was known as the "Pet Stand." In this stand, however, the crank used is on the outside of the case for an entirely different purpose from that of the complainants' patent, and the fact that this stand was manufactured prior to the issuing of the patent in suit is not well supported. It depends entirely upon the recollection of one witness. In fact, in all these stands, as well as in other machinery, cranks have been used and shafts have been used, as well as all other parts found in the complainants' patent, but never before do we find them in the same relative position in such a combination as to effect the result accomplished by the complainants' patent. He was the first to so arrange these old and well-known pieces of machinery to bring the result required. The changes made were slight, and apparently of not very great importance in each particular piece, but when combined by Strom the very slight change made in each one of the parts where change is found resulted in effecting a result which is shown to have been unknown and not accomplished by any other before the patentee.

There are numerous cases supporting inventions of this kind. It is only necessary, in support of this patent as against those cited as anticipations, to refer to *Brill v. Third Avenue Railroad Company* (C. C.) 103 Fed. 289, where it is said:

"A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor."

This proposition is also supported in the case of *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

Let a decree be entered for the complainants.

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SPRAGUE v. BRAMHALL-DEANE CO.

(Circuit Court, S. D. New York. November 11, 1904.)

1. PATENTS—ACTION FOR INFRINGEMENT—SUFFICIENCY OF COMPLAINT.

The complaint in an action to recover damages for infringement of a patent must show on its face that plaintiff has complied with the requirements of Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], by causing the patented article, or the package in which it is contained, to be marked in some suitable manner with the word "Patented."

Action at Law for Infringement of Patent. On demurrer to complaint.

Rufus L. Weaver, for plaintiff.

Hillary C. Messimer, for defendant.

HAZEL, District Judge. This is an action at law to recover damages for the infringement of a patented sterilizer. A demurrer has been interposed by the defendant on the ground that the complaint does not state facts sufficient to constitute a cause of action.

It does not appear from the face of the complaint that the plaintiff has complied with the provisions of section 4900 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3388], which imposes the duty on every patentee to publish the fact that an article is patented by labeling the same, or the package in which it is inclosed, in some suitable manner with the word "Patented"; nor does it appear that the defendant had any notice whatever of the asserted infringement. The authorities hold that a plaintiff seeking to recover damages for infringement of a patented article must affirmatively establish that the statute in question has been complied with. A strict compliance is a prerequisite to a patentee's right to recover damages. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426.

The demurrer is sustained with costs, the plaintiff having leave to amend within 20 days.

## In re HICKS.

(District Court, N. D. New York. January 5, 1905.)

**1. BANKRUPTCY—STATUTES—MUNICIPAL ORDINANCES AND REGULATIONS.**

Under the federal Constitution, providing that Congress shall have power to enact uniform bankruptcy laws, Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing the discharge of certain persons from specified debts on complying with the provisions of the act, superseded the ordinances and fire regulations of a city, requiring members of the city's fire department to promptly pay all necessary personal and household expenses, and making his failure to do so a ground for discharge in so far as it affected debts of a fireman dischargeable in a bankruptcy proceeding pending against him.

**2. SAME—PROCEEDINGS BEFORE MUNICIPAL TRIBUNALS—STAY—JURISDICTION.**

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], as amended by Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], vesting bankruptcy courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, etc., and to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the act, a court of bankruptcy has jurisdiction to enjoin the prosecution of a bankrupt fireman for neglect of duty, looking to his discharge from the department, because of his nonpayment of a debt dischargeable in a pending bankruptcy proceeding against him.

**3. SAME—ADEQUATE REMEDY AT LAW.**

Where, pending bankruptcy proceedings against a member of a city fire department, proceedings were instituted to remove him on charges, for neglect of duty, in failing to pay a debt dischargeable in bankruptcy, he had not an adequate remedy at law, in view of a provision of the city's charter declaring that in case of such removal the decision of the commissioner shall be final, and not subject to review by any court.

**4. SAME—INJUNCTION.**

Shortly after reinstatement of a member of a city fire department, he was adjudged a voluntary bankrupt, and almost immediately thereafter charges were filed against him for failure to pay a bill of a creditor, as required by the ordinances and fire regulations of the city, for the purpose of removing him from the department. *Held*, that such debt being provable in the bankruptcy proceedings, and there being no evidence that the nonpayment thereof in any way affected or impaired the discipline of the fire department, the proceedings for the bankrupt's removal would be enjoined until the expiration of 12 months from the date of the adjudication, or until the question of the bankrupt's discharge, sooner applied for, should be determined.

**In Equity.**

Application for an injunction enjoining and restraining Patrick Caulfield and James Caulfield, creditors of said bankrupt, and John P. Quigley, chief of the fire department of the city of Syracuse, N. Y., and also such others as may be aiding and abetting, from further prosecuting against said bankrupt, Allen M. Hicks, who is a member of the fire department of the city of Syracuse, N. Y., the charge "that the said Allen M. Hicks has been guilty of neglect of duty." The specification under such charge is "that said Allen M. Hicks has thus far failed to pay a bill of \$37.10 held by P. Caulfield & Son. When restored to duty on May 18th, he agreed to pay this as well as other bills, and up to the present time he has failed to do so."

Ray B. Smith, for the bankrupt.

W. W. Magee (Corp. Counsel), for John P. Quigley.

**RAY, District Judge.** The bankrupt, Allen M. Hicks, is a member of the fire department of the city of Syracuse, N. Y., and has been for a long time. At some time and for some reason not appearing, charges were preferred against said Hicks, and he was suspended from duty, and, it would seem, removed from his position as fireman. However this may be, his suspension and removal were declared illegal by the Supreme Court of the state of New York, and Hicks was restored to duty, not long before the institution of this proceeding. His pay as fireman is \$75 per month, and his illegal suspension from duty, of course, crippled him to some extent financially. He is a married man and a housekeeper. A long time before filing his petition in bankruptcy he had mortgaged his household furniture and belongings for as much or more than they are worth. The inventory and schedules filed by Hicks in this proceeding showed that he owes somewhere from six to eight hundred dollars. There is no charge or evidence of immorality on the part of Hicks, or that he has ever failed in any respect to faithfully perform his duties as fireman, and obey all orders and directions of his superiors, except in the one particular that he has not paid a debt owing by him to P. Caulfield & Son, and which debt amounts to about \$37. After Hicks was restored to duty, as above stated, it is alleged, and is probably true, that he promised to pay his indebtedness as rapidly as he could, and there is no evidence that he has not done so; but it is conceded that he is owing various debts, of the total amount above stated, which he has not paid.

On or about the 26th day of November, 1904, said Allen M. Hicks filed his petition and schedules in due form in voluntary bankruptcy in this court. On the 28th day of November he was duly adjudicated a bankrupt, and the time and place for the first meeting of his creditors were fixed. Shortly after Hicks was restored to duty, P. Caulfield & Son filed their bill, amounting to the sum of \$37.10, with the commissioner of public safety of the city of Syracuse; and thereupon the commissioner of public safety, in substance and effect, directed John P. Quigley, the chief of the fire department of said city, to take proceedings against said Hicks for the nonpayment of such indebtedness. It appears to the satisfaction of the court, and is evident, that this proceeding against Hicks now pending for his removal, and to which attention will be called more particularly, was the result of a determination on the part of the commissioner of public safety and of the chief of the fire department to get rid of Hicks, rather than a desire to promote, maintain, or defend the discipline of the fire department. The affidavit of said John P. Quigley is full of contradictions and inconsistencies, when carefully read and considered. Among other things, he testifies that he (Quigley) is the sole party bringing the charges, and that P. Caulfield & Son, nor either of them, had any knowledge that he was to bring such charges, and that said P. Caulfield & Son in no way advised, procured, or influenced him to make the charges against Hicks. Further on he says that Allen M. Hicks was reinstated in the fire department of the city of Syracuse on the 19th day of May, 1904; that shortly thereafter he was in-

formed by the commissioner of public safety (a Mr. Bowen) that Hicks was indebted to various merchants in the city of Syracuse for necessary personal and household expenses incurred during his term of office as fireman. He says that the commissioner of public safety instructed him (Quigley) to see to it that Hicks pay up those debts, but he was instructed to give him a reasonable time after his reinstatement to do so. He then testifies that on the 29th of June, 1904, the firm of P. Caulfield & Son filed in the fire department a bill for groceries and provisions sold to said Hicks, amounting to \$37.10, and that on the same day the said bill was filed he (deponent) received a letter from the commissioner of public safety inclosing the statement filed by P. Caulfield & Son, and directing him to see to it that Hicks gave it his attention. Shortly after July 1st Quigley was informed by the commissioner that Hicks, through his counsel, had filed a statement of his indebtedness. It is self-evident that, with the indebtedness stated existing against Hicks, he, a married man, residing in the city of Syracuse, was unable to support himself and wife and pay off this indebtedness, or even any considerable part of it, prior to the time this proceeding to remove Hicks was instituted. The witness further solemnly testifies—true, upon information and belief—that the said Hicks has adequate remedies at law in the courts of the state of New York in case he is improperly or illegally removed from office, and that the District Court of the United States has no jurisdiction in this matter. There is also an affidavit made by the Caulfields to the effect that Hicks is indebted to them in the sum stated, and that neither of them had any knowledge, prior to the time that Hicks was suspended by the commissioner of public safety of the city of Syracuse from his position in the fire department on the charges preferred by Quigley for the nonpayment of their bill, that he was to be suspended; and both testify that they have not in any way advised, procured, or influenced, or attempted or intended to advise, procure, or influence, said Quigley to prefer charges against said bankrupt for failing to pay their bill. They did file their bill with the commissioner of public safety, and they must have known when they filed that bill that it would probably set the commissioner of public safety and the chief of the fire department in motion, under the ordinances of the city, to which attention will be directed, for the removal of Hicks; and this court is of the opinion and believes that they filed the bill for the express purpose of having charges preferred and proceedings instituted to remove Hicks for the nonpayment of said bill, hoping thereby to secure their pay; and this court believes, from the affidavits, that the commissioner of public safety was quick to seize upon the filing of the bill, even if he did not procure it to be filed, as an excuse for setting the chief of the fire department in motion to prefer charges, hoping thereby to secure the removal of Hicks, as they had failed in their prior proceeding for that purpose. There is not a particle of evidence that the nonpayment of this indebtedness in any way affected or impaired the discipline of the fire department of the city of Syracuse. It may be and may not be



well to have such a provision, as will be recited, among the ordinances of the city; but it would be harsh, unjust, and even barbarous, to remove from the fire department of said city a member thereof, otherwise irreproachable, who should be owing debts he could not pay by reason of sickness or some calamity beyond his power to avert.

The charge preferred against Hicks by Quigley reads as follows:

"City of Syracuse, Department of Public Safety.

"Syracuse, N. Y., December 7, 1904.

"To Ralph S. Bowen, Commissioner of Public Safety, Syracuse, N. Y.—  
Sir: I hereby prefer charges and specifications against Allen M. Hicks as follows:

"Charge No. 1. That the said Allen M. Hicks has been guilty of neglect of duty.

Specification. For the violation of Rule 8 of Article 18 of the rules and regulations of the Fire Department. That said Allen M. Hicks has thus far failed to pay a bill of \$37.10 held by P. Caulfield and Son. When restored to duty on May 18 he agreed to pay this as well as other bills, and up to the present time he has failed to do so.

"All of which is respectfully submitted.

"Dated the 7th day of December, 1904.

"John P. Quigley,

"Chief Fire Department."

On the same day said R. S. Bowen, commissioner of public safety, prepared a notice to Hicks of said charge, and caused same to be served on him. It will be noted that the filing of charges by Quigley rapidly followed the filing by Hicks of his petition in bankruptcy.

In his schedules of indebtedness, filed with the clerk of this court on or about the 26th day of November, 1904, said Hicks included and specified honestly his indebtedness to P. Caulfield & Son, as well as all his other indebtedness. There is no pretense or claim that he owns any real estate, or that he has concealed any property. He lives, and for years has lived, in a rented house. The conclusion is irresistible that this charge was preferred and is being pressed for the reason that Hicks is taking the benefits of the national bankruptcy law, and for the purpose of either forcing Hicks to pay in full, or lose his position in the fire department of the city of Syracuse.

Syracuse is a city of the second class, and sections 201, 203, and 204 of charter of cities of second class provide as follows:

"Sec. 201. Fire Department. The commissioner of public safety shall have charge of and supervision over the fire department.

"Sec. 203. Appointment of Officers and Members. The commissioner shall appoint, when a vacancy shall occur, a chief of the fire department, who shall hold office during good behavior, or until he becomes permanently incapacitated or unfit to discharge his duties, and such other subordinates, to hold office during his pleasure, as may be prescribed by the board of estimate and apportionment, and all the officers and members of the department as vacancies may occur or the ordinances of the common council require or determine; and all the officers and members of the department shall, except as hereinbefore specified, and subject to the power of removal hereinafter specified, hold their respective places during good behavior and so long as they are competent to discharge the duties thereof, subject to the power of the common council to abolish any office or to diminish the

number of members. It shall be the duty of the chief, subject to the direction and control of the commissioner, to perform such services as may be delegated or directed by the commissioner.

"Sec. 204. Removals upon Charges. Any officer or member of the department may be removed by the commissioner upon charges affecting his conduct or character or his competency or capacity to discharge his duties, after a hearing upon such charges or an opportunity to be heard after notice thereof. The trial upon such charges shall be publicly conducted, according to rules and regulations adopted and promulgated by the commissioner; and for the purpose of such trials, the commissioner may issue subpoenas for witnesses and compel their attendance. In case an officer or member is found guilty upon charges affecting his conduct or character, instead of removing him, the commissioner may, in his discretion, suspend him from pay in the department for some definite time, or impose upon him a fine not exceeding fifty dollars. The decision of the commissioner shall be final and conclusive and not subject to review by any court."

The city of Syracuse has adopted ordinances, among which we find the following, viz.: Section 1, c. 35, of the ordinances of the city of Syracuse, provides as follows:

"It shall be the duty of all officers and employes of the city to pay all debts for necessary personal and household expenses incurred during his or her term of office, and any neglect so to do, shall be sufficient cause for his or her removal from employment or office."

Rule 8 of article 18 of the rules and regulations of the fire department provides as follows:

"(8) No member shall incur or contract any debts or liabilities which he is unable or unwilling to pay, or neglect or refuse to honorably discharge and promptly pay all indebtedness, claims and judgments and satisfy all executions that may be held or issued against him. The filing of a bill against any member of the bureau will subject such member to suspension and dismissal."

Rule 4 of article 2 of such rules and regulations provides as follows:

"(4) He shall see that all rules, ordinances, orders and directions for the government of the bureau are promptly and implicitly obeyed, and shall investigate all violations thereof and report the same to the commissioner."

It will be noted that, under the charter of the city, Hicks may be removed by the commissioner upon charges affecting his conduct or character, or his competency or capacity to discharge his duties, and he must be found guilty upon charges affecting his conduct or character, or his competency or capacity to discharge his duties. Inasmuch as Hicks was restored to duty by the courts of the state of New York after full investigation, this court will assume that there was no cause for his removal or suspension from duty up to the time he was restored to duty pursuant to the decrees of that court in May, 1904. It is self-evident that since that time Hicks has been guilty of no offense except inability to pay indebtedness in full, heaped upon him by what has been declared to be the unwarranted and unauthorized action of the commissioner of public safety and the chief of the fire department in the city of Syracuse. So far as appears or is intimated, his character is good, and his conduct has been irreproachable, except in that he has not paid the debt in question; and there is no suggestion or intimation that

he is not competent to discharge his duties as fireman or that he has become incapacitated in any respect. In short, there is nothing to show that Hicks has been or is unwilling to pay his debts in full. There is no evidence that Hicks has sought to evade payment, or is seeking to evade payment, in any improper, questionable, or unlawful way. All he has done and all he is doing is to take advantage of the national bankruptcy law, which, in substance, declares that if, being unable to pay his debts in full, he surrenders all his property not exempt to and for the benefit of his creditors, he may be discharged from all his indebtedness, with certain exceptions. Hicks owes no debt not dischargeable in bankruptcy.

It is written in the Constitution of the United States that the Congress shall have power to enact uniform laws on the subject of bankruptcy. This is the paramount law of the land, and, Congress having exercised its legislative powers by enacting a general bankruptcy law, it is the duty of every citizen of every state, of every officer of every state, and of every officer of each city, county and town, to recognize, observe, respect, and bow to the provisions of that law. Congress has provided what debts are dischargeable in bankruptcy, and what are not. If the bankrupt surrenders his property, and complies with all the conditions of the act, and brings himself within its provisions, he is entitled to his discharge; and no state court or state law or municipal ordinance, under any guise or pretense whatever, can deprive the bankrupt of the benefits the national law says shall accrue to him; nor can any state, state court, municipal body, or municipal ordinance inflict any penalty or punishment, directly or indirectly, upon the bankrupt, for failing to pay the debts in full, from which the national law says he shall be discharged. Neither can any state, state or municipal law or ordinance, say that to take advantage of the national bankruptcy law is an act affecting either the character or the conduct or capacity of a citizen, so far as they relate to his right and capacity to continue in or hold a public office or position created either by the general government or by a state. To permit this would be to allow a state to punish one of its citizens for taking advantage of the benefits of a national law, the justice and beneficence of which no state or state or municipal law is permitted to question. Hicks has done and is doing, in taking advantage of the national bankruptcy law, what the paramount law of the land says he may do—nothing more and nothing less. He has surrendered all his property to the national bankruptcy court, to be applied by it pursuant to law to the payment of all his creditors. The laws of the state of New York, the municipal ordinances of the city of Syracuse, and the rules and regulations of the fire department of that city in respect to his indebtedness can demand of him no more than this.

It is said that the United States court in bankruptcy has no jurisdiction to restrain the officers of the city of Syracuse from taking such action as they see fit to take against Hicks because of his nonpayment of this or other bills. Whether this be regarded as a

proceeding to collect or compel payment of the bill owing by Hicks to P. Caulfield & Son, or a proceeding to punish him for not paying it, or a proceeding to punish him for taking advantage of the provisions of the national bankruptcy act, or a proceeding to punish or discipline Hicks for a violation of the ordinance of the city of Syracuse, in that he has failed to pay such debt owing by him, and is seeking to be discharged from its payment without full payment, the fact stands out plainly that an attempt is being made to remove Hicks from his office or position in the fire department of the city of Syracuse, under the provisions of the ordinance in question, because he seeks to avail himself of the provisions of the national bankruptcy act; because he is doing what he lawfully may do—doing an act that in no way pertains to the proper discharge of his duties as a fireman, and which cannot legally be said to affect his character or standing as a citizen or as a fireman, for the reason the act is one the paramount law of the land says he may do, and one the city of Syracuse cannot say he shall not do, or suffer for in any way if he does it. This being true, the proceeding against Hicks, in any view, becomes the infliction of a penalty or of a punishment, or the attempt to inflict a penalty or punishment, for the nonpayment of a debt dischargeable in bankruptcy. This federal law says that if Hicks surrenders all his property, and commits no offense against the act, he shall be discharged from any obligation to pay this indebtedness. The ordinance of the city of Syracuse and the regulations of the fire department above quoted say that, if he fails or neglects to pay this debt in full, charges may be preferred against him for its nonpayment, and, on proof that he has not paid, he may be dismissed from his office or position in the fire department. Here is a plain conflict between the provisions of the national bankruptcy act and the ordinance of the city of Syracuse, and the rules and regulations of its fire department, above quoted. There can be no question which constitutes the paramount law of the land. Both cannot stand together. The ordinance and rules and regulations must yield. Proceedings against Hicks for his removal from the fire department must be stayed.

Broad and comprehensive power has been granted to the court of bankruptcy in this regard by the act itself. Section 2 of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], and amended February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], provides as follows:

"That the courts of bankruptcy as hereinbefore defined \* \* \* are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to \* \* \* (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. \* \* \*

To make sure that the courts of bankruptcy should have all the inherent powers of a court this was added to the section:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It is true that the Revised Statutes of the United States provide (section 720 [U. S. Comp. St. 1901, p. 581]) that an injunction shall not be granted by United States courts to stay proceedings in state courts, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It was the purpose of the Congress of the United States to enact an efficient, enforceable law—one containing provisions sufficient for its own enforcement, which includes necessarily the protection of bankrupts who take advantage of its provisions. Will any one attempt to deny that a state law making it an offense to take advantage of the provisions of the bankruptcy act would be void? Would not this be true of such an act inflicting a penalty for its violation, collectible in a court of law? In either case, would not the bankruptcy court have power to interfere and enjoin the enforcement of such a provision against the bankrupt, especially during the pendency of the bankruptcy proceedings? Suppose a state should make a law that no person taking advantage of the bankruptcy act should be permitted to hold any office under the state, or that, if he held such office, he should, on taking advantage of the act, be removed therefrom. Can any one doubt that the bankruptcy court would have power to enjoin the officers of the state attempting to enforce such provisions, especially during the pendency of the bankruptcy proceedings?

This subject is well covered in Collier on Bankruptcy (4th Ed.) p. 23, where the author says, speaking of subdivision 15, above quoted:

"Subd. 15. To Enforce the Act by Necessary Orders, Process, or Judgments. This is the omnibus clause of the section. Generally speaking, it may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the law, provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. \* \* \*

"Injunctions Other than Against Suits. The power to enjoin is inherent in the court of bankruptcy, as a court of equity. It includes the power to grant stays, conferred by section 11 of pending suits in other courts. That the broad phrasing of subdivision 15 amounts to an express ratification of this inherent power has not been doubted. The exercise of it, like the quasi criminal remedy of contempt, is essential to the due enforcement of the act."

The fact will be noted that no charge was preferred against Hicks until after he filed his petition in bankruptcy. The action of Bowen and Quigley, following that act of Hicks, is equivalent to a declaration on their part that no member of the fire department of the city of Syracuse can take advantage of the national bankruptcy act, and retain his place or membership in the department. Hence they are proceeding judicially, acting in a quasi judicial capacity, to try Hicks on the charge, in effect, that he has failed to pay the debt of P. Caulfield & Son, and propose, if they find the charge true, to impose sentence or inflict a penalty dismissing him from the department.

Already they have suspended him from duty and stopped his pay. It is urged that Hicks has ample remedy in the courts of the state of New York. This contention cannot be maintained. Section 204 of the charter of cities of the second class, relating to "removal upon charges," ends with the declaration that "the decision of the commissioner shall be final and conclusive and not subject to review by any court." This provision, if valid, precludes Hicks from appealing to the courts of the state of New York from any decision the commissioner might render.

Regarded as a proceeding to collect the debt of Caulfield & Son, or compel its payment, or to impose a penalty or punishment for its non-payment, we find ample authority in the following cases for staying further proceedings: *In re Charles S. Houston*, 2 Am. Bankr. Rep. 107, 94 Fed. 114; *Wagner v. Houston*, 4 Am. Bankr. Rep. 596, 104 Fed. 133, 43 C. C. A. 445; *In re Grist*, 1 Am. Bankr. Rep. 89.

Impotent, indeed, is the federal court in bankruptcy, if persons taking advantage of the act may not be protected by it from the imposition of fines and penalties, or deprivation of office, place, or position, by tribunals of a state, for no other reason than that they are invoking its provisions and seek discharge from their indebtedness on surrendering all their property. This is payment of the debt, says the federal law, in so far, at least, that it deprives the creditor of all remedy for its collection.

The order will be that Patrick Caulfield, James Caulfield, John P. Quigley, the chief of the fire department of the city of Syracuse, N. Y., R. S. Bowen, and all other persons, be and are enjoined and restrained from further prosecuting the charge against said Allen M. Hicks, above referred to, until the expiration of 12 months from the date of the adjudication herein, unless the said Hicks shall sooner apply for a discharge, and in such case until the question of such discharge shall be determined.

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### IN RE DOWD.

(Circuit Court, D. Colorado. December 8, 1904.)

#### 1. HABEAS CORPUS—ISSUANCE—JUDGMENT OF STATE COURT.

The federal courts and judges have the power under the acts of Congress to discharge prisoners restrained of their liberty in violation of the Constitution of the United States under judgments of the state courts. Rev. St. §§ 751-755 [U. S. Comp. St. 1901, pp. 592, 593].

But the law of the land which has been established by repeated decisions of the Supreme Court is that this power should not be exercised where the judgment of the state court under which the petitioner is confined is reviewable by appeal or by writ of error; but in such cases the petitioner should be put to that remedy, save in exceptional cases, such as those in which the prisoner is confined for an act done or omitted by him under the Constitution or laws of the nation, in pursuance of its authority, or under the laws and authority of a foreign government of which he is a subject. *Markuson v. Boucher*, 20 Sup. Ct. 76, 175 U. S. 184, 185, 44 L. Ed. 124; *Pepke v. Cronan*, 15 Sup. Ct. 34, 155 U. S. 100, 39 L. Ed. 84; *Reid v. Jones*, 23 Sup. Ct. 89, 187 U. S. 153, 154, 47 L. Ed. 116:

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¶ 1. Jurisdiction of federal courts in habeas corpus proceedings, see note to *In re Huse*, 25 C. C. A. 4.

New York v. Eno, 15 Sup. Ct. 30, 155 U. S. 89, 96, 97, 98, 39 L. Ed. 80; Baker v. Grice, 18 Sup. Ct. 323, 169 U. S. 284, 294, 42 L. Ed. 748.

**2. SAME—NEITHER WANT OF JURISDICTION NOR BREVITY OF IMPRISONMENT AUTHORIZES WRIT.**

Under these decisions of the Supreme Court, neither the fact that the petition shows that the state court was without any jurisdiction of the proceeding in which its judgment was rendered (New York v. Eno, 15 Sup. Ct. 30, 155 U. S. 88, 89, 90, 93, 96, 98, 39 L. Ed. 80), nor the fact that the term of the petitioner's imprisonment will expire before a hearing can be had in the ordinary course of proceedings upon the writ of error or appeal (Markuson v. Boucher, 20 Sup. Ct. 76, 175 U. S. 184, 44 L. Ed. 124), ordinarily withdraws a case from the effect of this general rule.

**3. SAME—SENTENCE FOR CONTEMPT OF SUPREME COURT OF COLORADO—REVIEW BY WRIT OF ERROR.**

The petition for the writ discloses the alleged facts that the prisoner is confined in jail at Denver for the violation of a writ of injunction issued by the Supreme Court of Colorado upon a complaint of the people of that state, on the relation of their Attorney General and others, for the purpose of preventing frauds in an election; that there was no statute of that state which authorized such a suit; that that court had no jurisdiction of the original suit, or of the proceedings against the prisoner for a violation of the injunction; that his confinement was in violation of the Constitution of the United States; that in the proceedings against him before the Supreme Court of Colorado he set up the right and immunity which he now claims under the Constitution of the United States, and that court decided against that right and immunity; that other citizens of Colorado have been arrested, and still others are to be arrested and tried by the Supreme Court of that state, for similar violations of the injunction; that other citizens have already been tried and sentenced; and that the Supreme Court of Colorado is proceeding in the original suit to supervise the election and to canvass the votes, in alleged violation of the laws of that state.

*Held*, (1) the petition shows that the judgment of the Supreme Court under which the prisoner is confined is reviewable by the Supreme Court of the United States by writ of error (Tinsley v. Anderson, 18 Sup. Ct. 805, 171 U. S. 101, 105, 43 L. Ed. 91); (2) the Supreme Court of the United States has repeatedly decided that, in a case of the character of that presented by this petition, a federal judge should deny the application for the writ; and, (3) if this question were not determined by those decisions, the character of the original suit and of the proceedings under it, the gravity of the questions they present, the fact that a decision of the Supreme Court of the United States, which may prevent confusion and conflict of opinion, may finally determine every doubtful legal question, may speedily terminate all controversy and litigation, and may authoritatively direct the action of the Supreme Court of Colorado, is available to the petitioner and to all others in a similar situation, while, even if a circuit judge should grant the writ here sought, should be of the opinion that the petitioner was restrained of his liberty in violation of the Constitution, and should discharge him, that adjudication would only determine that this particular prisoner should be discharged, would leave every other question without authoritative decision, and would introduce a conflict of opinion and tend to increase controversy and litigation—all these considerations would demonstrate the wisdom and applicability of the general rule here, rather than that this case should constitute an exception to it, and would persuade that the application for the writ should be denied, rather than that it should be granted.

**4. SAME—DENIAL OF APPLICATION.**

When the petition for a writ of habeas corpus shows that the petitioner is not legally entitled to it, the writ should not be issued, but the application for it should be denied, and the petition should be dismissed. Rev. St. § 755 [U. S. Comp. St. 1901, p. 593].

(Syllabus by the Court.)

## Application for Writ of Habeas Corpus.

E. F. Richardson and H. V. Hawkins, for applicant.

N. C. Miller, Atty. Gen., John M. Waldron, H. J. Hersey, and Thomas Ward, Jr., for the People of the State of Colorado.

Before SANBORN, Circuit Judge.

SANBORN, Circuit Judge. Michael Dowd presents an application for a writ of habeas corpus to inquire into the cause of his confinement in jail at Denver, in the state of Colorado, as he avers, in violation of the Constitution of the United States.

The acts of Congress empower the Supreme Court, the Circuit Courts of Appeals, the Circuit and District Courts of the United States, and the several justices and judges thereof, to issue such a writ; but they prohibit its extension to a prisoner in jail, except in certain specified cases, the only one of which applicable here is a case in which the prisoner "is in custody in violation of the constitution \* \* \* of the United States," and they provide that "the court or justice or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." Rev. St. §§ 751, 752, 753, 754, 755 [U. S. Comp. St. 1901, pp. 592, 593]. The first question, therefore, which presents itself upon the application for a writ of habeas corpus, is, does the petition itself show that the applicant is not entitled to the writ? And if this question should be answered in the affirmative, the application must be denied. *Ex parte Royall*, 117 U. S. 241, 251, 252, 6 Sup. Ct. 734, 29 L. Ed. 868; *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. 848, 29 L. Ed. 994; *Ex parte Frederick*, 149 U. S. 70, 77, 13 Sup. Ct. 793, 37 L. Ed. 653; *Wood v. Brush*, 140 U. S. 278, 289, 290, 11 Sup. Ct. 738, 35 L. Ed. 505; *Tinsley v. Anderson*, 171 U. S. 101, 105, 18 Sup. Ct. 805, 43 L. Ed. 91; *Markuson v. Boucher*, 175 U. S. 184, 186, 20 Sup. Ct. 76, 44 L. Ed. 124; *Storti v. Massachusetts*, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120.

The alleged facts disclosed by the petition in this case which are material to the determination of this question are these: There was a general election in the city and county of Denver on November 8, 1904, for the election of presidential electors, congressmen of the United States, and state, city, and county officers. On the 5th day of November, 1904, the Supreme Court of the state of Colorado, upon a petition of the people of the state of Colorado, on the relation of N. C. Miller, Attorney General, James H. Peabody, and D. B. Fairley, against the judges of election of the Eighth Precinct of the Seventh Ward of the city of Denver, and others, issued a writ of injunction, directed to the judges of this precinct and the other respondents, whereby it commanded them, their servants, agents, employés, and all persons acting or assuming to act under their control, authority, or direction, or in collusion or confederacy with them, to refrain from preventing a free, fair, and lawful election; from excluding or preventing the judge of election appointed by Harry C. Riddle, one of the respondents, from serving as such judge in that precinct; commanded the said judges to appoint as one of the clerks of the election in this precinct the person designated by the judge appointed by Harry C. Riddle; and



commanded and forbade numerous other specific acts. The judges of the Eighth Precinct of the Seventh Ward on the morning of the election appointed the petitioner, Dowd, a constable. Riddle requested the judges to appoint one Samuel Lucas as a clerk of election, and the judge of the election in this precinct appointed by Riddle requested the judges, in pursuance of the injunctive order of the Supreme Court, to appoint said Lucas as one of the clerks of the election. But those judges appointed other clerks. Lucas was not permitted to serve, and by the direction of the judges the petitioner, Dowd, led him out of the polling place. Dowd was not named as a respondent in the original petition of the people of the state of Colorado. On November 9, 1904, Ferdinand H. Hegwer and Preston R. Childers filed a complaint with the Supreme Court of the state of Colorado, verified by oath, which charged the petitioner with violating the writ of injunction, and prayed that a writ of attachment should issue, commanding his arrest. A warrant of attachment was issued, and the prisoner was arrested. The cause was continued until November 16, 1904, when the petitioner filed in the Supreme Court a petition and motion that the writ of attachment be quashed, and that he be discharged, on the grounds that the Supreme Court of Colorado had no jurisdiction of the original suit for an injunction, and that the issue of the writ of attachment and his arrest and confinement were violative of the sixth and of the fourteenth amendments to the Constitution of the United States. The motion to quash the writ and to discharge the prisoner was denied by the Supreme Court, witnesses were produced in support and in defense of the charge of a violation of the injunction, and a trial was had before that court. It found the petitioner guilty of a violation of the writ of injunction and of contempt of that court, and sentenced him to imprisonment in the jail of the city and county of Denver for the period of 60 days from the 19th day of November, 1904, and, in addition thereto, that he should pay a fine in the sum of \$250, and that he should stand committed until this fine was paid. Pursuant to this sentence, he is now confined in the common jail under a mittimus issued by the Supreme Court of the state of Colorado to the sheriff of the city and county of Denver, which commands him to enforce this sentence. There was no statute of the state of Colorado which authorized the original suit, or any of the proceedings, thereunder, and the Supreme Court of Colorado never had jurisdiction of any of them.

The petition for the writ of habeas corpus also shows that there is no remedy available to the petitioner in the courts of the state of Colorado, and that it is impossible for the petitioner to have his cause presented to the Supreme Court of the United States upon writ of error, and to have the matter determined within the period of his confinement in the common jail under the sentence imposed upon him; that his imprisonment violates the fourteenth, fourth, fifth, and sixth amendments of the Constitution of the United States; that this is a matter of the utmost urgency and importance, not only to the petitioner but to the people of the state of Colorado and of the United States, and that, in addition to the petitioner, several persons are now confined in the common jail of the city and county of Denver under commitments issued by the Supreme Court of the state of Colorado in the same cause in

which the commitment of the petitioner was issued, and upon the same or similar charges; that there are many other persons who are under arrest upon writs of attachment issued against them by order of the Supreme Court of the state of Colorado; that their trials are set and ready to be heard; that the Supreme Court of that state is daily issuing writs of attachment against other persons for like violations of the injunction; and that it has assumed exclusive jurisdiction of the general election in the city and county of Denver, and is directing the canvass of the votes, in alleged violation of the laws of the state of Colorado.

A final judgment or decree in any suit, civil or criminal, in the highest court of a state where any title, right, privilege, or immunity is claimed under the Constitution of the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, may be re-examined and reversed or affirmed in the Supreme Court of the United States by appeal or by writ of error. Rev. St. § 709 [1 U. S. Comp. St. 1901, p. 575].

In the proceeding against him for contempt of court, the petitioner set up and claimed the right, privilege, or immunity under the Constitution of the United States upon which he now relies to secure the writ of habeas corpus, and the decision of the Supreme Court of Colorado was against that right or immunity. The Supreme Court of the United States therefore has jurisdiction to review by writ of error the judgment of conviction under which the petitioner is imprisoned. *Tinsley v. Anderson*, 171 U. S. 101, 105, 18 Sup. Ct. 805, 43 L. Ed. 91. And it also has jurisdiction to review it by writ of habeas corpus and by writ of certiorari, pursuant to the decision of that court in *In re Watts and Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933.

Not only this, but by virtue of its appellate jurisdiction the Supreme Court of the United States has the power to issue its writ of mandamus to the Supreme Court of the state of Colorado either in aid or in the exercise of its appellate jurisdiction, and in this way to exercise a certain supervisory power over the action of that court. *Livingston v. Dorgenois*, 7 Cranch, 577, 588, 3 L. Ed. 444; *Ex parte Bradstreet*, 7 Pet. 634, 644, 8 L. Ed. 810; *New York Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949; *Ex parte Roberts*, 15 Wall. 384, 386, 21 L. Ed. 131; *Insurance Co. v. Comstock*, 16 Wall. 258, 270, 21 L. Ed. 493; *Virginia v. Rives*, 100 U. S. 313, 316, 323, 327, 329, 25 L. Ed. 667. A circuit judge has no such appellate or supervisory power over the proceedings of the Supreme Court of the state of Colorado, and this notable difference between the power of the Supreme Court and that of the circuit judge, as well as the radical distinction between the authority of a decision of that court and that of a decision of a circuit judge, are worthy of grave consideration here, in view of the fact that the Supreme Court of Colorado is proceeding in the exercise of a jurisdiction which it claims to have to arrest and confine other citizens of that state, and to supervise the general election. The limit of the power of the circuit judge under this petition is to discharge the prisoner, and, if that were done, the result would be a decision

of a circuit judge that the prisoner was confined in violation of the Constitution of the United States, in conflict with a decision of the Supreme Court of Colorado that he was not so confined. And while the former decision would prevail, it would not have the controlling, authoritative, and conclusive effect which, under our system of jurisprudence, a decision of the Supreme Court must have, and it would not put an end to, but would rather tend to increase, litigation and confusion.

Where a petitioner is confined in violation of the Constitution of the United States under a judgment of a state court which is reviewable by writ of error in the Supreme Court of the United States or in a higher court of the state, the issue of a writ of habeas corpus by a federal judge is not imperative, but discretionary, and, in the exercise of this discretion, the considerations to which reference has just been made are entitled to grave attention. "That discretion," says the Supreme Court, "should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. Ed. 868.

In exceptional cases, as where a citizen or subject of a foreign state is in custody for an act done under the authority of his own government (*Wildenhuis's Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565), or an officer or a citizen of the United States has been arrested under state process for acts done or omitted under the Constitution or laws of the federal government, and pursuant to its authority (*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, and *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949), the writ has been granted and the prisoner discharged. But the general rule and the better practice is to deny the application for the writ where the petitioner may review by appeal or by writ of error the judgment under which he is confined in the Supreme Court of the United States or in a higher court of the state. "It is certainly the better practice," says Mr. Justice Jackson in *In re Frederick*, 149 U. S. 70, 77, 13 Sup. Ct. 793, 37 L. Ed. 653, "in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of habeas corpus, for under proceedings by writ of error the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged." *Reid v. Jones*, 187 U. S. 153, 154, 23 Sup. Ct. 89, 47 L. Ed. 116; *Markuson v. Boucher*, 175 U. S. 184, 186, 187, 20 Sup. Ct. 76, 44 L. Ed. 124; *Pepke v. Cronan*, 155

U. S. 100, 15 Sup. Ct. 34, 39 L. Ed. 84; *Ex parte Fonda*, 117 U. S. 516, 518, 6 Sup. Ct. 848, 29 L. Ed. 994; *New York v. Eno*, 155 U. S. 89, 96, 97, 98, 15 Sup. Ct. 30, 39 L. Ed. 80; *Baker v. Grice*, 169 U. S. 284, 294, 18 Sup. Ct. 323, 42 L. Ed. 748; *Whitten v. Tomlinson*, 160 U. S. 231, 242, 16 Sup. Ct. 297, 40 L. Ed. 406; *Tinsley v. Anderson*, 171 U. S. 101, 105, 18 Sup. Ct. 805, 43 L. Ed. 91; *Ex parte Royall*, 117 U. S. 251, 252, 6 Sup. Ct. 734, 29 L. Ed. 868; *Cook v. Hart*, 146 U. S. 183, 195, 13 Sup. Ct. 40, 36 L. Ed. 934; *Wood v. Brush*, 140 U. S. 278, 290, 11 Sup. Ct. 738, 35 L. Ed. 505; *Ex parte Frederick*, 149 U. S. 70, 77, 13 Sup. Ct. 793, 37 L. Ed. 653; *Davis v. Burke*, 179 U. S. 399, 402, 21 Sup. Ct. 210, 45 L. Ed. 249; *Storti v. Massachusetts*, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120; *Eaton v. State of West Virginia*, 34 C. C. A. 68, 72, 91 Fed. 760, 764.

The contention of the applicant that this rule should not be applied to a case like that at bar, in which the petition shows that the state court had no jurisdiction, and that in every such case the writ should issue, cannot be sustained, because in the cases cited above in which the rule was established, and in which it has been insistently followed by the Supreme Court, whose decisions must control, the indispensable reason stated in the petition for the issue of the writ was this very want of jurisdiction in the state courts either to entertain the suit or to inflict the punishment, and because the adoption of the contention of the applicant would bring nearly all applications for writs of habeas corpus under the exceptions, and would thereby practically abrogate the rule, since the only question reviewable upon a writ of habeas corpus to inquire into the detention of a prisoner by order of a state court is the jurisdiction of that court to entertain the suit or to take the action which results in his detention. In *re Debs*, 158 U. S. 564, 600, 15 Sup. Ct. 900, 39 L. Ed. 1092; In *re Nevitt*, 54 C. C. A. 622, 117 Fed. 448. In other words, a case in which the petition for the writ shows that the state court under whose judgment the prisoner is restrained of his liberty was without any jurisdiction of the proceeding is not an exceptional, but is an ordinary, case of an application for the writ, and that showing is as frequently a characteristic of the cases which fall under the rule as it is of those which illustrate the exceptions to it.

In *New York v. Eno*, 155 U. S. 88, 89, 90, 96, 98, 15 Sup. Ct. 30, 39 L. Ed. 80, the petition for the writ disclosed the fact that the petitioner was restrained of his liberty by a state court which "has not and never has had jurisdiction" of the offenses charged against him, in violation of the Constitution of the United States; and yet the Supreme Court, without considering or determining whether or not the state court had jurisdiction, or whether or not the petitioner was confined in violation of the Constitution, reversed the judgment of the Circuit Court, which discharged the prisoner upon a writ of habeas corpus, because it did not follow the established rule—deny the writ of habeas corpus and put the petitioner to his review by writ of error. In *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748, the Supreme Court reversed a discharge of the peti-

tioner upon a writ of habeas corpus for the same reason, without considering or deciding the question whether or not the prisoner was detained in violation of the Constitution of the United States.

The question is not novel in this circuit. In *Markuson v. Boucher*, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124, a petition for a writ of habeas corpus was presented to the United States District Court for the District of North Dakota, in which the petitioner alleged that he was confined in the State Penitentiary under a sentence of a state court of North Dakota, which had been affirmed by the Supreme Court of that state, that he should be punished by imprisonment for one year for contempt, for the violation of an injunction issued by that court under section 7605 of the Revised Codes of that state. He also averred that the statute violated the fifth, sixth, and fourteenth amendments of the Constitution of the United States, so that the court which sentenced him had no jurisdiction of the charge upon which he was convicted, and that he was in "straitened circumstances, and without means or power to prosecute a writ of error from the Supreme Court of the state to the Supreme Court of the United States, or to employ counsel to present or argue it there, and is informed and believes, if he had such means, it could not be brought on for hearing before the expiration of his sentence." The District Court refused to discharge the prisoner. In the Supreme Court the constitutional points raised and the question of the jurisdiction of the state court were argued at length, but that court refused to consider them. It affirmed the judgment below, and said:

"We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error. \* \* \* The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a state in which the constitutional rights of a prisoner could have been claimed, and may be were rightly decided, or, if not rightly decided, could be reviewed and redressed by a writ of error from this court."

The case of *Pepke v. Cronan*, 155 U. S. 100, 15 Sup. Ct. 34, 39 L. Ed. 84, is a decision of the same character under similar facts.

These decisions of the Supreme Court leave no alternative in the case at bar to one who would not disregard the law clearly laid down by the highest judicial tribunal in the land. The case falls under the rule which that court has established, and not under the exceptions to it which it has specified. The petitioner is not in custody for an act done under the authority of the federal government or of any foreign government.

The fact that the hearing and decision of his case by the Supreme Court under a writ of error cannot be had until the term of his imprisonment will have expired has been determined in *Markuson v. Boucher*, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124, to present no exception to the general rule. Any other practice would make every sentence of imprisonment for a short term by a state court, where the prisoner asserts that there was a denial of any of his rights, privileges, or immunities under the Constitution of the United States, a proper subject of examination on writ of habeas corpus by the federal judges. Moreover, the Supreme Court has the power, and, if the case presented

is of sufficient importance, it will undoubtedly exercise its power, to grant a speedy hearing and to render an early decision.

While the original suit in the Supreme Court of Colorado for the injunction, the supervision of the election, and the various proceedings therein, are of grave importance, and may demand the immediate and final decision of many important questions which are there presented, those questions cannot be finally determined in this proceeding; and the only authoritative adjudication that could be here made, if the writ were issued, would be a discharge of the prisoner, or his remand to the custody of the sheriff.

If the Supreme Court had not already repeatedly decided how the discretion of a federal judge to issue a writ of habeas corpus to question the adjudication of a state court should be exercised in an action of the character of the case at bar, the nature of the original suit in the Supreme Court of Colorado, and of the various proceedings under it, the gravity of the questions they present, the need of a speedy and conclusive determination of them, the appellate and supervisory jurisdiction of the Supreme Court over them, the fact that its decision will prevent confusion and conflict of opinion, will finally determine every legal question, and will put an end to conflict, controversy, and litigation, while an adjudication by a single judge in the case in hand that this petitioner be discharged would finally determine nothing more, but would leave every other question without authoritative decision and open to further litigation—these exceptional facts would persuade rather that the application for the writ should be denied, than that it should be granted.

There may be exceptional cases—doubtless such cases will arise—which have not been specified by the Supreme Court, in which the writ of habeas corpus should be issued by a federal judge to question the judgment of a state court, although a right of review by appeal or by writ of error may still exist. But the case at bar is so far and so clearly within the rule which the Supreme Court has laid down for our guidance in the cases of *Markuson v. Boucher*, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124, *Pepke v. Cronan*, 155 U. S. 100, 15 Sup. Ct. 34, 39 L. Ed. 84, *New York v. Eno*, 155 U. S. 89, 96, 97, 15 Sup. Ct. 30, 39 L. Ed. 80, and *Baker v. Grice*, 169 U. S. 284, 291, 18 Sup. Ct. 323, 42 L. Ed. 748, that the application for the writ in this case cannot be granted without a flagrant disregard of that rule and of the repeated decisions of that court.

The application must accordingly be denied, and the petition for the writ must be dismissed.

PORTER et al. v. TONOPAH NORTH STAR TUNNEL & DEVELOPMENT CO.

(Circuit Court, D. Nevada. November 28, 1904.)

No. 771.

1. MINING CLAIMS—CONFLICTING LOCATIONS—PRIORITY OF RIGHT.

So long as a prior location of a mining claim is subsisting, no rights in any of the ground covered by such claim can be acquired by a junior locator.

2. SAME—AMENDED CERTIFICATE OF LOCATION—NEVADA STATUTE.

Cutting's Comp. Ann. Laws Nev. §§ 210, 213, were enacted for the benefit of locators of mining claims, giving them 90 days to perfect their location, to cure defects, if any existed, in the original notice or the marking of the boundaries, mistakes in the directions and courses, etc. Such statute does not require the filing of an amended certificate of location where the original notice is clear, definite, and certain, and the boundaries of the claim so marked and monumented that they can be readily traced and determined, in which case such notice may be filed and recorded as a certificate of location.

3. SAME—CONFLICTING CLAIMS—EVIDENCE CONSIDERED.

Evidence considered, and held insufficient to sustain the burden of proof resting on adverse claimants to show that any part of mining ground sought to be patented by defendant was within the boundaries of a claim as previously located by plaintiffs and their grantors.

Suit in Support of an Adverse Claim to Mining Property.

Garoutte & Goodwin, for complainants.

Campbell, Metson & Campbell and Key Pittman, for defendant.

HAWLEY, District Judge (orally). This is a suit or proceeding brought in support of an adverse claim and protest filed by the complainants in the United States Land Office at Carson City, Nev., against the application of the defendant for a patent to certain mining ground situated in Tonopah, Nye county, Nev., to determine which of the parties has the better right to the mining ground in controversy. The right and interest of the complainants to the land is based upon a location of a mining claim known as the "Dave Lewis Hope," and the amended certificate of location of said claim under the name of the "Mizpah Intersection"; and the right and interest of the defendant to the ground is based upon a location of a mining claim known as the "Ivanpah." The Dave Lewis Hope claim was located August 26, 1901, by Dave R. Lewis and Charles J. Carr. The notice of location reads as follows:

"Location Notice Dave Lewis Hope. Notice is hereby given that the undersigned has this day located fifteen hundred linear feet on this vein or lode, supposed to run in an Northwest and South E. direction with three hundred feet on each side of the vein. Commencing at this monument and running one thousand feet in a Southeasterly direction, and five hundred feet in a Northwesterly direction. This mine is situated in the hill or mountain east of the group of mines known as the Tonopah mines owned by J. Butler and Co. This mine shall be known as the Dave Lewis Hope. Situated in Tonopah Mining District, Nye Co. Nevada. Dated Aug. 26, 1901. Locators. Dave R. Lewis, Chas. J. Carr."

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¶ 1. See Mines and Minerals, vol. 34, Cent. Dig. §§ 65, 68.

This notice was recorded in the county recorder's office September 2, 1901. The amended and additional certificate of location of the Dave Lewis Hope, under the name of the "Mizpah Intersection," was made May 17, 1902, by Jerome P. Porter, and reads as follows:

"Additional and Amended Certificate of Location. Know all men by these presents that the undersigned Jerome P. Porter, a citizen of the United States, has this 17th day of May, 1902, amended, located and claimed, and by these presents does amend, locate and claim by the rights of the original discovery, and the location heretofore made such deeds, transfers or conveyances as may have been made, and this amended certificate made, filed and recorded as provided by Federal law and by the laws of the State of Nevada now in force, and local customs and rules fifteen hundred linear feet, on this lode, vein, ledge or deposit, bearing gold, silver, lead, copper and other valuable minerals, with all its dips, angles, and variations as allowed by law, together with three hundred feet on each side of the middle of said vein at the surface and all veins, lodes, ledges or deposits and surface ground within the lines of said claim. This said lode was originally located by D. R. Lewis and Chas. J. Carr on the 26th day of August, 1901, and named the Dave Lewis Hope, by which name it is found of record in Book E. of Mining Locations pages 123 and 124, Nye County, Nevada Records. It is also found in Book B, page 119 Records of Tonopah Mining District said County and State. The name of this lode in future will be the Mizpah Intersection, the date of this amended location is made the 17th day of May, 1902. The name of the amending locator is Jerome P. Porter. From the discovery point at the discovery monument there is claimed by me one thousand feet in a Southeasterly direction and five hundred feet in a Northwesterly direction, along the course of said lode or vein. The general course of this vein is North 8° West by South 8° East. The discovery shaft or its equivalent is situated upon the claim eight hundred feet South from the North end center and exposes the ledge at a depth of fully ten feet; its dimensions are 5 by 8 by 10 feet deep. This further additional and amended certificate of location is made and filed without waiver of any previously acquired and existing rights in and to said mining claim, but for the purpose of correcting any errors or omissions in the original location, or location certificate, description or record; and for the purpose of securing the benefits of the Act of the Legislature of the State of Nevada, Approved March 16th, 1897, and the amendments thereto, and of conforming to the requirements of law. The amending locator hereto is the original locator or lawful grantee deriving title and right of possession from them by deed of conveyance. [Then follows a description of the location by metes and bounds.] Locator. Jerome P. Porter."

In this amended notice there are several interlineations and changes, and there was more or less controversy as to who made the same. This is especially true as to the erasure of the word "shaft" and substitution of the word "monument." There was also another amended and additional certificate of location in pencil, and with more or less interlineations, that was left by Dr. Porter with the recorder. The notices, however, are substantially the same.

The notice of location of the "Ivanpah" by F. M. Ish, of date October 10, 1901, is as follows:

"Certificate of Location. State of Nevada, Nye Co. Know all men by these presents that I, F. M. Ish, have this 10 day of Oct. 1901, located 1500 ft. linear ft. on the Ivanpah lode or vein or deposit, together with 300 ft. on each side of the middle of the vein 700 ft. running southerly and 800 ft. northerly from center of discovery monument. Situated Tonopah Mining District, Nye Co. State of Nevada, to wit, the south end of this claim adjoins the north side line of the Mizpah mine and crosses a portion of the east end of the Lucky Jim—is situated on the west and northwest slope of the high hill northeast of the town of Tonopah, known as the Oddie Peak."



This notice was recorded in the office of the district recorder, and in the office of the county recorder, January 8, 1902. There was but one location notice. As posted on the ground it was called "Notice of Location," and when recorded it was called "Certificate of Location."

It will be observed that the Dave Lewis Hope mining claim was prior in point of time to the other claims, and if it included any portion of the ground within the Ivanpah location, and if the law was complied with by the owners of the Dave Lewis Hope as to the work and labor to be done thereon, then it would necessarily follow that a decree should be rendered in favor of complainants. Because "mining claims are not open to relocation until the rights of a former locator have come to an end," two locations cannot legally occupy the same space at the same time. However regular in form a junior location might be, it is of no effect as against the rights conferred upon the prior locator, so long as the prior location is subsisting. These principles were announced by the Supreme Court in *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735, in 1881, and repeated in numerous decisions, including *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 79, 18 Sup. Ct. 895, 43 L. Ed. 72, decided in 1897, and have always been followed by the national courts, and are too well settled to require discussion.

The testimony on behalf of the complainants as to the place where the discovery monument of the Dave Lewis Hope was erected, and as to where the notice was posted, taking the directions and distances mentioned in the notice, would so locate the land as to include a portion of the ground embraced in the Ivanpah location. On the other hand, under the testimony of the defendants, the discovery monument, with the notice thereon, of the Dave Lewis Hope, would locate the ground entirely without the premises covered by the Ivanpah location, and would not include the cut claimed to have been made by the locators of the Dave Lewis Hope. Upon these points, as well as others, the testimony is more or less conflicting, and, in many respects, unsatisfactory. There is more or less uncertainty in the testimony upon all the controlling questions of fact involved in this case.

With reference to the location of the claim and discovery monument on the Dave Lewis Hope, Carr testified that he and Lewis put up nine stakes and monuments on the different lines and courses of the claim, giving the distances and directions, and that the first one that he built was "about 45 or 50 feet" north of "the present shaft where the North Star tunnel is worked"; that this stake "was placed in rocks, and a 3 by 4 scantling in it." This was his starting point. "Our location work was here. \* \* \* I put one notice the first day from the location ground on the vein." At all the corners he placed notices in cans, "describing what corners and what directions they were in."

Caper, at Carr's request, in the month of October, 1901, went up on Oddie mountain and stayed there about one hour. He testified that he knew where the North Star hoisting works are now—

"But I have never been up there. Q. Where did you go with Mr. Carr on that ground with reference to that shaft or those hoisting works? A. Well, I don't know exactly; it is close there, somewhere on the side of the hill. \* \* \* Q. What did you see there? A. I see they had a cut there. \* \* \* Q. Describe that cut to the court. A. There was a cut, I think, about 15 feet long, and the face was about 10 feet. \* \* \* Q. How wide was it? A. About

4 to 4½ feet. \* \* \* Q. Did you see any monument or stake around there anywhere? A. I see the monument a few feet above his cut up there. \* \* \* Q. How close to the cut? A. Three or four feet; somewhere there. Q. Was there any notice there at that monument? A. He had some paper out of the can, and he read it. I was on the cut at that time, and when I went in there I see his name and Lewis' on the paper."

As to the work done upon the claim, Carr testified that, about 8, 10, or 12 days after they had put up their monuments, they commenced work right alongside of the location.

"We made a cut of three lengths of the shovel; the shovel measures five feet; and that made 15 feet, and from 4½ to 5 feet wide. Q. How deep was that cut at the face? \* \* \* With reference to your height? A. Well, it was a little over my reach. \* \* \* Q. State to the court when this work that you have described was completed. \* \* \* A. I guess we were about from 35 to 40 days doing it. \* \* \* Thirty-five or thirty-eight or forty days, something like that; long before the required time, anyhow. We had 90 days."

Dr. Porter testified that he first went to Tonopah in the month of November, 1901; that he saw a cut near the present North Star shaft, but paid no particular attention to it at that time; that in the latter part of April, 1902, he went upon the ground with Dave Lewis, and the cut "was still there"; that about the middle of May, having previously obtained a bond on the claim, he enlarged the cut. "The cut then was 4½ feet wide, and I enlarged it to about 14 feet wide, and cut a large adit in the hill. \* \* \* Sunk a prospecting shaft 5 by 8 in the clear" on the vein which was exposed by the cut. In all, he performed over \$100 worth of work on the cut. He also testified that he had, and introduced, a photograph showing the cut as it existed prior to his doing any work thereon, and also another photograph taken after he finished his work. He then testified as to what steps were taken by him on May 17, 1902. On his cross-examination, in describing the posts and monuments, he was asked:

"Q. Did you see any location monument there? A. No, sir. Q. All that you saw then were eight monuments? A. Yes."

He then described the monuments as they appeared to him in April, 1902, when he went back there. At another time, when testifying about the attachment papers:

"Q. I am asking you about point No. 1 on the Carr diagram. Was there a monument at that point on the Dave Lewis Hope claim? A. I did not see one there."

On behalf of defendant, Frank M. Ish testified that prior to October 10, 1901, the date of the Ivanpah location, he examined the ground, and went over the hill to ascertain where there was vacant ground. Among other things, he said:

"In looking this ground over, I went to every monument that was on that hill that could be seen, commencing at the north end of the Mizpah, or the east end of the Mizpah, and going across the ground in a northwesterly direction, and whatever ground was vacant to the left of what I thought to be the Silver Star location. \* \* \* I examined all of the monuments that I could see, of whatever nature or description, was on that ground, and I found in my investigations, up near the top of Mount Oddie, I found the location post, discovery post, of the Dave Lewis Hope claim. I found a monument probably

20 inches high, possibly two feet and a half across. \* \* \* A small monument of rock, and in that monument a small can—a baking-powder can or something of that kind, I think—with a removable top, and I took out and read the notice. This notice then claimed, if my recollection serves me right, 500 feet northwesterly, and 1,000 feet southeasterly, or northerly and southerly. \* \* \* I am not exactly positive of that, more than it was, I think, northerly or northwesterly, and southeasterly. Knowing the latitude that prospectors take to get the directions and locations of a claim, I sought to the north for space that would indicate where his lines were, and I found none. I then went to the south again, and examined all the ground along on the line of the Mizpah, or about that point, which would take it about the required distance, and I found none there. There were no side monuments that I could find, and, not knowing further about his ground, I located the Ivanpah."

After giving a description of how he made the Ivanpah location, where his posts and monuments were placed, etc., upon which there is no controversy, he testified, in answer to questions, as follows:

"Q. State whether or not there was any excavation in the nature of a cut on that ground in October, 1901, when you went there. A. No, sir; there was absolutely not a breaking of the surface, not a pick point, that was visible for a distance of a hundred feet anywhere within the confines of what was then located as the Ivanpah claim."

He was asked whether any work was done by him on the Ivanpah:

"A. Yes, sir; I did not do the work myself, but I employed Mr. L. O. Ray. He subsequently did the work; he did it, about the 1st of December, by driving a cut into the hill, which exposed the vein at a depth of 10 feet. Q. Was any work done within the limits of the Ivanpah claim subsequent to October 8 or 9, 1901, other than this work? A. No, sir; there was none done, not a particle. Q. Now, as to 1902, was there any work done within the Ivanpah by any one? A. Yes, some time in the month of February. \* \* \* I don't know the date. I at that time had charge of a property at a place called Weepah, out at Lone Mountain, and, employing a number of men, it was necessary for me to go into town very often; that is, quite often, sometimes once a week, sometimes once in two weeks, or oftener. I do not remember the dates, but on returning from one of these trips I saw that an excavation had been made on the side of the mountain at a point where, very near where, the present location of the North Star shaft is. It was new, and I discovered it, as I say, from a long distance. The breaking of the surface of that hill you can see for long distances. It was plainly visible from the town."

His attention was called to a diagram made by Mr. Carr, and he was asked the question:

"Assuming that the white lines as made by Mr. Carr are the lines of the Dave Lewis Hope claim, where would the dump made when you were going back and forth to Weepah be—inside of those white lines, or outside of them? \* \* \* A. I believe it would be clear outside of their lines. Q. About how many feet would it be from the point where you found the Carr notice?"

And, after specifying certain figures marked on the diagram, he was asked:

"Using that as a starting point, how far outside or inside of the westerly side line of the Dave Lewis Hope claim would that dump be? A. It would be well without it."

In the course of his testimony:

"Q. Was there a smaller cut at the place where you say you saw this work done in February? Was there a small cut prior to February at that place? A. No, sir. Q. Could it have been there and you not have seen it? A. No, sir;

it could not have been there and I not have seen it. \* \* \* Q. You have heard Mr. Carr testify that in August of 1901 he put up nine large monuments there on that ground, and put tin cans in each of them, and stakes in each of them. I will ask you whether or not at any time in 1901 you saw any monuments or stakes of the kind or character at the place described by Mr. Carr, except the one where you found the notice of location? A. No, sir; I never saw them, and I know, further, that if they had existed I could not have helped but seen them."

There were eight other witnesses on behalf of the defendant who testified to seeing the location monument and notice of location at or near the point testified to by Mr. Ish, and several of them testified as to the examination of the ground and finding no posts or monuments on the lines testified to by Mr. Carr previous to the time when Porter made his amended location, and many reasons are given tending to show that the witnesses could not be mistaken. They vary somewhat as to the distance of the location monument from the work in the cut near the North Star shaft, most of them placing it up on top of the hog's back "near the apex of Mount Oddie."

Nine witnesses besides Ish testified that there was no work done by anybody at the point testified to by Carr near the North Star shaft until the month of February, 1902. The testimony upon this point is clear, direct, positive, and convincing in its character. It seems unreasonable to believe that the witnesses could have been misled or mistaken.

A brief reference to the record will indicate with sufficient clearness the general character of this testimony. Ray, a stockholder in the defendant corporation, was familiar with the location. He testified that the first time he saw the cut was "about the 15th of February, 1902"; that he lived at Ray, and frequently visited Tonopah; that "the trail I went over time and again in December went right to the side, not more than three feet from where that cut was placed afterwards"; that there "never was any cut in that mountain during the month of December, 1901, or any time previous to that"; that he was over the ground four or five times during the month of January. Curtis, a wholly disinterested witness, testified that there was no cut or excavation within a radius of 200 feet from where the North Star shaft now is, when he visited the place in November, 1901. The testimony of Oddie and several other disinterested witnesses is substantially to the same effect.

Ramsey testified that he was on the ground with Curtis and Salsberry, and that there was no cut or excavation at that place.

"Q. How do you know? A. Well, I know because we were right in the particular spot; sat down there for a while; probably half an hour we sat there and talked—Mr. Curtis, Mr. Salsberry, and myself. Q. Was there any digging or use of a pick there at that time? A. I didn't notice any digging at all. Q. Did any of your party do any digging there at that time? A. I did a little digging with a pick; went around and made a little hole a few inches deep. Q. What were you digging on, if anything? A. We were sitting on the ground there, and a kind of streak ran down there; I dug down and dug out some black-looking stuff—manganese."

The testimony of John McCune, a typical pioneer mining prospector, is very strong. He knew Dave Lewis, and at one time worked three shifts for him on the Dave Lewis Hope claim along about the 1st of February, 1902. The work consisted of a crosscut, "an open cut,"

near where the North Star shaft is now; "wasn't very far from it sure. Q. Who paid you for that work? A. Dave Lewis." He used powder and steel procured from Davis & Lothrop. Dave Lewis showed him the location monument.

"It was up on a ridge \* \* \* a little bit west of north from where we done the work. Q. About how far north would you figure it? \* \* \* A. I didn't have any compass for that. Q. How far would you guess it to be? A. Well, I would guess it probably 300 feet—some place in that neighborhood. \* \* \* Q. When you went up to do this work, was there any cut where you started this cut in? A. There was a little work there, not anything to speak of. \* \* \* You could not call it work; it was just enough to show that somebody had been on the ground, I guess. Q. Been scratching there? A. Well, that is all it was. \* \* \* I could not call it location work at all. \* \* \* Oh, it was just enough to show that there was somebody there; it was kind of drawn, or shoveled, the dirt, or I don't know whether they had a shovel at all or not."

It appears from the record that Dave Lewis before his death made a confidant of Mr. Davis, a merchant in Tonopah; deposited his money with him, when he had any; traded with him; and often talked about his property, and of the Dave Lewis Hope claim. The books kept at the store of Davis & Lothrop show the purchase of the materials furnished McCune, at the request of Lewis, at the time mentioned. In April or May, 1902, having heard much talk about the Dave Lewis Hope, Davis, in the interest of Lewis, and Mr. Harris, the secretary of the defendant, made an engagement with Lewis, and met him on the ground with the avowed purpose of having him show them where the ground was, and what work had been done upon it, etc. Much of the testimony of these witnesses consisted of statements and declarations made by Lewis which will only be considered as leading up to the facts testified to by the witnesses. Lewis showed them, among other things, the cut at the point near the North Star shaft, and told them the work was done in February, 1902. He also pointed out to them the location monument of the Dave Lewis Hope, about 300 feet northerly up the hill from the cut where he claimed he had done some work. They went to this monument, examined the ground thoroughly all around the vicinity, and found nothing to show that any work had ever been done there.

Eleven witnesses, men of prominence and good standing in Tonopah, and nearly all of them wholly disinterested, testified that they were well acquainted with the general reputation of Charles J. Carr in the community as to truth, honesty, and integrity, and that it was bad.

The mere contradiction of a witness does not necessarily warrant the court in disregarding the whole of his testimony for want of corroboration, but the contradiction may be such as tends to weaken, if not entirely destroy, the force and effect of his testimony. A witness may also be directly impeached by proof that his general reputation for truth, honesty, and integrity in the community where he resides is bad.

The burden of proof to establish the validity of the Dave Lewis Hope claim, and that it included some portion of the ground embraced within the boundaries of the Ivanpah location, was upon complainants. They failed to establish these facts by a preponderance of evidence to the satisfaction of the court. There was no amended location made to the

Dave Lewis Hope until long after the 90 days had expired within which time it may be conceded, for the purpose of this case, that an amended notice of the Dave Lewis Hope claim might have been made so as to include a portion of the Ivanpah location. The original location was made August 26, 1901; the amended location by Porter was not made until May 17, 1902, over eight months after the original location was made, and long subsequent to the date of the location of the Ivanpah claim. This amended location, in so far as it covers any portion of the Ivanpah location, in the light of all the facts, is subsequent in time to the rights acquired by the Ivanpah claim. If the amended certificate of location of the Dave Lewis Hope claim had been made and recorded within the 90 days provided by the statute, or at any time thereafter before the Ivanpah was located, then it might be claimed that the record notice thereof would have been *prima facie* evidence of its own sufficiency, as provided by the statute of Nevada. But, as is said in 1 Lind. on Mines (2d Ed.) § 393:

"The real purpose of the record is to operate as constructive notice of the fact of an asserted claim and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity."

And further adds:

"These facts once proved, the recorded certificate may be considered as *prima facie* evidence of such other facts as are required to be stated therein."

After a careful examination and consideration of all the relevant testimony contained in the record, I am clearly of the opinion that the decided weight of the evidence shows that on the 10th day of October, 1901, the ground then located by Ish as the Ivanpah was vacant, public mineral land, subject to location; that the Ivanpah was a valid location; that the locator and owners thereof have fully complied with the law, and have the better right and title to the ground covered by such location.

The fact that no amended location of the Ivanpah ground was made within the 90 days after the location, cannot be taken advantage of by the complainants under the facts of this case. I do not understand the law to be, in cases where the original notice is clear, definite, and certain, and the boundaries of the claim so marked and monumented that the same can be readily traced and determined, that it is necessary for the locator thereof to file an amended certificate of location, as required by sections 210 and 213, Cutting's Comp. Ann. Laws, Nev. That statute was passed for the benefit of the locators, giving them 90 days to perfect their location, to cure defects, if any existed, in the original notice or the marking of the boundaries, mistakes in the directions and courses, etc. The certificate of location and amended certificates may always be made within the 90 days so as to allow the discoverer "to rectify and readjust his lines whenever from any cause he desires to do so, provided he does not interfere with or impair the intervening rights of others." But if the locator is satisfied with his original notice, he can file the same within 90 days, and can call it his certificate of location. The object of the statutes of Nevada, touching this matter, was fully discussed and stated by this court in Tonopah & Salt Lake M. Co.

v. Tonopah M. Co., 125 Fed. 389, 396, and the principles there announced are applicable to this case, and fully support the views I have expressed.

The defendant proved all the necessary facts entitling it to a patent. Let a decree be entered in favor of the defendant, with costs.

### KNICKERBOCKER TRUST CO. v. MYERS.

(Circuit Court, M. D. Pennsylvania. November 30, 1904.)

#### 1. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—MANNER OF ENFORCEMENT.

Under Acts Md. 1892, p. 153, c. 109, § 851, which provides with respect to certain kinds of corporations that "each stockholder shall be liable to depositors and creditors \* \* \* for double the amount of stock at the par value" held by him, the liability is absolute and direct to creditors, and, both under the general law and the Maryland decisions, may be enforced by an action at law by a creditor against a particular stockholder to the extent of the creditor's claim or the limit fixed in the statute, any payment previously made being available as a defense pro tanto.

#### 2. SAME—RETROACTIVE STATUTE—IMPAIRING OBLIGATION OF CONTRACT.

The right of individual action by a creditor for his own benefit, given by such statute, which became a condition of the creditor's contract with the corporation, could not be taken away by a subsequent statute; and Act Md. 1904, p. 579, c. 337, which attempted to take away such right, and substitute therefor a single suit in equity in a Maryland court for the benefit of all creditors, to which any nonresident stockholder might become a party, and provided that, when any such stockholder did so, any individual action pending against him, and commenced since January 1, 1903, should abate, is invalid, not only because it substitutes a remedy less efficacious to a creditor who has brought an action against a solvent stockholder, but also because it impairs the obligation of his contract by retroactively changing the character of the stockholder's liability thereunder.

#### 3. SAME—NATURE OF LIABILITY—ACTS OPERATING TO DISCHARGE.

Under Acts Md. 1892, p. 153, c. 109, § 851, which makes stockholders directly liable to creditors of the corporation for double the par value of their stock, such liability is not secondary, but primary, and, as between them, the stockholder is a principal debtor, who may be sued without exhausting the remedy against the corporation; hence an agreement between a creditor and the corporation by which collaterals are applied on the debt at an agreed value in good faith, or a settlement with indorsers by which they are released on payment of an agreed sum, does not operate to discharge a stockholder from liability for a balance still due the creditor.

#### 4. SAME—SALE OF STOCK—FAILURE TO HAVE TRANSFER RECORDED.

A stockholder in a corporation cannot avoid his statutory liability to a creditor on account of stock which he sold prior to the creation of the debt, where he neglected to have the stock transferred on the books of the company as required by its rules and the terms of his certificate.

**At Law.** Rule for judgment non obstante veredicto on reserved points.

¶ 1. Stockholders' liability to creditors, see notes to Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer. 33 C. C. A. 23.

Action at law to enforce the liability of a stockholder of a corporation imposed by statute in favor of creditors. Verdict was taken for plaintiff for \$4,000, subject to the following points of law which were reserved:

(1) Whether there was any evidence on which the plaintiff is entitled to recover, with leave to enter judgment in favor of the defendant notwithstanding the verdict if the court should be of the opinion that, upon the law, it should be so entered. (2) But if the court should be of opinion that the plaintiff was entitled to recovery, then subject to the further point whether the verdict should not be reduced from \$4,000 to \$2,000, in view of the admitted fact that the defendant on May 9, 1900, prior to the time when any liability had accrued to the plaintiff in the premises, had sold to one Jacob Slagle 100 of the 200 shares of the stock of the City Trust & Banking Company, on which the defendant's liability is claimed, and had delivered the certificate for such shares to said Slagle, duly indorsed, but had failed to have the shares transferred on the books of the company as required by its rules.

W. Calvin Chesnut and C. E. De Lone, for plaintiff.

Nevin M. Wanner and C. E. Ehrhardt, for defendant.

ARCHBALD, District Judge. It is not disputed that at the time the City Trust & Banking Company of Baltimore, Md., became indebted to the plaintiff, on April 20, 1903, as well as in June following, when it became insolvent and passed into the hands of a receiver, the defendant, J. Wesley Myers, was a stockholder in the company, owning 100 shares, at least, of the par value of \$1,000. He was credited on the books with double that number, which was the extent of his original holdings, acquired in March, 1900, but he had sold one-half of what he had in May of that year to one Jacob Slagle, turning over to him one of the two certificates into which he had had his stock divided for the purpose; no entry of this, however, having been made on the books of the company, as required by the terms of the certificate and the rules. The charter of the company, by express provision, was made subject to the Acts of the General Assembly of Maryland of 1892, p. 153, c. 109, wherein, in section 85*l*, it is ordained with regard to corporations of this character that "each stockholder shall be liable to depositors and creditors \* \* \* for double the amount of stock at the par value held by" him, and it is upon this that the responsibility of the defendant in the present action is predicated.

The liability so imposed is absolute, direct, and several, and any stockholder may be pursued by action at the instance of a creditor, and judgment recovered to the full extent fixed by the statute, so far as it is necessary to satisfy his claim, provided the stockholder has not already paid other corporate debts, for which, so far as he has, he is entitled to credit pro tanto. Not only is this the general law (8 Cycl. Law Proc. 678, 679; 26 Am. & Eng. Encycl. Law [2d Ed.] 1021, 1041; *Dreisbach v. Price*, 133 Pa. 560, 19 Atl. 569), but it is that which prevails in Maryland, on which the liability of the defendant primarily depends (*Matthews v. Albert*, 24 Md. 535; *Norris v. Johnson*, 34 Md. 485; *Hammond v. Straus*, 53 Md. 1; *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456; *Cahill v. Original Big Gun Ass'n*, 94 Md. 353, 50 Atl. 1044, 89 Am. St. Rep. 434). In *Norris v. Johnson*, 34 Md. 485, the



question was whether the liability could be enforced against an individual stockholder by one creditor, where others were shown to exist, or whether resort must be had to equity to obtain relief; and, in disposing of it, the court says:

"They [the members] become stockholders in these corporations voluntarily, and risk their money in them for expected gain to themselves, and with full knowledge of the nature and extent of the liability [which] the law says they shall assume in so doing. In this way credit is given to the corporation that contracts the debts, and, when debts are thus contracted, we see no objection to permitting any creditor to seek out any responsible stockholder, and sue him at law for the debt, and place on him the burden of proceedings in equity to obtain contribution from others equally liable with himself. The creditors, as amongst themselves, may here, as in other cases, be well left to a race of diligence in the recovery of their claims, especially when the extent of recovery as against any one stockholder is limited, and he can show that the limit has been reached, as a defense to any further suits. It is true, he may be thus compelled to pay more than his share, looking to the like responsibility of other stockholders, but for this he has his remedy in equity for contribution."

Supplementing this, it was held in *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456, not only that the liability ran directly to creditors, to be enforced in an action at law by a creditor against a particular stockholder, but that it could not be enforced by a receiver of the company for the benefit of all creditors generally.

Without disputing these principles, the defendant relies upon certain changes in the statute law of Maryland by which he claims to have been relieved. By act of March 25, 1904, p. 179, c. 101, section 851 of Acts 1892, p. 153, c. 109, which is the basis of the defendant's liability, was repealed, and re-enacted so as, in substance, to provide that, in corporations like the one here, stockholders should be individually responsible, equally and ratably, and not one for another, for the debts and engagements of the corporation, to the amount of their stock at its par value, in addition to such stock; such liability to be an asset of the corporation for the benefit of all creditors, so far as necessary to pay the debts, and to be enforced only by appropriate proceedings by a receiver, assignee, or trustee of the corporation, acting under the orders of a court of competent jurisdiction. But as it is expressly provided that the rights and remedies of any creditor under existing laws against the stockholders of the corporation who were liable to such creditor at the time of the passage of the act shall remain unaffected thereby, it needs no further notice. There is another modification, however, which is of more significance. By act of April 12, 1904, p. 597, c. 337, a section to be known as 8511 was added to the statute, whereby it is provided that the exclusive remedy for the enforcement of liability, under the law as it stood before the repeal and re-enactment of the section referred to, should, as against stockholders residing in the state of Maryland, be by bill in equity in the nature of a creditors' bill by one or more creditors in behalf of all, in a court having jurisdiction within the limits of the county or the city of Baltimore, in which, as the case might be, the principal office or place of business of the corporation then was, or had

last been, to which bill stockholders residing beyond the limits of the state might become parties defendant, and thereupon should not be proceeded against in any other state or territory in respect to any liability imposed by the section as it stood before its repeal. This amendment was made operative as of the 1st of January, 1903, and was, as it is declared, to cause the abatement of all actions which had been brought against stockholders since that date to enforce the statutory liability created by the section under discussion as it stood before its repeal, with a saving provision, however, as to the operation of the statute of limitations, for the interim, as to any plaintiff in any such abated action who should within 60 days from the passage of the act become a party to the creditors' bill; the costs of such action to be transferred to, and taxed in, the equity proceedings. Availing himself of the privilege given by this enactment, the defendant, on his own petition, a few days before the present case was called for trial, was made a party defendant to a creditors' bill pending in circuit court No. 2 of Baltimore City, brought against the stockholders of the insolvent City Trust & Banking Company, to enforce the liability imposed by the statute by virtue of which it is contended that the present action falls.

The liability assumed by the defendant in becoming a stockholder, according to the law as it stood at the time he took stock in the corporation in question, in March, 1900, as well as in April, 1903, when the loan was obtained by it from the plaintiff company, was in the nature of a contract with prospective creditors (26 Am. & Eng. Encycl. Law [2d Ed.] 1020; *Matthews v. Albert*, 24 Md. 535; *Norris v. Wrenschall*, 34 Md. 492), and could not as such be impaired in any essential particular by state legislation (*Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Concord National Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; *Whitman v. Oxford National Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587). It ran moreover, as we have seen, directly from the stockholder to the creditor. *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456. And the obligation thus became a part of every contract, debt, and engagement of the corporation, as much as if severally made with the stockholder himself. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. If this be so, it is difficult to see how the statutory changes to which reference has been made, and on which the defendant relies to escape responsibility, can be sustained. The attempt is made to do so on the ground that they affect the remedy only, and not the right, but this far from appreciates the radical difference in the results brought about. The stockholder may be liable to the same pecuniary extent as before, but the manner in which it is worked out is entirely changed. Instead of being answerable to the creditors severally, of which each is entitled to avail himself by separate action against any responsible stockholder, according to his own convenience, wherever found, and with respect to which, as between creditors, it is a race of diligence—the first to sue being entitled to appropriate the whole until fully paid—the liability

of the stockholder is to creditors, generally and ratably, to be enforced by bill in the courts of Baltimore, to which all are virtually constrained to resort. This is much more than a variation in remedies. It is a difference in substantive rights. *Dexter v. Edmands* (C. C.) 89 Fed. 469; *Western National Bank v. Reckless* (C. C.) 96 Fed. 70; *Webster v. Bowers* (C. C.) 104 Fed. 627; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. The contract which the creditor had with each stockholder, as though written into the bond, has been cut up by the roots, and it is idle to suggest that anything like an equivalent has been given in its place.

Even where a change of remedy is sanctioned, the new one to be valid, must be as efficacious as the old, which is not the case where it is so qualified and restricted as materially to abridge the rights of the party affected, as they stood under the previous law. *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. On this basis, therefore, equally with the other, the present enactment cannot stand. Not only, as we have seen, is the creditor, where before he had a free hand, remitted and confined, as to Maryland stockholders, to a suit with other creditors in the home forum of the insolvent corporation, and as to nonresidents of the state, to similar suits where they are to be found; but, by the express provision of the law, existing actions, if any, in which he had a perfect right of recovery, are abated, without more, if within the state, or, if elsewhere, by the nonresident stockholder, who is being pursued, voluntarily appearing as a defendant in a pending bill in the Baltimore courts. Applying this to the present case, the remarkable result is produced, that, under a law passed three weeks after the action was instituted, the defendant, four days before it is called for trial, by being made a party to a suit in the circuit court No. 2 of Baltimore, is enabled to defeat a recovery here, the right to which was complete when the action was begun; the plaintiff being turned out of court with costs. It is said that the costs are taken care of by the statute; being transferred to the equity proceedings, if the creditor so wills. It is not easy to understand how others who have had no part in making them can be burdened in this way, but, however that may be, the question of costs is only of incidental significance. The material thing is that the remedy originally possessed by the creditor, which entered into the very substance of the obligation, has been summarily cut off, and that the one which has been substituted so changes the relation of the parties as not only to affect the character and value of the contract, but seriously to hamper and abridge its enforcement. Having regard to the fundamental law of the land, this cannot be done.

It may be that, abstractly considered, the change in the law is just. *Cushing v. Perot*, 175 Pa. 66, 34 Atl. 447, 34 L. R. A. 737, 52 Am. St. Rep. 835; *Ball v. Anderson*, 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693. It is, no doubt, a hardship to compel the individual stockholder to respond to the full amount of his liability in different suits to one or more creditors, until it has been exhausted, and then seek contribution from others similarly situated, in perhaps widely separated jurisdictions,

in order that he may have to pay no more than his proper share; from which, under the present act, he is relieved by a single suit in the courts of the domicile of the corporation, in which, after an ascertainment of the debts and a liquidation of the assets, the deficit is distributed amongst all the stockholders ratably. But these are considerations to be addressed to the lawmaking powers when the original act creating the obligation was passed, and have no place here. The matter is one of strict law, and must be so disposed of. This was not the character of liability imposed by the law as it stood when the defendant became a stockholder and the debt was contracted, and it is to that that the defendant must be held. The Legislature could not, without overturning the contract relations between the parties established by the statute, assume to substitute a different liability, and make it retroactive, as they have.

It is contended, however, that the defendant is discharged by the acts of the plaintiff, by which others who were held for the obligation have been released. It seems that, at the time the loan was made by the plaintiff to the City Trust & Banking Company, a note was taken, which the nine directors of the company personally indorsed and guaranteed; bonds of the Hammond Ice Company, of the par value of \$300,000, being also pledged as collateral security. Upon the subsequent default and failure of the company, by arrangement with the directors these bonds were credited at \$20,000, which was conceded to be their full value, and the directors themselves paid over various sums, amounting in the aggregate to \$15,000; the plaintiff thereupon agreeing to release them from anything further. The debt which was originally \$100,000 was thus reduced to \$65,000, which still remains unsatisfied, and many times exceeds the amount for which the defendant is sought to be held. But it is claimed that his obligation as a stockholder is that of a guarantor or surety, and therefore secondary to that of the corporation, which is primary and principal, and that, by the action of the plaintiff which has been referred to, he has therefore been prejudiced and discharged. But this clearly misconceives the law. However it may be under different statutory provisions, under the one which is here in question stockholders, as already pointed out, are responsible to creditors directly; and while it is true that the debt in each case is that of the corporation, so that, as between it and the stockholder, there is the distinction suggested, as between the creditors and the stockholder there is not. The undertaking of the latter is not that of a surety or guarantor, but of a principal debtor, to whom the creditor may at once resort. 8 Cycl. Law Proc. 677; 26 Am. & Eng. Encycl. (2d Ed.) 1021; 3 Clarke & Marshall, Private Corp. §§ 810, 814. It has accordingly been held that a creditor does not have to exhaust his remedies against the corporation before proceeding against stockholders. *Hager v. Cleveland*, 36 Md. 476; *Conn. Riv. Sav. Bank v. Fiske*, 60 N. H. 363. Nor will the latter be discharged by an extension of time given to the corporation without their consent. *Harger v. McCullough*, 2 Denio, 119. Neither would they, therefore, by such action as is complained of here. It is true that in *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456, the obligation is considered by *Boyd, J.*, to be "in the nature of a guaranty

to creditors that, in the event of the failure of the corporation to pay its debts and liabilities, each stockholder would contribute towards their payment to the extent of the par value of the stock held by him." But this was spoken in another connection, and is not to be carried outside of that. It cannot have been intended to qualify the numerous decisions of the same court, referred to above, by which the obligation of the stockholder has been held to be direct and primary.

But it is said that the defendant at the time the debt was contracted, as well as at the date of the failure of the company, was the owner of but 100 shares, and should not, therefore, in any event, be held for more than \$2,000—double their par value. Unfortunately, however, the disposition which he made of one-half of his stock to Mr. Slagle in May, 1900, was never entered on the books of the company as prescribed by its rules, and it is by these that his liability is to be determined. The law is well established that, where a transfer is required to be so entered, there must be a substantial compliance therewith, in order to relieve the original holder. 26 Am. & Eng. Encycl. Law (2d Ed.) 1039; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; *Magruder v. Colston*, 44 Md. 350, 22 Am. Rep. 47; *Baltimore Retort Co. v. Mali*, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304; *Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; *Kerr v. Urie*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493. As is said in *Magruder v. Colston*, 44 Md. 350, 22 Am. Rep. 47:

"Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock. Until this is done they continue to be stockholders, within the meaning of the [United States] banking act. \* \* \* If creditors must look beyond the legal title as exhibited by the books of the bank, they can never know against whom to proceed."

And in *Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373, it is said:

"The entry of the transfer on the books of the company is required, not for the translation of the title, but for the protection of the parties and others dealing with the company, and to enable the company to know who are its stockholders entitled to vote at meetings, and to receive dividends when declared."

In the present instance the defendant, although warned by the certificate, simply indorsed it and turned it over to the party to whom he sold the shares; making no effort to see that the transfer was completed by a proper registry of the transaction on the books of the company. In this he failed in his duty both to himself and to all concerned, and cannot escape the consequences of his neglect upon the showing which is now made.

The rule for judgment non obstante veredicto in favor of the defendant on the points reserved is discharged. Let judgment be entered on the verdict in favor of the plaintiff for \$4,000, with interest and costs.

## In re DUCKER.

(District Court, W. D. Kentucky. June 25, 1904.)

1. **CONDITIONAL SALES—EFFECT—STATE LAW.**

Under the law of Kentucky, a conditional sale of merchandise, by which the seller retains title until the purchase price is paid, and has power to retake possession if the price is not paid, is an absolute sale, with a mortgage back to secure the price.

2. **BANKRUPTCY—CONDITIONAL SALES—FAILURE TO RECORD—CREDITORS—PRIORITY.**

Ky. St. 1903, § 496, provides that no deed of trust or mortgage conveying real or personal estate shall be valid against creditors until acknowledged or proved according to law and lodged for record; and Bankr. Act July 1, 1898, c. 541, § 64, cl. "b" (5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], provides that debts owing to any person who by the laws of the states or the United States is entitled to priority shall have priority in bankruptcy. *Held*, that the seller of merchandise to a bankrupt under an unrecorded conditional sale, though entitled to priority as against prior creditors of the bankrupt, was not entitled to priority as against subsequent creditors without notice, notwithstanding such creditors had no lien or "hold" on the property, other than the caveat afforded by the bankruptcy adjudication.

Wm. M. Smith, for the Shuster Co.  
Benjamin F. Washer, for trustee.

EVANS, District Judge. The bankrupt resided in this district, and did business here. Upon his petition the adjudication in this case was made February 29, 1904. Various creditors proved their debts as unsecured. The T. B. Shuster Company, of New Haven, Conn., having made a conditional sale (as it supposed) to the bankrupt of certain merchandise which it delivered to him in Louisville, Ky., the parties entered into a written agreement by which it was stipulated between them that the title to the merchandise should remain in the seller until the purchase price was paid, and power was given to it to retake possession of the property and remove it if it was not paid. This being precisely such an agreement as the settled law of Kentucky makes an absolute sale, with a mortgage back to secure the purchase money (*Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146; *Welch v. Cash Register*, 103 Ky. 30, 44 S. W. 124, and cases cited), the Shuster Company has proved its claim as a secured debt. The date of the agreement was January 11, 1904, and, though it was in writing, it was not recorded. Subsequently to that date, and after the delivery of the merchandise in Louisville, certain persons extended credit to the bankrupt, and thereby created the debts they have proved in these proceedings. In the contest between them and the Shuster Company, before the referee as to priority of right in the proceeds of the merchandise, the referee ruled against the Shuster Company; holding that, as it had failed to put its mortgage to record, the subsequent creditors had the better right. The company has brought the case here for a review of that ruling.

It may be remarked that certain of the bankrupt's debts were created before January 11, 1904, and before the merchandise was delivered.

This class of debts may be laid to one side, as, under the Kentucky law, the holders of such antecedent demands have no interest in the questions now under discussion, unless the proceeds of the merchandise shall exceed the amount necessary to pay the subsequently created debts and that of the Shuster Company. Of this there is no possibility. The claims of the subsequent creditors, however, depend upon a provision in the Kentucky Statutes about which there has been much discussion, which it cannot be said has removed all doubt—doubt which the discussion itself, rather than the statute, has largely created.

Under the provisions of section 64 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], among the "debts which have priority" are—clause "b" (5)—those "owing to any person who by the laws of the states or the United States is entitled to priority." It is therefore essential to ascertain whether the Shuster Company, holding an unrecorded mortgage, is, or whether the subsequent creditors are, entitled to priority of payment out of the merchandise or its proceeds. The Kentucky statute must furnish the test. This is expressly demanded by the clause in the bankruptcy act just quoted, so that upon that statute alone, and its construction by the Kentucky Court of Appeals, the decisions of the pending questions must turn. The applicable Kentucky Statute (1903) is in this language:

"Sec. 496. No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

This statutory provision has, in substance, long been embraced in the laws of the state, and, as has been stated, has been the subject of many, not to say various, judicial decisions. I need not undertake to enumerate or state them. Suffice it for the present to say that certain propositions respecting its construction have at last been definitely settled. Among them are the following: (1) That debts created before the mortgage cannot have priority over it, whether it is recorded or not; (2) that, whether recorded or not, the mortgage is good as between the parties thereto; (3) that it is good, also, as against a creditor who has notice thereof before extending the credit in which his debt originates; (4) that it is good against a purchaser who before the purchase has notice of it; and (5) but for one expression in *Wicks v. McConnell*, 102 Ky., at page 439, 43 S. W. 206, and the opinion of Judge Cochran in the case of *Sewell, Bankrupt* (D. C.) 111 Fed. 791, we would say unhesitatingly that it had also been settled that the proper construction of section 496 requires that every subsequent creditor, who, before his debt was created, did not have notice thereof, should be adjudged an absolute priority over the holder of the secret and unrecorded mortgage. The expression to which I have referred in the opinion of the Court of Appeals in the case of *Wicks v. McConnell*, 102 Ky., at page 439, 43 S. W. 206, is this:

"On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith

to have given credit are protected, as against the secret lien, *in the rights which they secure by their diligence in the levy of their execution or attachment.*"

If this was meant to be a construction of the words of the statute, it would be our duty to follow it; but a very careful examination of the whole subject has brought me to a clear conviction that, in adding the words I have italicised in the above extract, the court did not mean nor intend to make that state of case a condition precedent to priority in the subsequent creditor, but used the language to emphasize the clearer equities of the case with which the court was dealing. In that case there was in fact an attachment, so that there was no occasion to discuss, and the court did not discuss or mean to dispose of, a case where there was no attachment. The question was not mooted. The words we have noticed were incidental, and there is nothing in the reasoning of the court in the opinion, nor in its discussion of the interpretation of the statute, which shows or suggests that the element of the case thus referred to furnished the *ratio decidendi*. The record showed that in that case there was a levy of an attachment, but I am very confident that the decision must have been the same without it, when former rulings are considered in connection with the statute itself, which in no way expressly makes an attachment or execution necessary to defeat the priority of the secret mortgage. Suppose the debts have been created subsequently to the mortgage, but too late for an attachment (for which there must always be statutory grounds) or an execution; must such a creditor lose a priority expressly given by a statute which in no way mentions either?

Under the Kentucky Code of Practice, in order to obtain an attachment against the property of a debtor, the plaintiff in the action must, under section 196, file an affidavit showing the existence of at least one of the grounds of attachment prescribed by section 194, viz.: (1) The nonresidency of the defendant; or (2) his absence from the state for a period of four months; or (3) that he has departed from the state with intent to defraud his creditors; or (4) that he has left the county of his residence to avoid the service of a summons; or (5) so conceals himself that a summons cannot be served upon him; or (6) either that he has removed or is about to remove a material part of his property from the state, without leaving sufficient to pay his debts; or (7) that he has sold or is about to sell his property, with a fraudulent intent to cheat his creditors. It is obvious that the instances in which an attachment can be obtained must be comparatively rare. Under the Kentucky law and practice, especially in the country districts, where the terms of court are far apart, it may take some time to get a judgment and an execution thereon. All this being true, a most important inquiry is, can it be that the Legislature, instead of making the invalidity of the secret mortgage as against subsequent creditors and purchasers without notice depend alone upon nonrecord, as the statute expressly provides, intended, also, without hinting at it in the section referred to, to make that invalidity also depend upon the possibility of obtaining an attachment or execution, in this way giving the creditor who was fortunate enough to discover grounds of attachment, or to have a term of court sufficiently early to get a judgment,



all the benefits of the statute, while other meritorious creditors, whose cases come literally within the express language and spirit of the legislation, are cut out? With the lights before me, I must answer this inquiry in the negative. My conviction is clear that the Legislature did not so intend, and that the section of this statute we have quoted does not warrant any such discrimination against subsequent creditors who could not find grounds for an attachment or opportunity for an execution. The Legislature did not, in my judgment, intend to make the right of the subsequent creditor without notice turn upon the conduct of his debtor in affording or not affording grounds of attachment. The rights of that class of creditors, *quoad hoc*, were made to depend upon the laches of the secret mortgagee in not putting his mortgage on record, and upon that alone. A proceeding in bankruptcy is an equitable proceeding, and it seems clear to me that one of the true grounds upon which to rest the superior rights of the subsequent creditors over those of the secret mortgage is that they have a superior equity growing out of several considerations, viz.: (1) The basis of credit given to the debtor by the possession of the property, which aids in creating grounds of belief that he is able to pay; (2) the failure of the mortgagee to give them the necessary warning to the contrary, by putting his mortgage upon the public records; and (3) it is more equitable, where one of two innocent persons must suffer, that he should be made to do so who by his negligence and fault leads the other into a situation of danger. I suppose it would be admitted, and it apparently has been admitted, that the language used by the Legislature in section 496, Ky. St. 1903, has been considerably "pulled and hauled" by the judicial efforts exerted upon it; but, leaving out of view the case of a "purchaser for a valuable consideration without notice," it would seem, when reduced, under the guidance of the decisions, to its ultimate analysis, that the section must be construed as if it read thus: "No mortgage conveying an equitable title to personal estate shall be valid against subsequent creditors having no notice thereof before the creation of their debts until such mortgage shall be acknowledged, or proved according to law and lodged for record." This seems to be the exact meaning of the statute when considered with respect to the rights of subsequent creditors and the holders of a secret mortgage. Nothing is said about an execution or attachment or other "hold" upon the property. As to subsequent creditors without notice, the invalidity of the mortgage is made absolute, unless it is acknowledged and lodged for record. Undoubtedly there may be room for the suggestion that considerable interpolation has been indulged in by the courts, but that does not concern us, where there has certainly been a "construction," whether by that means or another. What we are to ascertain is the "construction," and not the route thereto. As far as the Court of Appeals has gone, we must follow; but, even granting that it was forced to interpolate in order to fix the legislative meaning, that would not authorize this court to make additional interpolations. In the analysis of the section just attempted, there does not, under the Kentucky decisions, seem to be any room left for adding a proviso to the effect that the mortgage shall not be

valid, "provided the subsequent creditor has in some way and by some judicial process secured a hold on the property mortgaged." It seems to me that such a proviso was not, by construction or otherwise, interpolated into section 496 by what was decided in *Wicks v. McConnell*, and that it was never meant by the court to be so interpolated. This view is different from that of Judge Cochran, as announced in *Re Sewell* (D. C.) 111 Fed. 791, and it has been with hesitation and regret that I have found myself unable to agree with the conclusion reached by my learned Brother upon a question of Kentucky law; but it consoles me somewhat to reflect upon the frequency with which our Court of Appeals has failed to agree with itself about the construction of the same statute. Certainly, in his opinion in the *Sewell Case*, Judge Cochran, up to a certain point, stated with admirable and characteristic clearness the result of the numerous decisions construing section 496; but planting his conclusion upon the statement above copied from Judge Du Relle's opinion in *Wicks v. McConnell*, 102 Ky. 439, 43 S. W. 206, Judge Cochran, in the *Sewell Case*, at pages 792, 793, 111 Fed., says:

"In the very nature of things, it is only subsequent creditors without notice who have in some way got a *hold* on the property that are in the contemplation of the statute. *Without such a hold, they are not in a position to raise an issue with the holder of the unrecorded deed or mortgage.*"

It is in the language which I have italicized that Judge Cochran expresses the view that in some way the subsequent creditor must get a "hold" on the mortgaged property before he can litigate, and he seems to be of opinion that such a hold can only be obtained by an execution, attachment, or similar process. With all deference, it seems to me that there are other ways to raise such an issue between the parties as will enable the court to determine their respective rights. Certainly this may be easily done in a bankruptcy proceeding. It has been done in this case. And there is much force in the suggestion made at the argument in behalf of the subsequent creditors that in such proceeding the adjudication itself is, in effect, an attachment for the benefit of all creditors, and a caveat to all the world. *Mueller v. Nugent*, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866. If this be sufficient, then the subsequent creditors have a hold on the property, and even the view of Judge Cochran seems possibly to be met. Besides, as already pointed out, section 496 in no way makes—and certainly does not in terms make—the rights of subsequent creditors dependent upon their suing out attachments or obtaining judgments upon their debts. To require them to do either solely in order to put them in position to litigate with the secret mortgagee would not only be outside of the statute, but would usually defeat the equitable advantage the statute intended to give them over the concealed mortgage. This, we think, was not intended, and especially when lodging the mortgage for record is such an easy and simple proceeding. In short, it seems to me that this superadded condition cannot be supported except by reading into section 496 a provision which the Legislature did not actually put there, and which the Court of Appeals has not put there by construc-

tion, unless it did so in *Wicks v. McConnell*. As already indicated, it does not appear to me that the court in this case intentionally attempted or intended to do so.

It seems to me, therefore, that in this case the rights of the Shuster Company must be subordinated to those of the creditors who became such subsequent to the mortgage, and without notice thereof. The ruling of the referee to that effect is approved and affirmed, and, in administering the fund arising from the sale of the merchandise delivered by the Shuster Company, the referee will be governed by the views herein expressed, to wit, the priority of the Shuster Company in the proceeds of the merchandise to which its mortgage applies will be subordinated to the payment of those creditors of the bankrupt whose debts were created subsequent to the delivery of that merchandise to the bankrupt, provided that if, as to any of such subsequent debts, the Shuster Company shall in due season and in proper form allege and prove that, at the time it was created, the creditor had notice of the Shuster Company's mortgage such creditor shall be postponed to the Shuster Company. The burden of proof as to such notice will be upon the Shuster Company. *Calais S. S. Co. v. Van Pelt*, 2 Black, 378, 17 L. Ed. 282; *Carr v. Callaghan*, 3 Litt. 371, 372. That is to say, if the company asserts that a creditor had notice of its mortgage, it must prove the fact thus affirmatively alleged.

A decree accordingly may be entered.

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### SIMONDS v. GEORGIA IRON & COAL CO.\*

(Circuit Court, N. D. Georgia. July 9, 1904.)

#### 1. TRIAL—INSTRUCTIONS—CONFINEMENT OF RECOVERY TO PLEADINGS.

In an action for injuries to a servant, plaintiff alleged certain acts of negligence, and later offered to amend by alleging that he was ordered into the place where he was injured, and went there under fear of punishment. The court rejected this amendment on the ground that it would introduce a new cause of action, and charged the jury that plaintiff could not recover by reason of being ordered into the place where he was injured, if he was injured from that cause alone, separate and apart from any other act of negligence. *Held*, that in so far as the case was affected by the offer to amend, and by evidence which might have been introduced as to the act of negligence charged in the amendment, there was, in view of the instructions, no error of which defendant could complain.

#### 2. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING—VARIANCE.

In an action for injuries to a servant, evidence *held* to show that plaintiff was injured by the swinging of a scale board, as alleged in his petition, and not by reason of having been ordered under the scale board, as alleged in a rejected amendment.

#### 3. SAME—CONVICTS EMPLOYED BY LESSEE—QUESTION OF ACCIDENT.

In an action by a convict for injuries sustained by him while in the service of a lessee of the state, where the whole evidence showed that the injury was caused by a known risk of the service, the question of accident was not in the case, and it was unnecessary for the court to charge thereon.

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\*Affirmed by Circuit Court of Appeals, 133 Fed. 1019.

#### 4. SAME—ASSUMPTION OF RISK.

A convict who is leased out by the state to an employer cannot recover for injuries which he sustains by having voluntarily placed himself in a position of danger, but, as he does not engage in the service of his own free will, he does not assume the risks visible in, and ordinarily incident to, the service, which a free man engaging therein would be charged with having assumed.

C. L. Pettigrew and George L. Bell, for plaintiff.  
Rosser & Brandon, for defendant.

NEWMAN, District Judge. The first question to be considered on this motion for a new trial is that raised by reason of an amendment offered by plaintiff's counsel and rejected by the court. The plaintiff offered to amend by alleging that the plaintiff was ordered under the descending scale board, and went under it in fear of punishment, and was injured. When the court rejected this amendment the plaintiff proceeded with the case, and went to the jury on the other grounds of negligence. These were, as stated in the charge of the court: First, in putting him to work in a dangerous place; second, in allowing the scale board used in hoisting materials from the pit to run down upon him negligently and without warning; third, in allowing the scale board to run at a dangerous rate of speed, and in a sidewise motion; and, fourth, in having no appliances sufficient to control the speed of the scale board. It is claimed now that the plaintiff's testimony showed that the accident occurred as he sought to set up in the amendment, which was rejected, and consequently he ought not to recover. It is claimed that the immediate cause of his injury, according to his own evidence and that of the witness Springfield, was his being ordered under the descending scale board, and going in in consequence of such orders.

The court instructed the jury upon this subject as follows:

"It is urged by defendant's counsel that the plaintiff seeks to recover here because he was ordered by the foreman, Brown, under the descending scale board, and was injured by reason of having been so ordered. The court has held, in passing upon the pleadings in this case, that this would be a distinct and a new cause of action in this case, and that it could not be set up here as a distinct and affirmative ground for recovery. The court so instructs you now that the plaintiff cannot recover by reason of being ordered by the foreman, Brown, under the descending scale board, if you believe he was injured from that cause only, and separate and apart from, and without reference to, the other grounds of negligence which have been referred to."

I think the case, so far as it was affected by this offer to amend, and by the evidence of the plaintiff and of Springfield as to the plaintiff having been ordered under the descending scale board, was fairly put before the jury by this instruction. The case was in a somewhat peculiar and unusual situation, but I do not see how the defendant can complain of any injury to it by the direction given to the case in this respect.

¶ 4. Risks assumed by servant, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

An examination of the plaintiff's evidence fails to show what is contended for by the defendant's counsel on this branch of the case. This is an extract from the plaintiff's testimony:

"Q. You say you went back into the cut? Where was the scale board when you went back? A. It had swung off at the other end from where I was at work."

And this also:

"Q. Can you state how much work you did from the time you went back, until you saw the scale board on the other side? A. I did not do any. I stooped over to pick up my pick, and went to raise it up, when it struck me in the back. Q. What kind of a motion did that scale board have when you saw it on the other side? A. It swung over that way pretty fast. Q. Did it have any other motion at the same time? A. Not as I remember. It swung over that way. When Brown hollered like he did, I jumped off right in here. It was over at that end, and as it came back it struck me."

It will be seen from this statement of plaintiff that at the time he went back to work the scaleboard was, as he expressed it, "at the other end of the pit." And this does not sustain the contention of counsel for defendant, as I understand his contention. A person would not be likely, even under the compulsion of fear of whipping, to go to certain injury, and possible death, by walking immediately under one of these descending scale boards, so that a fair view of the matter, and that indicated by the extract from the testimony, is that the plaintiff went back into the pit and started to go to work while the scale board was swinging on the other side of the pit, and it could not be told exactly where it would descend.

Springfield's testimony, so far as it relates to this subject, is as follows:

"A. Well, sir, when that scale board come out it was at one end. I taken up the scale board, and these men that were picking where I would take up the scale board. I taken the scale board up, and brought it back, and gave signals to stop, and motioned it was going a little too fast; and, when it got about twelve feet below where I was going to let the scale board down, it stopped sudden, and that gave it a swing. I called out 'Watch out for Ella' (I had so much talking to do), and I waited until it got about halfway back. I gave the signal to drop it, and, as I gave the signal, Mr. Brown hollered out: 'By God! you all quit work. Wait until the captain comes with the whip.' This man was standing to one side as I looked to see if the men was out of the way. John was about 8 feet closer than the others, and, as I gave the signal to let it down, the next I saw was a man's foot with a pick in his hand, and, as I seen that, I threw up my hand; and this man in the tower—hoisting man—he come to the door and said: 'Why in hell don't you stop it in the right place?' Q. What kind of a motion did that scale board have in coming down? A. As it come down it was swing backward and forward across the hole. Q. How far did it swing at that time? A. Sometimes it would not be swinging very much. Q. I mean at this time—at this particular time how far did it swing? A. It was swinging from about one end of the hole to the other—clear across the hole." And again: "Q. If there had not been any swinging there, and let down slowly, would it have hit John, in the position where he was? A. No, sir."

So that, even from Springfield's testimony, it appears that it was the swinging of the scale board that caused it to strike the plaintiff. It may be seriously doubted, in view of this evidence of the plaintiff and of Springfield, whether any instruction with reference to the

proposed amendment was proper. But even if it was proper, I think it was covered by the instructions as quoted above.

The next question in the case which ought to be mentioned is the claim of counsel for defendant that the court instructed the jury if the defendant was guilty of negligence in either of the four respects claimed by the plaintiff, and which have been referred to above, that the plaintiff was entitled to recover, unless he was himself guilty of contributory negligence. The particular thing with regard to this, as I understand it, is that there was no evidence either upon the subject of this being a dangerous place to work, or that the appliances used by defendant were not sufficient to control the speed of the scale board. I think an examination of the whole record will show that there was enough evidence to require the court to put the case before the jury on both grounds. The contention of the plaintiff was that this was a dangerous place to work, and he offered evidence as to its size, and how the men were engaged in working, and how these scale boards were raised, and also how the signals were given; and I did not think it was a case for the court to say that it was a safe place to work, but, rather, that it was a question for the jury. I think so now.

With reference to the appliances to control the speed of the descending scale boards, it is only necessary to refer to the testimony of Dr. Atkinson, without reference to the other testimony, to show that there was evidence which made it the duty of the court to submit the question to the jury.

The testimony of Joel Hurt and George Hurt on this subject was clear and forcible as to the character and sufficiency of the appliances for the purposes intended. But even with this strong testimony for the defendant, it was a question for the jury to determine.

The next question in the case arises from the claim of counsel for the defendant that the court did not instruct the jury that if the plaintiff's injuries were caused by an accident, pure and simple, without negligence on the part of any one, he could not recover. The court did, at the request of counsel for defendant, instruct the jury as follows:

"The burden is on John Simonds to show not only that he got hurt, but that he got hurt by reason of the negligence of the Georgia Iron & Coal Company. The mere fact that the accident occurred is not of itself, and in the absence of other circumstances, sufficient to show any negligence on the part of the Georgia Iron & Coal Company, nor any reason why there should be any recovery against it in this case."

Assuming that this does not cover the suggestion now made on this point, I do not believe that such an instruction was required under the facts of this case. The court instructed the jury, as was proper, as follows:

"Free persons, entering into a contract of service with an employer, take the risks of the dangers which are visible, and naturally an ordinarily incident to such service. This is not true of convicts engaged in a particular service, such as this question here. They engage in it without their consent, and without their free will being exercised in the matter. This does not mean, however, that a convict can carelessly and negligently place himself in a dangerous position, and then recover for injuries received in con-

sequence thereof. It is the duty of a convict, as well as of a free man in the same service, to exercise ordinary and reasonable care and diligence; and if such convict voluntarily and freely incurs unnecessary risks, and puts himself, of his own volition, in a position of danger, he cannot recover, any more than a free man, under like circumstances, in the same service."

I believe, in view of the place at which the plaintiff was put to work by the defendant company, the situation with reference to the descending scale boards, one of the dangers of this employment and this work was that those engaged in the pit might be struck by the descending scale board. The whole evidence seems to show this. The evidence showed that these convicts engaged in this work had been warned to be careful, and to look out for these descending scale boards. It shows that a person was kept on the side of the bank to give signals of the descent of the scale board, and it seems, if the signals were not given properly, or were not heard, or misunderstood, that those engaged in this work were liable to be struck by the descending scale board. So it is unnecessary to hold on this branch of the case that there was any particular negligence about this on the part of the company, but only that the necessity of using care to avoid these descending scale boards was one of the incidents of the service. It required observation and alertness on the part of those who engaged in this work to protect themselves. If so, it seems necessarily to have been a risk of the service, and, that being true, and if it was right to instruct the jury that the plaintiff did not assume the ordinary risks of the service, as it certainly was, then it would hardly be fair to state to the jury, if it was an accident, pure and simple, the plaintiff could not recover. If it was simply an accident, it was simply a risk of the service, under the undisputed facts of this case. Reflection about the matter has confirmed me in the opinion I entertained during the trial that the question of an "accident, pure and simple," is not in this case.

I think, therefore, that the law of this case was fairly stated to the jury, and it was then a question for the jury to determine upon the facts. They found that the plaintiff was entitled to recover, and fixed the amount of the recovery.

Counsel for defendant, in his brief filed on this motion, clearly and tersely states his position on this question, which is indicated by an extract as follows:

"It is true that the convict cannot select the particular place at which he is to work, nor the particular tool to be used. But the law, when it makes him a convict, takes the place of his will, and selects for him the class of place in which he shall work, and the class of tools which he shall use. This legal selection, instead of his will selection, is the penalty he pays for violation of the law. The free man takes voluntarily the risks incident to his occupation. The convict takes the risk as a part of his penalty for the law's violation. When the lessee hires a convict, he takes him just as he does a free man, so far as accidents incident to the business or concern. The lessee is responsible only for such wrong as he does the convict. That he must work in certain classes of places and at certain classes of business is the command of the state, and not that of the lessee. This being true, if he is hurt as a result of pure accident, the incident of the business that the state, not the lessee, forces upon him, then the lessee is not responsible. The law says: 'I have taken charge of this man. For the next year he must work

at mining. I will work him, or I will permit you to work him. I have already condemned him to the accidents that are incident to the business. With that you have nothing to do, from that you can't relieve him. But you must furnish a reasonably safe place, and tools of like safe character. I have not condemned him to work in unsafe mines, nor with unsafe tools; and, if you add to his sentence by forcing him to do so, you will be liable."

If this be the law, the instruction given by the court was erroneous, and the defendant was entitled to a different instruction. But I am wholly unable to agree with this view of the law. In my judgment, the law of the case is as it was given to the jury, and as stated herein.

One of the grounds in the motion for a new trial is that the court erred in instructing the jury as to the measure of damages. I do not understand it to be seriously urged that the verdict was so excessive as to require the court to interfere on that ground. The extent to which the plaintiff was injured was so apparent that there could hardly be any claim that the verdict was excessive, if the plaintiff was entitled to recover at all. The question of negligence and contributory negligence was for the jury, and that they have determined.

Believing as I do that the law was fairly presented to the jury, I have no right to interfere with its verdict. Consequently the motion to set aside the verdict and grant a new trial is denied.

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In re SIEBERT.

(District Court, D. New Jersey. December 14, 1904.)

**1. BANKRUPTCY—POWERS OF REFEREE—INJUNCTION STAYING PROCEEDINGS IN STATE COURT.**

Under General Orders in Bankruptcy No. 12, § 3 (89 Fed. vii), which provides that an application for an injunction to stay proceedings of a court or officer of the United States or of a state "shall be heard and decided by the judge," at least in the district of New Jersey, where the rules adopted pursuant to Bankr. Act July 1, 1898, c. 541, § 38, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], vest referees with such jurisdiction as may be delegated to them under the bankruptcy act "and the general orders of the Supreme Court," a referee has no power to grant an injunction staying a proceeding in a state court, and such an order is void.

In Bankruptcy. On rule to show cause.

Myers & Goldsmith, for the rule.

Lewis R. Conklin, opposed.

LANNING, District Judge. On June 7, 1904, the New Jersey Foundry & Machine Company secured a judgment in the city Court of the City of New York against Julius H. Siebert for \$718.81. On the same day execution was issued and returned unsatisfied. On June 10th an order was made by the City Court directing Siebert to appear on June 14th for examination in supplementary proceedings. He failed to appear, and his default was noted. On June 16th Siebert filed in this court his petition in voluntary bankruptcy, and on the same day he was adjudged bankrupt, and the



cause referred, by a general order, to one of the referees of this court. On June 18th that referee, upon the petition of the bankrupt, issued an order to the following effect:

"That New Jersey Foundry & Machine Company, their agents, servants or attorneys, be, and they hereby are, enjoined and restrained from further proceeding upon a judgment obtained by them against the above-named bankrupt in the City Court of the City of New York, or from further proceeding with an examination of said bankrupt in proceedings supplementary to execution, wherein the said New Jersey Foundry & Machine Company is the judgment creditor and the above-named bankrupt the judgment debtor, for twelve months from the date of adjudication herein, or, if the bankrupt should apply for his discharge within that time, then until the hearing and determination of such application. This order being made subject to the determination of the judge of said court upon the application contained in the annexed petition."

On July 11th the attorney of the execution creditor filed in the New York court his affidavit on which he secured a rule requiring Siebert to show cause why he should not be punished for contempt of the New York court in disobeying its order returnable June 14th. On the hearing of this rule he was adjudged guilty of contempt, which judgment, on appeal to the New York Supreme Court, was affirmed. The present application is that the New Jersey Foundry & Machine Company and its attorney be punished as and for a contempt of the authority of this court in disobeying the order of its referee. I have concluded that the application must be denied. General Order 12, § 3 (89 Fed. vii) promulgated by the Supreme Court of the United States, provides that "applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge." Loveland, in his work on Bankruptcy (2d Ed.) p. 112, refers to the above order as one limiting the powers of referees. Collier, however, (4th Ed.) p. 128, refers to the language of section 38 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], as conferring, not on the Supreme Court of the United States, but on the several District Courts, the power to fix the limits of the jurisdiction of referees. The language of that section is that:

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to \* \* \* perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

It will be observed that section 38 of the bankruptcy act excepts from the jurisdiction of referees questions concerning applications for discharges and applications in relation to compositions, while section 3 of general order 12 (89 Fed. vii) adds to these two exceptions any application for an injunction to stay proceedings of a United States court or a state court, or of an officer of either of such courts. This section of general order 12 is new, and not modeled upon any rule or order promulgated under any previous

bankruptcy act. When it was framed, section 38 of the present bankruptcy act must have been before the draftsman, and the decision of the Supreme Court to insert such a limitation upon the powers of referees must have been reached after due consideration, and under the supposed power conferred upon the Supreme Court, not by section 38, but by section 30, of the bankruptcy act (30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]), which provides that "all necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

The power to issue orders to stay proceedings in the state courts should be exercised with care, and with due regard for the rule of comity that should be observed between courts of bankruptcy and the state courts. It is only in bankruptcy cases that a federal court can enjoin a proceeding in a state court. Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581]. Section 11 of the bankruptcy act (30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]) provides that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

This section authorizes the stay to be made either by the state court in which a suit may be pending at the time of the filing of a petition in bankruptcy or by the bankruptcy court. Ordinarily, the application for such stay should, in the first instance, be made to the state court. *In re Geister* (D. C.) 97 Fed. 322. The possibilities of collision between federal and state courts by the exercise of the power referred to are apparent. These possibilities are increased by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), providing that when, because of insolvency, a receiver has been put in charge of the property of a corporation by the order of a state court, that act, notwithstanding the property is thereby in custodia legis, shall be deemed one of bankruptcy. In the case of *Watts and Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, there was a clash between a state court and a bankruptcy court over a question concerning the custody of the property of an insolvent corporation. Mr. Chief Justice Fuller, in the course of his opinion, said:

"We cannot but express our regret at the unfortunate collision between the two courts, and the belief that the considerate observance of the rule of comity is adequate to avert such occurrences."

If there be any doubt as to whether the power to issue injunctions to stay proceedings in state courts is withheld from referees by the third section of general order 12, there can be no doubt but that by the rules of this court such power is withheld from them. Rule 6 provides that:

"The clerk shall mail a copy of the order of reference to the referee, and thereafter all proceedings, except such as are required by the act or by the general orders to be had before the judge, shall be had before the referee."

**Rule 25 reads as follows:**

"The referees heretofore or hereafter appointed for the District of New Jersey are hereby respectively vested with the jurisdiction which, by the bankruptcy act of July 1st, 1898, and the general orders of the Supreme Court, promulgated at the October term of 1898, the court or judge may delegate to or confer upon said referees; and they are respectively empowered and authorized to do all acts, take all proceedings, make all orders and decrees and perform all duties so authorized to be delegated by said act and said general orders without special authority in each case and under the general authority conferred by this order."

**And rule 21 reads as follows:**

"When a motion for an injunction is pending, or is about to be made, the referee may, in order to prevent injury to the property of the bankrupt, or otherwise, grant a temporary restraining order staying proceedings until the hearing and decision of said motion. In case all parties in interest agree that said motion be heard by the referee in charge, they may file with the referee a written stipulation to that effect. The decision of the referee on such motion shall be filed with the clerk, and if the referee decides that an injunction shall issue, an order to that effect may be made by the judge."

Under these rules, a referee has no power to issue an injunction. If, by consent of the parties in a case, he acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. The judge of the court, and he only, may then, if the decision of the referee be that an injunction should issue, make an order for injunction. The referee may also, without consent of the parties, in order to prevent injury to the property of the bankrupt, grant a temporary stay of judicial proceedings; but such stay should be but for a few days, and only until the applicant can have an opportunity to move for an injunction before the judge. Such has been the general practice in the district of New Jersey. It is probable that the referee in the case at bar had this practice in mind when he inserted in the order issued by him the provision that it was "subject to the determination of the judge." The insertion of this provision, however, left the order without efficacy even as a temporary stay.

The conclusion reached is that the order of the referee was invalid. The rule to show cause must therefore be discharged.

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**GREENFIELD v. UNITED STATES MORTGAGE CO. OF SCOTLAND,**  
Limited, et al.

(Circuit Court, E. D. Arkansas, N. D. December 20, 1904.)

**No. 54.****1. EQUITY—CLOUD ON TITLE.**

Where plaintiff is the owner and in possession of real estate, and there is an outstanding claim, which on its face appears to impair plaintiff's title, but which may be shown by extrinsic proof to be invalid, plaintiff is entitled to maintain a bill to quiet his title and to remove such claim as a cloud thereon, without having first established his title in several actions at law.

## 2. SAME—FEDERAL COURTS—JURISDICTION—AMOUNT INVOLVED.

Where plaintiff sued to quiet title and to set aside a deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest, and costs, the amount involved, for the purpose of determining the jurisdiction of the federal Circuit Court, was the value of the land, and not the amount required to redeem.

In Equity. On motion to remand.

The complainant filed her bill in the chancery court of Jackson county, state of Arkansas, to remove as a cloud on her title to certain lands two deeds, under which the defendant mortgage company claims title to the same realty. The plaintiff, who is in possession of the premises in controversy, claims to be the owner thereof, and charges that on April 23, 1901, she, being then a married woman, was by force and threats compelled by her husband to execute a mortgage, in the nature of a trust deed with powers of sale, to the defendant Carlisle, as trustee, for the purpose of securing a loan made by the mortgage company to her husband, she receiving no part of the consideration, nor was the loan for the benefit of her separate estate. She also charges that the loan was usurious, and, under the laws of the state of Arkansas, absolutely void. That on the 13th day of March, 1903, the defendant Carlisle, under the powers contained in the mortgage deed, caused said lands to be sold for a default in the payment of the debt secured by it, and at such sale the mortgage company became the purchaser of the lands. She further charges that before the expiration of a year, within which time she was, under the laws of the state of Arkansas, permitted to redeem the premises from the foreclosure sale, she offered to do so, and tendered to the mortgage company the sum of \$1,192, the amount of the sale, with interest and costs, which was refused by it. The prayer of the bill is that the mortgage deed, as well as the deed executed by the trustee to the mortgage company under the foreclosure, be canceled as a cloud on her title; or, if the court finds that the mortgage was valid, that she be permitted to redeem the lands from the sale upon payment of the sum of \$1,192, which would be full satisfaction of the mortgage debt, interest, and costs. In due time the defendants, by proper proceedings, removed the cause from the state court to this court, alleging in their petition for removal that the matters in controversy exceeded in value the sum of \$2,000, exclusive of interest and costs. Complainant now moves to remand the cause, upon the ground that the matter in dispute does not exceed in value the sum of \$2,000, exclusive of interest and costs.

Jones & Jeffries, for complainant.

T. E. Hare, for defendants.

TRIEBER, District Judge. Whether, in an action to redeem from a mortgage, the jurisdiction of a national court is to be determined by the value of the land or the amount of the mortgage debt is immaterial, and need not be determined in this cause, as the main object of this bill is to cancel, not only the mortgage deed, but also the deed of the trustee, executed by him under the foreclosure proceedings to the mortgage company, which deed vests in the purchaser the entire fee to the estate. The prayer for relief, so far as it asks for a redemption, is only in the alternative in case the court

¶ 2. Jurisdiction of circuit courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 86 C. C. A. 459.

holds that the mortgage and sale made thereunder are valid. Therefore the only question involved in this proceeding is whether, in an action to quiet title and remove a cloud on complainant's title, which cloud is caused by a mortgage for less than \$2,000, but which mortgage has been foreclosed and a deed executed to the purchaser, the jurisdiction of the court is to be determined by the value of the land or the amount of the mortgage debt.

The allegation in the petition for removal that the value of the land exceeds \$2,000 is not controverted. In fact, upon the argument, it was admitted that it was in excess of \$2,000.

While at one time a bill of this kind could not be maintained unless the title of the complainant had been established in several actions at law, the modern rule is that it is not necessary that the complainant party should have been subjected to several actions of ejectment and been successful in them. It is sufficient if he is the owner and in possession of the premises, and there is an outstanding claim which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; 6 Am. & Eng. Enc. Law, 150. The action may, in fact, be appropriately termed an action to try title by equitable proceedings, for the party in possession, being unable to maintain an action of ejectment against one claiming the lands, but out of possession, is remediless at law to quiet his title, and can only obtain adequate relief in an equitable proceeding of this kind. The title to the premises can be as effectually settled in such an action as it could be in an action of ejectment, especially if the defendant by cross-bill asks for confirmation of his title, which is frequently done, and has been done in this instance. The party in possession need not await the pleasure of the adverse claimant, who is out of possession, to have his rights determined.

In this country dealings in real estate constitute a very material part of the commercial transactions; conveyances and mortgages of that class of property amount to millions of dollars daily throughout the Union. To facilitate them and simplify conveyances has been the object of a great deal of legislation. The registration acts were the first, and probably the most important, step in that direction. In many states the old equity rule that a bill to quiet title can only be maintained by one in actual possession has been modified by statute, so that it does not apply to wild and unoccupied lands. In the language of Mr. Justice Field, in *Holland v. Challen*, *supra*:

"It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed: for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litiga-

tion and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. \* \* \* An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement." 110 U. S. 21, 3 Sup. Ct. 498, 28 L. Ed. 52.

A party in possession of lands, under claim of ownership, cannot maintain an action of ejectment to establish or settle his title, and, unless a court of equity can settle the title in a proceeding of this nature, not only will he be unable to find a purchaser for his lands, but he will not feel justified in making valuable improvements thereon himself as long as there is an outstanding title of record which is good on its face, although it may be shown by evidence dehors the record to be absolutely void. The law courts being remediless to grant the relief, courts of equity must be resorted to, and there is no reason why such courts should not assume jurisdiction and settle the title to real estate, when called upon by the party in possession thereof, upon the ground that no complete and adequate remedy can be obtained in a court of law. Public policy requires a speedy settlement of land titles, and courts of equity in this country for over 50 years have unhesitatingly assumed jurisdiction, for the purpose of settling them, when the common-law courts were powerless to do so.

If this view is correct, it follows as of course that the matter in controversy in this cause is the title to the lands, and not the mortgage debt, which was extinguished by the sale and the purchase by the beneficiary under the mortgage.

In *Stinson v. Dousman*, 20 How. 461, 15 L. Ed. 966, the action was to recover \$481.16 as rent under a contract whereby Dousman covenanted to sell and convey to Stinson the lands for \$8,000, to be paid, with interest at the rate of 10 per cent. annually, in three installments. The first installment of \$2,000 and interest was to be paid the 1st of September, 1854. The vendee was required to keep the buildings insured, and engaged that the policy, in case of loss, should inure to the benefit of the vendor, and also agreed to pay all the taxes accruing from May, 1853. The contract concludes with an express condition:

"That in case of failure by the vendee to perform either of the covenants on his part, the vendor was at liberty to declare the contract void, and thereupon to recover, by distress or otherwise, all the interest which shall have accrued upon the contract up to the day of declaring the contract void, as rent for the use and occupation of the premises, and to take immediate possession thereof."

Upon appeal to the Supreme Court it was objected that the matter in dispute was not of the value of \$1,000; that the only matter involved was the annual rent, which amounted to \$481.16; and therefore that that court was without jurisdiction. But this objec-

tion was overruled by the court and its jurisdiction sustained, Mr. Justice Campbell, in delivering the opinion of the court, saying:

"But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract."

In *Smith v. Adams*, 130 U. S. 167, 175, 9 Sup. Ct. 566, 569, 2 L. Ed. 895, Mr. Justice Field, speaking on this subject of quieting titles, says:

"Thus a suit to quiet title to parcels of real property, or to remove a cloud therefrom by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected."

In *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* (C. C.) 43 Fed. 545, which was a bill to quiet title, the court held, quoting from the syllabus, that:

"For the purpose of determining the jurisdictional amount in a bill to quiet title, the whole value of the property, the possession or enjoyment of which is threatened by defendant, is the measure of the value of the matters in controversy."

The same principle was announced and followed by the United States Circuit Court of Appeals for the Ninth Circuit in *Woodside v. Ciceroni*, 93 Fed. 1, 35 C. C. A. 177.

In *Simon v. House* (C. C.) 46 Fed. 317, the proceeding was to set aside certain conveyances as fraudulent, and the court held that:

"In a proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiff's title, the matter in dispute is the value of the land in controversy."

Supposing the premises sold under a mortgage executed to secure an indebtedness of \$2,100 had, owing to the fact that the improvements were destroyed after the execution of the mortgage, been reduced in value to a sum less than \$2,000, could the mortgagor maintain an action of ejectment for the recovery of the premises, or could the party in possession maintain an action of this kind, in a court of the United States, upon the ground that the mortgage debt was of sufficient value to authorize it, although the value of the lands, which was the only thing in controversy, was less than the amount necessary to enable a national court to assume jurisdiction?

This being an action involving the title to lands, and their value being in excess of \$2,000, the necessary diversity of citizenship existing, it was properly removed, and the motion to remand must be overruled.

## IN re E. J. ARNOLD &amp; CO.

(District Court, E. D. Missouri, E. D. April 15, 1904.)

**1. GAMING—GAMING TRANSACTIONS—RECOVERY OF MONEY ADVANCED.**

Money lost in betting on horse races, or advanced with the intention that it shall be used in a gaming venture, in the profits of which the person advancing it is to share, cannot, as a rule, be recovered back.

**2. FRAUD—PROCUREMENT OF MONEY—TITLE OF PERPETRATOR.**

Persons who secure money from depositors by false and fraudulent representations of material facts take no title to the money as against the depositors, who may, on discovery of the fraud, take legal steps to regain possession thereof.

**3. BANKRUPTCY—PROCUREMENT OF MONEY BY FRAUD—REMEDY OF CREDITORS.**

Creditors in bankruptcy proceedings may invoke the principle that money procured by fraud may be recovered back, by proving a demand for money had and received by the bankrupt to their use.

**4. SAME—PROVABLE CLAIMS—GAMBLING TRANSACTIONS—MONEY OBTAINED BY FRAUD.**

Creditors of bankrupts, who advanced money to them on the strength of their fraudulent representations that they were earning sufficient profits to pay a stipulated weekly interest; that they were solvent and responsible, and had on hand sufficient money to pay all their depositors the amount of their deposits; and that they did not pay dividends out of receipts—may prove up their claims in bankruptcy proceedings, although they knew and intended that the money which they advanced to the bankrupts would be used in gambling ventures.

**5. SAME.**

In so far as a purpose to engage in gambling, in pursuance of which one party has advanced money to the other, has not been executed, the one advancing the money may sue to recover the same, or establish a claim therefor in bankruptcy proceedings.

**6. SAME—STATUS OF CREDITORS.**

A creditor who moves to expunge an allowance in favor of another creditor stands in the shoes of the bankrupts, and has no higher rights than they.

**In Bankruptcy.**

Sale & Sale, for petitioner.

J. W. Noble and E. L. Gottschalk, for Gottschalk Printing Co.

ADAMS, District Judge. On July 2, 1903, the petitioner, Williams, formally made proof of a claim against the estate of the bankrupts in the sum of \$5,200. Afterwards the Gottschalk Printing Company made proof of a claim against the estate, and, on the standing thus secured, moved to expunge the claim of Williams. The referee heard evidence on this motion, and on March 3, 1904, made an order sustaining the same, and further ordered that the claim of Williams be expunged and disallowed. The question so decided is brought here for review.

The reasons assigned for expunging petitioner's claim are, in effect, that the money which had been deposited by the petitioner with the bankrupts, and which was the basis of the claim proved up by Williams, was intrusted to the bankrupts by Williams with the intent and purpose that the same should be used for the joint account of both in gambling ventures; that is, betting on horse



racers. It is undoubtedly true that money lost in betting on horse races cannot be recovered, and it is also true that the law does not generally lend its aid to relieve any one of several parties who knowingly and intentionally embark in a gambling venture. These general principles are well understood; but this case, in my opinion, presents other facts which distinguish it from cases falling under the general doctrine just announced.

A brief résumé of the facts found by the referee will disclose the nature and the extent of the business of the bankrupts, their method of soliciting deposits, and their method of operation: It appears that the bankrupts embarked in their business with a capital of only \$10,000; that they commenced business in St. Louis some time in the year 1900, and continued the same until February 10, 1903, the date of the commencement of these proceedings in bankruptcy. The general character of the business conducted by the bankrupts was the same from the beginning to the end. By means of circulars, pamphlets, and newspaper advertisements, which were widely distributed, they invited the public to send to or deposit with them money to be used by them in conducting a racing stable, in buying race horses, "making books" on horse races, and betting on such races. The depositor received what the bankrupts termed a "certificate of deposit," being a receipt and contract by the terms of which the bankrupts agreed to share their profits with the depositor, to the extent of a certain stipulated per centum each week. At the outset the so-called profits agreed to be shared with the depositor were fixed at 5 per cent. per week; later on they were reduced to 3 per cent; and in December, 1902, they were reduced to 2 per cent. All of the receipts or certificates issued contained a provision that the deposit might be withdrawn, in whole or in part, at any time, on demand and the surrender of the certificate. The circulars, pamphlets, and advertisements distributed over the country by the bankrupts were well devised to impose upon the credulous and secure their confidence. The public was assured that the bankrupts' firm was no "get rich quick," "pay dividends out of receipts," or "bust up" concern. By means of lavish expenditures for advertising, the business was developed to large proportions. The daily receipts of money were sometimes as large as \$38,000. At the date of the institution of bankruptcy proceedings against the firm, its total liabilities on account of deposits of money made with it exceeded \$3,000,000, and the number of depositors exceeded 13,000. The patrons were given to understand that the weekly interest of 5, 3, or 2 per cent., as the case might be, was all paid out of the profits of the business; that the capital was unimpaired; and that any creditor or patron might withdraw his money at any time, upon giving a certain specified notice. It appears from the evidence that the only business conducted by the bankrupts with a view of earning money was the racing of their horses upon race tracks, and betting upon the results of horse races. The evidence shows, as reported by the referee, that during the whole three years of the business of the bankrupts the result of their betting ventures was from \$250,000 to \$300,000. This amount, therefore, may fairly be

said to be all of the money that the bankrupts ever earned; and this was all they ever had, besides their capital of \$10,000 and the amount of the deposits made with them by their patrons. I also gather from the report of the referee that this sum of \$250,000 to \$300,000 was the gross amount of receipts from betting on horse races. The referee finds, and the evidence supports him in that finding, that the bankrupts actually conducted a business of the general character represented by them in their circulars, and that the persons who deposited money with them did so with the purpose and expectation that such money would be used in the business of breeding and racing horses and betting on horse races. From this general finding the referee reaches the conclusion that the patrons and the bankrupts were engaged in an unlawful venture, and that the petitioner in this case, who was one of the patrons, has no legal right to share in the assets of the bankrupts. I may here remark that the total amount of all of the property which came into the hands of the trustee in bankruptcy, when reduced to cash, will not exceed \$100,000. In addition to the foregoing, the referee makes a finding of facts substantially as follows: That many of the most material representations made by bankrupts to the public, and upon the faith of which deposits of money were made with them, were entirely untrue. Bankrupts represented in their advertising matter that they had from the commencement of their business earned, were then earning, and expected thereafter to earn, sufficient "profits" to pay to depositors the stipulated amounts weekly, and that they were solvent and responsible, and had on hand sufficient assets to pay to all depositors the amount of their deposits, and that they did not pay dividends out of receipts, and that they conducted a legitimate business, licensed by state and city. The referee further reports that it is entirely clear from the evidence that these last-mentioned representations were false. He says "that the bankrupts at all times paid the so-called weekly profits out of the money received from depositors, and that their ability to continue paying the so-called weekly profits, and to meet the demands of withdrawing depositors, depended upon their securing a constant increase in the amount received from depositors."

From the foregoing facts, I have reached the conclusion that to deal with this case on the theory that the depositors and the bankrupts were simply engaged in an unlawful or gambling business is altogether too superficial a view. From the facts found by the referee, it is undoubtedly true that the bankrupts secured money from their so-called depositors by false and fraudulent representations of material facts. On familiar principles of law, they thereby secured no title to the money as against a depositor, who might, on discovery of the fraud, take legal steps to regain possession of his money. The law is equal to this emergency. It treats the fraudulent actor as a trustee for his victim. A constructive trust is created by the fraud practiced in securing the money. And in bankruptcy proceedings, which are summary and equitable in their nature, the creditors may invoke this salutary principle of law by

proving up a demand for money had and received by the bankrupts to their use. The vice inherent in the ultimate use to which the money was to be put does not, in my opinion, present any obstacle to a recovery based upon the fraud and imposition practiced in securing the money, and the trust thereby created. The assurances held out by the bankrupts to the public that they had earned from the commencement of their business, and were then earning, sufficient profits to pay to the depositors the stipulated weekly interest; that they were solvent and responsible, and had on hand assets sufficient to pay all their depositors the amount of their deposits; and that they did not pay dividends out of receipts—were representations of material facts, and intended and adapted to accomplish the purpose of securing deposits. The public obviously acted on these attractive representations, and parted with their money in the belief that they were true, when in fact they, and each of them, were grossly false. Notwithstanding the fact that the depositors were informed that their money, when obtained, would be used in gambling ventures, I think the actuating cause of their parting with their money was the false representations which gave them assurance of success. In such circumstances, the parties cannot be said to be in *pari delicto*. The greater wrong rested in the fraud practiced upon the public in securing the money. The purpose and object of the contract involved in the payment of the money to the bankrupts by the depositors may have been in contravention of the law, and to this extent the parties may have been in equal fault. But as said by Chief Justice Poland in a similar case (*Hinsdill v. White*, 34 Vt. 558):

"The plaintiff was induced to enter into [the contract] and to pay the money by false and fraudulent representations of the defendant. In such cases, are the parties to be regarded as in *pari delicto*, so that the law will regard them as equally reprehensible, and refuse to interfere?"

The learned chief justice answered this question in the negative.

Without analyzing other authorities to which my attention was called in argument, I may safely state that the conclusion reached in this matter is supported by the principles announced in the following cases: *Catts v. Phalen & Morris*, 2 How. 376, 11 L. Ed. 306; *McLaughlin v. National Mutual Bond & Investment Co.* (C. C.) 64 Fed. 908; *Timmerman v. Bidwell*, 62 Mich. 205, 28 N. W. 866; *Jones v. Inness*, 32 Kan. 177, 4 Pac. 95; *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419; *Preston v. Hutchinson*, 29 Vt. 144; *Hodge v. Sexton*, 1 Hun, 576; *Pomeroy's Equity Jurisprudence* (2d Ed.) § 403.

The result reached might be justified in another way: The small amount of money now in the hands of the trustee is the remnant of the depositors' money, not actually expended in gambling. There is abundant authority for the proposition that even though the original purpose of the parties was to engage in an unlawful venture, like gambling, yet, in so far as that purpose has not been executed, a *locus penitentiae* is open to the depositors, and the courts of the land are open to them to recover their money. But I prefer to put this decision on the broad ground that the bankrupts

in this case shall not be allowed to secure deposits of money to the amount disclosed by this record by false and fraudulent representations of material facts, and afterwards be heard to say that the depositors shall not recover it from them, on the ground, forsooth, that the ultimate use to be made of the money was to bet on horse races. The right of recovery in this case is based upon the false representations of material facts, and the fraudulent acquisition of money thereby. Any other conclusion than that now reached would permit the bankrupts, after successfully swindling the community out of millions of money, to bid defiance to their creditors and enjoy the fruits of their iniquity, unrestrained.

The Gottschalk Printing Company, the creditor who moved to expunge the allowance in favor of Williams, must stand in the shoes of the bankrupts. Its right can rise no higher.

It results that the action of the referee in expunging the claim of the petitioner, Williams, must be disapproved, and it is ordered that the order heretofore made expunging the same be set aside, and that in lieu thereof there be an order allowing the claim of the petitioner as made.

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THE SEEFÄHRER.

(District Court, N. D. California. November 25, 1904.)

No. 13,298.

**1. SHIPPING—SHORTAGE OF CARGO—EXPLANATION OF WEIGHTS GIVEN IN BILL OF LADING.**

Bills of lading, which, although containing formal recitals of the weight of a commodity received, also contain a clause, "Weight, measure and contents unknown," are not conclusive against the vessel as to the exact weight; and the uncontradicted testimony of the master and mate that the commodity was not weighed when taken on board, and that all that was actually received was delivered, is sufficient to exonerate the ship from liability for a prima facie shortage.

In Admiralty. Suit to recover for short delivery of cargo.

Powell & Dow, for libelants.

William P. Humphreys, for respondent.

DE HAVEN, District Judge. This is a libel to recover damages for an alleged short delivery of freight shipped at Antwerp on the German ship Seefahrer. The bills of lading issued by the master acknowledged the receipt on board the Seefahrer for delivery at San Francisco of 145,503 pounds of canary seed and 5,649 pounds of poppy seed; but, in addition to this general statement of weight, they also contain the printed clause, "Weight, measure and contents unknown." The vessel delivered at San Francisco 138,743 pounds of canary seed and 4,331 pounds of poppy seed, and, in addition to this, tendered to the libelants 2,955 pounds of canary seed, which they refused to receive on account of its damaged condition. I am satisfied from the evidence that the condition of this rejected seed was such that the libelants were not bound to receive it, and were justified in abandoning the same to the ship.

This disposed of, the only question that remains is whether the ship is liable for the nondelivery of the 1,318 pounds of poppy seed and the remaining 3,805 pounds of canary seed, necessary to make the full weight named in the bills of lading. The libelants offered no evidence as to the number of pounds of seed actually received on board the Seefahrer, other than the bills of lading. In answer to this, the claimants called the master and mate of the ship as witnesses, and they testified that the seed was not weighed when put on board of the Seefahrer at Antwerp, that many of the sacks were not full of seed at that time, and that all of the seed actually received by the ship was delivered or tendered to the libelants at San Francisco, with the exception of a few pounds which may have been consumed by rats during the voyage. This evidence, uncontradicted as it is, must be accepted as true, and is sufficient to discharge the vessel from its prima facie liability to deliver the full number of pounds stated in the bills of lading. The bills of lading, containing, as they do, the clause, "Weight, measure and contents unknown," are not conclusive upon the ship as to the number of pounds of freight shipped, but are open to explanation. The case of *Planters' Fertilizer Mfg. Co. v. Elder*, 101 Fed. 1001, 42 C. C. A. 130, is in point. In that case the court said:

"As the bills of lading in the present case, although containing formal recitals of specific weights, which were made, probably, for the purpose of determining the amount of freight to be paid, were indorsed in one case, 'weight and quantity unknown,' and in the other, 'weight unknown,' there can be no question that the same are open to explanation in regard to the exact amount of goods delivered to the ship; and, as the bills of lading accompanied the drafts drawn by the shippers and paid by the consignee, the consignee was undoubtedly charged with notice that the recitals of weights contained in the bills of lading were purely formal."

See, also, *The Ismaele* (D. C.) 14 Fed. 491.

The ship is undoubtedly responsible for the value of the seed eaten by rats during the voyage, but that 5,100 pounds of seed were thus consumed is extremely improbable. In my opinion, \$50 would cover all the damage sustained from this cause.

The libelants' loss on account of the failure of the ship to deliver in good condition the 2,955 pounds of canary seed actually shipped was \$181.75.

It follows from this that the libelants are entitled to recover as damages the sum of \$231.75 and costs. So ordered.

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#### DR. MILES MEDICAL CO. v. GOLDTHWAITE.

(Circuit Court, D. Massachusetts. September 20, 1904.)

No. 1,804.

#### 1. INJUNCTION—INDUCING VIOLATION OF CONTRACT—INJURY TO BUSINESS.

Complainant is a manufacturer of proprietary medicines put up in distinctive packages, and sold only through wholesale and retail dealers in drugs, with whom complainant has contracts providing that the medicines shall be sold only at certain uniform prices, and to no other dealer than such as become parties to the contract, a list of whom is furnished by complainant. Defendant, a retail druggist who was not on the list, procured the medicines through another, who in selling them violated

his contract, and in selling the same defendant mutilated the packages so as to prevent identification, and in some cases emptied the original package into a plain package. He also sold the medicines at prices below those fixed by the contract. *Held*, that such contracts were legal and enforceable, and that complainant was entitled to an injunction restraining defendant from interfering with the contracts by inducing their violation by parties thereto, and also from selling the medicines as complainant's in other than the original packages and at the contract price, to the injury of complainant's business and good will.

In Equity. Suit for injunction.

The following statement of facts is condensed from the brief for complainant and the evidence:

Complainant, the Dr. Miles Medical Company, manufactures proprietary medicines, all of which are made under formulas which are secret, and are sold under trade-names, and in packages of peculiar and distinctive style, in all of which complainant possesses, as far as it legally may, an exclusive monopoly. The company has adopted an elaborate system to control the prices, at wholesale and retail, of its articles, and insure sales of its articles at uniform prices. The retail prices are stamped on the packages and labels, and are advertised. Contracts with the wholesale or jobbing druggists and with retail druggists, and a system of numbers stamped on each package, and report cards from wholesale dealers, enable each package to be traced and identified. The provisions of the wholesale contract are, in substance, that the wholesale agent, in consideration of being supplied with Dr. Miles' remedies at certain prices, agrees to sell the same only at certain prices, and only to people whom the Dr. Miles Medical Company shall previously designate, and to fill out the proper cards and slips which are inclosed in the packing cases, making the number of the slip correspond with the number on the package, and filling out in the body of the card the name of the purchaser. The names of the persons to whom the Dr. Miles Medical Company permits its goods to be sold by the wholesaler are contained in lists which are furnished the wholesaler from time to time, and contain only the names of persons who have entered into the regular retail contract with the Dr. Miles Medical Company. The retail agency contract provides, in substance, that, in consideration of being furnished with the Dr. Miles Medical Company's preparations, he will sell only at certain prices stipulated in the contract and marked upon the packages of medicines, that he will stamp his name upon the packages, and that he will not sell to any other druggist, either wholesale or retail, who has not entered into a contract with the Dr. Miles Company.

The evidence showed that defendant was a retail druggist who had not entered into the contract with complainant; that he had, however, procured a supply of complainant's medicines through a dealer who was a party to the contract, and was selling the same at less than the contract price when complainant's medicines were called for, but first mutilating the packages and destroying the numbers thereon so they could not be identified, and in some cases emptying the medicine from the original package into a plain package, in which it was given to the purchaser without any direction as to its use. There was also evidence that such practice tended to impair the confidence of purchasers in the remedies.

The bill prayed for a temporary and permanent injunction restraining defendant from interfering with complainant's contracts by inducing, or attempting to induce, dealers who had entered into the same to sell him goods in violation thereof, and, second, from selling complainant's medicines otherwise than in the original packages without alteration. The order, entered on a motion for preliminary injunction, and the final decree awarded injunctions in conformity to such prayer.

George L. Huntress, Frank F. Reed, and Edward S. Rogers, for complainant.

F. M. Rixby, for defendant.

**COLT, Circuit Judge.** On this motion for a preliminary injunction the defendant has filed no counter affidavits in reply to the moving affidavits of the complainant, nor has the defendant's counsel filed any brief in reply to the exhaustive printed brief of the other side. From these circumstances it looks as if the defendant did not seriously intend to contest the granting of this motion. The complainant has taken the testimony of the defendant. Upon that testimony alone, and especially upon that portion of it in which he states his connection with George M. Lilley, and the manner and circumstances under which he obtained the proprietary medicines in question through Lilley, the complainant is entitled to a preliminary injunction. See *Sperry & Hutchinson Co. v. Mechanic's Clothing Co.* (Circuit Court of the United States, District of Rhode Island, February 15, 1904, opinion by Judge Brown) 128 Fed. 800.

Motion granted April 25, 1904.

September 25, 1904, on complainant's motion, the preliminary injunction was made perpetual.

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**NOYES v. CRAWFORD.**

**SAME v. CRAWFORD et al.**

(Circuit Court, N. D. Iowa, W. D. October 4, 1904.)

Nos. 357, 358.

**1. FEDERAL COURTS—JURISDICTION—ASSIGNED CLAIMS.**

In an action by an assignee of a chose in action to recover the contents thereof, the jurisdiction of the federal Circuit Court depends on whether the action might have been brought by the assignor when it was commenced, if he had made no assignment thereof; and hence where there was a diversity of citizenship at that time between both the assignor and the assignee and defendants, it was immaterial that at the time of the assignment the defendants and the assignor were citizens of the same state.

**2. SAME.**

Where plaintiff alleged a cause of action for damages for a conspiracy charged to have been committed by defendants against plaintiff after he became the owner of a contract for the sale of real estate by assignment, the citizenship of plaintiff's assignor of the contract was immaterial to the jurisdiction of the federal Circuit Court, the cause of action alleged never having existed in his favor.

Submitted on Demurrer to the Petitions upon the Ground that the Court has no Jurisdiction of the Actions.

T. D. Higgs, F. F. Faville, and E. C. Herrick, for plaintiff.

Helsell & Shultz, Milchrist & Scott, and Jas. De Land, for defendants.

**REED, District Judge.** No. 357 is an action at law to recover damages for an alleged breach of contract to sell and convey real estate.

¶ 1. Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

No. 358 is an action at law to recover damages for an alleged conspiracy on the part of defendants to defeat plaintiff's title to the contract and land described therein, which is the same contract sued upon in No. 357. A demurrer by plaintiff to the answers of defendants in each case was being argued at the last term of court, when it was discovered that the averments of the petition in No. 357 failed to show a cause of action within the jurisdiction of the court, in that it failed to show the citizenship of Wm. J. Clemons, to whom defendant Crawford made the contract declared upon by plaintiff, and who assigned the same to plaintiff. The petition in No. 358 also failed to show the citizenship of said Clemons. The plaintiff was thereupon permitted to amend the petitions in this respect, and he has done so by alleging "that at the time the actions were commenced the said Wm. J. Clemons was a citizen of the state of Missouri, and could have brought an action upon the contract sued upon if no assignment of the same had been made." To the petitions as so amended the defendants demur upon the ground that they fail to show when Clemons assigned the contract to plaintiff; the contention being that if he so assigned the same before he ceased to be a citizen of Iowa he had parted with all interest under the contract, and his subsequent removal from Iowa, and becoming a citizen of another state, would not vest a right in the plaintiff to sue upon the contracts in this court.

This identical question was decided in this circuit against the contention of the defendants in *White v. Leahy*, 3 Dill. 378, Fed. Cas. No. 17,551. In *Emsheimer v. City of New Orleans*, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042, the Supreme Court, upon consideration and review of the authorities, holds that the question of the jurisdiction of the Circuit Courts, in cases brought by the assignees of choses in actions to recover the contents thereof, depends upon whether or not the action might have been brought (at the time it was commenced) by the assignor if he had made no assignment of the same. If he could, then the assignee thereof, if a citizen of a state other than that of defendant, at the time the action is commenced, may sue thereon in the Circuit Court of the United States, though the assignment was made before the assignor ceased to be a citizen of the same state as the defendant, and *White v. Leahy* is cited with approval. These decisions are conclusive upon this court.

The case against Crawford and Sisson, No. 358, is an action for damages for a conspiracy or a tort alleged to have been committed by defendants against the plaintiff after he became the owner of the contract. The cause of action so alleged never existed in favor of Wm. J. Clemons, and the question of his citizenship, so far as such action is concerned, is not material. *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765.

It follows that the demurrer to the petition in each case must be overruled, and it is so ordered.



## In re GORDON SUPPLY &amp; MFG. CO.

(District Court, M. D. Pennsylvania. December 17, 1904.)

1. **BANKRUPTCY—APPRAISEMENT—PURPOSE OF.**

The purpose of the appraisal which is directed to be made by Bankr. Act July 1, 1898, § 70b, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, for which in the first instance he is to be accountable.

2. **SAME—MANNER OF MAKING.**

The particularity with which such appraisal is to be made is not indicated, and depends somewhat upon circumstances. It should, however, be general, and not special, and should not go into the detail practiced by a merchant taking an inventory of stock; only such particularity being indulged in as is sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value.

In Bankruptcy. On bills of appraisers.  
W. H. Jessup, for trustee.

ARCHBALD, District Judge. The bankruptcy act provides that all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers, who shall be appointed by and report to the court. Section 70b, Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]. The manifest purpose of this is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, and for which in the first instance he is accountable. The particularity with which it is to be made is not indicated, and must depend somewhat on circumstances, there being no set rule which can be laid down. It is not to descend into minutiae, however, nor go into the detail practiced by a merchant taking inventory of his stock. This is not only unnecessary, but it involves too much expense, and, as an economical administration is the cardinal rule of the bankruptcy law, it is not sanctioned thereby. An appraisal must be general, rather than special, only such particularity being indulged in as will be sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value. More than this is not expected, and therefore to be avoided; or at least, if indulged in, must be paid for by those who direct it, and not out of the estate. It is in this respect that the appraisal for which the present bills are rendered errs, and, as the same is true of several others which have recently been before the court, I am moved to give expression to this opinion for the guidance of the profession and others. The aggregate charges of the appraisers in this case amount to \$200; one of them claiming \$95, another \$80, and the third \$25, according to the number of days which were, respectively, spent by each in the performance of their duties. The rate charged—\$5 a day—is not out of the way, but the time is entirely beyond what was called for, the two whose bills are the largest having devoted the one 19 and the other 16 days to the work, which was extended over nearly 6 weeks. There is no question as to the completeness and accuracy of what was

done. The only thing to complain of is that it was done too well. I am informed that the appraisers not only went over the stock of hardware and supplies of the bankrupt company, shelf by shelf and package by package, but that they consulted invoices and price lists, making a calculation of trade discounts, as one would who wanted to know its value to the last dollar. This was a waste of labor, serving no useful purpose, and going far beyond anything intended by the law. The question is whether the work, having been done in this way, should be paid for, or whether the bills should be cut down to what they would amount to on the true basis. I am inclined, under all the circumstances, to approve them as they stand, indicating my views in this way for its effect on future cases, rather than on this one. Having acted in good faith, and without any one to give them direction, or to suggest the limit to which they should go, it hardly seems just to hold them to the rule now for the first time promulgated, however correctly it expounds the law. The bankruptcy law is still new, and we are all learning, and it will not do to hold to it too rigidly where it has not yet been construed and defined. I will therefore direct the payment of these bills by the trustee without deduction, but shall expect all parties to take note of what is here said, and to see to it that hereafter appraisement expenses are kept down to what they ought to be, and no more.

Bills approved.

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In re TIFFANY.

(District Court, S. D. New York. November 30, 1904.)

**1. BANKRUPTCY—LIENS OBTAINED THROUGH LEGAL PROCEEDINGS—SUBJECTING INCOME OF TRUST FUND.**

Code Civ. Proc. N. Y. § 1391, as amended by Laws 1903, p. 1071, c. 461, provides that in case of certain trusts the surplus of the income beyond the sum which may be necessary for the education and support of the beneficiary shall be liable in equity to the claims of his creditors in the same manner as other personal property which cannot be reached by an execution at law. *Held*, that a single creditor should not be permitted to acquire a lien on the income of a trust fund of which an alleged bankrupt was beneficiary through proceedings under such statute in a state court, at least unless after an adjudication the trustee should fail to institute proceedings for the benefit of all creditors within a reasonable time, such lien being one obtained through legal proceedings, which if acquired within four months prior to the filing of the petition in bankruptcy would have been rendered void by Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450].

In Bankruptcy.

Elisha W. McGuire, for the motion.

William V. Goldberg, opposed.

HOLT, District Judge. This is a motion by W. & J. Sloane to vacate as to them an injunction restraining creditors from interfering with the property of the bankrupt. By the will of the bankrupt's father a trust fund was created for the benefit of the bankrupt, out of

the income of which \$18,000 a year is paid to the bankrupt in weekly installments of \$346.16. On May 31, 1904, W. & J. Sloane recovered a judgment against the bankrupt for \$5,336.05 for necessities. An execution was issued thereon on the same day, which has been returned wholly unsatisfied. On October 28, 1904, an order was obtained in the New York Supreme Court by which it was ordered that an execution issue against the income of the trust fund, as provided for in section 1391 of the Code of Civil Procedure, as amended by chapter 461, p. 1071, Laws 1903. Upon such order an execution was issued to the sheriff of New York county, commanding him to satisfy the judgment out of the income payable from the trustees, to an amount equal to 10 per cent. of such income. On the same day a petition in bankruptcy was filed against the alleged bankrupt and a receiver appointed.

The beneficiary of this trust fund has no estate in the income which can be seized upon execution. The trust vests the whole estate in law and in equity in the trustee, subject only to the execution of the trust. By the statutes of New York it is provided that in the case of certain trusts the surplus of the income beyond the sum which may be necessary for the education and support of the beneficiary shall be liable in equity to the claims of his creditors in the same manner as other personal property which cannot be reached by an execution at law. A trustee in bankruptcy may bring a suit to enforce such liability. In *Re Baudouine*, 3 Am. Bankr. Rep. 651, 656, 101 Fed. 574, 41 C. C. A. 318.

If an adjudication shall be had and a trustee in bankruptcy appointed, the trustee can bring such a suit. If such a suit should result successfully, I think that no one creditor should be permitted to obtain a preference by obtaining a lien on the fund within four months before the bankruptcy. It is claimed that this lien is analogous to a mechanic's lien, which has been held not to be a lien obtained through legal proceedings, within the meaning of section 67f of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]. But I think that this lien is one obtained through legal proceedings, namely, by issuing the execution pursuant to the special order obtained.

My conclusion is that this motion should be denied, with leave to renew it if the trustee does not institute any proceedings to reach the trust fund for the benefit of creditors within 30 days after his appointment and qualification, or if he brings such proceedings and it is held in them that he is not entitled to recover.

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### VON BERNUTH v. UNITED STATES.

(Circuit Court, S. D. New York. December 12, 1904.)

No. 3,346.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—IMITATION SILK YARN—SIMILITUDE.

Imitation silk yarn, which is made from cotton waste subjected to a chemical process, whereby it loses its identity as cotton, and which resembles silk yarn in quality, texture, and use, is held, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205

[U. S. Comp. St. 1901, p. 1693], to be dutiable at the rate applicable to silk yarn, under paragraph 385 of said act (chapter 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]).

**On Application for Review of a Decision of the Board of General Appraisers.**

The decision in question (G. A. 5,257, T. D. 24,155) relates to an importation at the port of New York by Hardt von Bernuth & Co. The opinion filed by the Board of General Appraisers is as follows:

FISCHER, General Appraiser. The protest is against the assessment of duty at the rate of 30 per cent. ad valorem, under paragraph 385, Schedule L, § 1, c. 11, Act July 24, 1897, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], on certain so-called artificial silk yarns. This assessment was made in accordance with the board's decisions (G. A. 4,939, T. D. 23,110, and G. A. 5,081, T. D. 23,528), where merchandise of the character here in question was held not to be dutiable as manufactures of pyroxylin, under paragraph 17, Schedule A, § 1, c. 11, Act July 24, 1897, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1626], but dutiable at the rate here complained of, by virtue of the similitude clause; the board finding that the article was similar in quality, texture, and use to silk yarn. The importers now claim that the merchandise is more similar to cotton yarns, and is therefore dutiable as such under paragraph 302, Schedule I, § 1, c. 11, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1655], by virtue of the similitude clause. The alternative claim is made that it is dutiable at the rate of 20 per cent. ad valorem under section 6, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as a nonenumerated manufactured article.

At the hearing the importers introduced testimony to show that the yarns are made from cotton waste, that they require treatment in dyeing more nearly resembling the dyeing of cotton yarn than that of silk yarn, and that they are woven in the same manner as cotton yarns. It appears, however, from all the evidence in this case, and from the evidence in G. A. 4,939, which is made a part of this case, that all yarns of this character, whether made from silk waste or from cotton waste, are known as imitation silk, and that the fabric woven therefrom is known and sold as "nearsilk." It further appears that the yarns are produced by a process which is described in the letters patent covering the same and offered in evidence, as follows: "The process, which consists in dissolving cellulose, without decomposing the same, and causing the solution to flow in a thread or fiber like stream into a bath containing a precipitant of cellulose, whereby the latter is precipitated from its solution in a thread or fiber like form."

From this it follows that the merchandise as imported no longer consists of cotton, even though it may have been originally cotton waste, and not silk waste. Note *Meyer v. Arthur*, 91 U. S. 570, 23 L. Ed. 455. The contention that the yarns produced by the patented process are dyed and woven in a manner similar to such processes with regard to cotton yarns we do not consider as of weight; for this similarity, if in fact it exist, does not relate to material, quality, character, or use, which are the only points of similarity referred to in section 7, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1694]. The yarns are similar, however, to silk yarn (as was found in G. A. 4,939) in three of those characteristics, namely, quality, texture, and use, and are not similar to cotton yarns as to any of the characteristics named in section 7.

We therefore see no reason for modifying our ruling laid down in G. A. 4,939 and G. A. 5,081, and accordingly overrule the protest, and affirm the decision of the collector.

Frederick W. Brooks, for the importers.  
Charles D. Baker, Asst. U. S. Atty.

PLATT, District Judge. Judgment affirmed on the decision of the Board of General Appraisers.

## In re MILGRAUM &amp; OST.

(District Court, E. D. Pennsylvania. December 1, 1904.)

No. 1,804.

**1. BANKRUPTCY—CLAIMS—OBJECTIONS—CERTIFICATE OF REFEREE—LACHES.**

Petitioner presented a claim against a bankrupt on March 8, 1904, which was allowed on March 10th. On April 25th the trustee requested the referee to expunge the claim, which was denied on June 24th. Nothing further was done by the trustee until September 20th, when he presented a petition for review of the order of March 8th, in response to which the referee filed a certificate on September 22d, presenting his refusal to expunge for review instead of the original allowance. *Held* that, more than six months having elapsed before petitioner asked for a review, the certificate was barred by delay, whether it be treated as a petition to review the allowance of the claim, or the referee's refusal to expunge.

In Bankruptcy.  
See 129 Fed. 827.

Keator & Johnson, for James Talcott, creditor.  
Julius C. Levi, for petitioning creditors.

J. B. McPHERSON, District Judge. The application to dismiss rests upon the following facts: James Talcott, the petitioner, presented a claim against the bankrupts to the referee on March 8, 1904, which was duly allowed on March 10th. On April 25th the trustee requested the referee to expunge the claim, giving a reason that need not now be considered. Thereupon the referee heard testimony upon this request, and refused it on or about the 24th day of June. Nothing further was done by the trustee until September 20th, when he presented a petition asking for a review of the order of March 8th allowing the claim, in response to which the referee filed a certificate on September 22d, which seems to present his refusal to expunge as the question for review, instead of the original allowance in March. In this connection, I may be permitted to say again that a certificate should always state clearly and distinctly the precise question or questions for review. In the great majority of cases the report leaves nothing to be desired upon this point, but sometimes the question is not thus propounded, and has to be sought for at the cost of a good deal of time and trouble. In the present instance, however, the apparent difference between the trustee's petition and the referee's certificate is not of importance, because I am clearly of the opinion that, whatever the question may be that was intended to be certified to the court, the petition for review was too late. If the question is upon the allowance of the claim, then more than six months had elapsed before the petitioner asked for a review. If the question is upon the refusal to expunge, the period of delay was three months, and in either event I think the petitioner's inactivity was unreasonable. The time within which a review must be asked for is not specified either by the bankrupt act or by the general orders, but the text-writers and the cases agree that reasonable promptness must be used. Brandenburg (3d Ed.) § 696; Loveland (2d Ed.) p. 119; Collier (4th Ed.) p. 310; and

citations in notes to passages referred to. In the absence of a rule of the district court fixing the time within which the petition for review must be presented to the referee, each case must be judged upon its own facts, and in the case now under consideration the excuse offered for the delay does not seem to be sufficient.

The certificate of the referee must be dismissed.

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In re LINES.

(District Court, M. D. Pennsylvania. December 12, 1903.)

No. 346.

**1. BANKRUPTCY—STAYING PROCEEDINGS IN STATE COURT—DISTRESS FOR RENT.**

Where, after distress by a landlord, the tenant is adjudicated a bankrupt, the necessary effect is to put the property under the control of the bankruptcy court, which will stay further proceedings with the distress, and require the landlord to submit his rights to that court for adjudication.

In Bankruptcy. On petition to restrain landlord from proceeding with distress.

Mial E. Lilley, for petitioner.

Rodney A. Mercur, for landlord.

ARCHBALD, District Judge. The facts disclosed by the evidence are peculiar, and the legal results by no means clear, so that I shall content myself with deciding just what I have to. It is undisputed that after the distress had been made title to the goods, which was then in Mrs. Fannie Dryden, was transferred by her to her father, John M. Lines, the present bankrupt, and that he immediately filed a voluntary petition, and was adjudicated a bankrupt. The necessary effect of this was to put the property under the control of this court, and compel the landlord to seek redress here. What the exact consequence of this may be, I am not now prepared to say. The case is complicated by the fact that, according to the testimony of Mrs. Dryden and her mother, a new lease was made to the former for a part of the premises from April 1st; while the landlord's warrant was against Mr. Lines for rent which, in part, at least, antecedes that date. But as title is now back in Mr. Lines, the original tenant, and the goods at the time of the retransfer to him were upon the demised premises, it is a question whether they are not thereby liable again for the whole rent. Whatever legal liability there is, however, the bankruptcy court is competent to enforce it, and bound to recognize it; the landlord being limited, however, as a preferred creditor, to not exceeding one year's rent. In re Duble, 9 Am. Bankr. Rep. 121, 117 Fed. 794. The bankrupt has also claimed the goods under his \$300 state exemption, which introduces another cause for disputation. It is not possible to dispose of these conflicting claims in the present proceeding. The only thing I see to do is to stay the landlord's sale, and direct the trustee to take possession, after which the other questions will, no doubt, come up in their order.

The rule is made absolute, and an injunction is awarded against Job

P. Kirby, landlord, restraining him from a sale of the goods distrained for rent in arrear, and directing him to turn over the said goods to the trustee, without prejudice, however, to his rights, if any, by virtue of such distress to make claim upon the proceeds arising therefrom.

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THE DRUMCRAIG.

THE LOCH TROOL.

(District Court, N. D. California. November 29, 1904.)

No. 13,261.

1. COLLISION—DEFENSE OF INEVITABLE ACCIDENT—BURDEN AND MEASURE OF PROOF.

To establish the defense of inevitable accident in a suit for collision, the respondent has the burden of proving that the collision resulted from a cause against which human skill and foresight could not have provided in the exercise of ordinary prudence.

2. SAME—VESSEL BREAKING FROM MOORINGS.

The breaking of a ship from her moorings at a dock during a severe storm, and her drifting into collision with another moored vessel, *held* not due to inevitable accident, where there was such warning of the approach of the storm as required the master, in the exercise of ordinary care, to put out more fastening lines.

In Admiralty. Suit for collision.

Frank & Mansfield, for libellant.

Page, McCutchen & Knight, for claimant.

DE HAVEN, District Judge. This libel was filed by the owner of the ship Drumcraig, against the British ship Loch Trool, to recover damages for injuries sustained as the result of a collision between the two vessels. The collision occurred about 4 o'clock on the morning of March 10, 1904. The Drumcraig was lying safely moored alongside the wharf at Oakland Pier, in the harbor of San Francisco. The Loch Trool was moored at the same pier, and distant about a ship's length from the Drumcraig. The Loch Trool broke away from her moorings, and drifted into collision with the Drumcraig. It is claimed by the owners of the Loch Trool that the collision was the result of inevitable accident.

The burden of proving that such was the cause of the collision is upon the Loch Trool. The Louisiana, 3 Wall. 164, 18 L. Ed. 85; The Andrew Welch (D. C.) 122 Fed. 557. An inevitable accident is something that human skill and foresight could not, in the exercise of ordinary prudence, have provided against. The Pennsylvania, 24 How. 307, 16 L. Ed. 699. Upon consideration of the evidence, my conclusion is that this defense of inevitable accident has not been sustained. I think it is shown by a fair preponderance of the evidence that the storm, although a violent one, gave sufficient warning of its approach to have made it the duty of the master of the Loch Trool to put out more fastening lines before the ship broke from her moorings, and the failure to

do this constitutes negligence for which the Loch Trool must respond in damages.

There will be a decree in favor of the libelant, and the case is referred to United States Commissioner Manley to ascertain and report the amount of damages sustained by libelant.

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In re KNAUER.

(District Court, N. D. Iowa, W. D. December 22, 1904.)

No. 403.

**1. BANKRUPTCY—REFEREES—DUTIES.**

It is no part of the duty of a referee in bankruptcy to notify the bankrupt or his attorney of the date of expiration of the time for filing the petition for discharge, the bankrupt and his attorney being required to take notice thereof.

**2. SAME—DISCHARGE—FILING—TIME.**

Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides that any person, after the expiration of a month and within the next twelve months subsequent to being adjudged a bankrupt, may file an application for discharge, and if it appears to the judge that the bankrupt was unavoidably prevented from filing it within such time it may be filed within the next six months. *Held*, that where petitioner was adjudged a bankrupt on October 2, 1901, and his petition for discharge was filed with the clerk October 11, 1902, but was not presented to the judge until November 25, 1904, when an order of discharge was asked, the petition was not filed in time, and the discharge would be denied.

In Bankruptcy. On petition for discharge.

George A. Gibson, for bankrupt.

REED, District Judge. The adjudication of bankruptcy was October 2, 1901, upon the voluntary petition of the bankrupt, filed that date. The petition for discharge is dated September 22, 1902, but was not filed with the clerk until October 11, 1902. The referee certifies that on September 15, 1902, he notified, by letter, the attorney for the bankrupt that the year in which the petition for discharge should be filed would expire October 12, 1902. This was no part of the duty of the referee. The bankrupt and his attorney should take notice of the date of the adjudication, and see that the petition for discharge is filed within the year from such date. As stated above, the petition for discharge is dated September 22, 1902, and no reason whatever is shown why it was not filed at such time, or within the year from the date of the adjudication, except the letter of the referee stating that such year would expire October 12, 1902. This did not, however, prevent the bankrupt from filing it at the time of its date or within a day or so thereafter. The petition for discharge was not presented to the judge within 18 months after the adjudication, and leave obtained from him to file the same within such time, nor was it ever presented to the judge until November 25, 1904, when he was asked to grant the discharge. Upon



such facts the discharge must be denied. Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427].

It is ordered accordingly.

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In re SNYDER & JOHNSON CO.

(District Court, N. D. Illinois. July 11, 1904.)

No. 10,696.

**1. BANKRUPTCY—TRADING PURSUITS—SOLICITING ADVERTISEMENTS.**

A corporation engaged in the business of soliciting advertisements and placing them in newspapers at rates previously obtained from such papers is not engaged in a trading pursuit, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and cannot be adjudged an involuntary bankrupt thereunder.

In Bankruptcy. On exceptions to report of referee.

Ferguson & Goodnow, for petitioners.

John J. Symes, for Chicago Daily News Co.

James A. Brady, for bankrupt.

KOHLSAAT, District Judge. This cause comes before the court on exceptions to the referee's report, holding that the respondent is not a trader, or otherwise, within the meaning of the statute concerning bankruptcy. The respondent is a corporation organized under the laws of Illinois. Its business was that of soliciting advertisements, and then placing them in the newspapers, at rates previously furnished to it by the various papers. These rates were such that the respondent was able to realize a profit. They were in no sense agents of the newspapers, but, so to speak, sold the advertising to the papers. It would seem that to this extent they were traders in the general sense. The referee, however, found to the contrary; basing his finding on the decision of the Court of Appeals of this circuit in *Re Surety Guaranty Trust Co.*, 121 Fed. 73, 56 C. C. A. 654, in which case the court seems to hold that the statute applies only to persons trading in tangible property or chattels. Under this ruling, the referee is right.

The exceptions are overruled, and the report is approved.

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JOHN D. PARK & SONS CO. v. BRUEN et al.

(Circuit Court, S. D. New York. November 11, 1904.)

**1. FEDERAL COURTS—SUIT AGAINST DEFENDANTS IN DIFFERENT DISTRICTS—JURISDICTION.**

The practice in the Second Circuit follows a decision holding that Rev. St. § 740 [U. S. Comp. St. 1901, p. 587], which provides that where defendants reside in different federal districts in the same state an action may be brought in either, and a duplicate writ issued to the other district or districts, was not repealed directly by the judiciary act of March 3, 1887, as amended by Act Aug. 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), nor by implication by the provisions of section 1, that a suit shall be brought only in the district of which either plaintiff or defendant is an inhabitant.

On Demurrer for Want of Jurisdiction.

Morris & Fay (Henry T. Fay, of counsel), for complainant.  
Robinson, Biddle & Ward, for certain defendants.

HAZEL, District Judge. The complainant, a foreign corporation, is a citizen of the state of Kentucky. The defendants are citizens of the state of New York, some of whom are residents and inhabitants of the Southern District, others of the Northern, and still others of the Western District. A number of individual defendants, residing in the Northern and Western Districts, have appeared specially and filed a joint and separate demurrer upon the sole ground that the court has not jurisdiction of the person of such defendants. It is conceded that if section 740 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 587] was not repealed by the provisions of the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), the jurisdiction of the court over the demurrants is complete, and accordingly the demurrer must be overruled. The decisions upon this point are not entirely uniform. The prevailing practice, however, is controlled by the adjudication in *Goddard v. Mailler* (C. C.) 80 Fed. 422. In that case Judge Coxe, after carefully considering the question, decided that section 740 was not inconsistent with the later enactments and was neither expressly nor impliedly repealed. Hence it was held that two or more defendants, residents and inhabitants of different districts of the state, may be sued in either district. In *New Jersey Steel & Iron Co. v. Chormann* (C. C.) 105 Fed. 532, Judge Lacombe questioned the soundness of the holding in the *Goddard Case*, but nevertheless directed the issuance of a duplicate subpoena pursuant to section 740, and suggested that the controverted question be afterward raised by plea or demurrer, to the end that a final settlement thereof might be had on appeal to the Circuit Court of Appeals. No appeal, however, was taken. Therefore, in view of the prior decision in this circuit, under which the practice of issuing a duplicate writ by the clerk against defendants, who are residents of different districts, would seem to be upheld, the additional suggestions submitted by counsel for complainant on argument need not be discussed. The demurrer is overruled, with costs. The defendants may answer within 20 days.

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JOHN D. PARK & SONS CO. v. BRUEN et al.

(Circuit Court, S. D. New York. November 11, 1904.)

1. PLEA OF RES JUDICATA—MOTION TO OVERRULE—REFERENCE.

A plea in bar on the ground of former adjudication will not be overruled on motion where the record in the former action is not before the court, unless it clearly appears from the pleadings that the causes of action were not the same, but will be referred to a master in accordance with the usual practice.

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¶ 1. See Equity, vol. 19, Cent. Dig. § 410.

On Motion by Complainant to Overrule Plea.

Morris & Fay (Henry T. Fay, of counsel), for complainant.  
Robinson, Biddle & Ward, for certain defendants.

HAZEL, District Judge. According to the complainant, there are many essential differences of fact between this action and the action upon which defendants rely to support their plea in bar. The record of the Supreme Court of the state of New York, where the cause is alleged to have been tried, is not before me. The position of the complainant is that the bill and plea, when compared and examined, will show the allegations of the bill and the subject-matter of the former litigation to be essentially different. A superficial examination of the record, however, satisfies me that it would be better that the cause be sent to a master in accordance with the usual practice of the court in such cases. Story, Eq. Pl. §§ 697, 698; *Emma Silver Min. Co., Ltd., v. Emma Silver Min. Co.* (C. C.) 1 Fed. 39. It is unnecessary to indicate my views of the question whether the adjudication set forth in the plea is identically the same as here or whether the former adjudication is res adjudicata. The suggestion is sufficient that, if the former judgment is to operate as an estoppel here, the record in extenso should be before the court. The motion to overrule the plea for insufficiency is denied, with costs.

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UNITED STATES v. KLOTZ.

(Circuit Court, S. D. New York. November 15, 1904.)

No. 3,432.

1. CUSTOMS DUTIES—CLASSIFICATION—SILK ON COPS—ADVANCE IN MANUFACTURE.

Where raw silk has been re-reeled from skeins upon cops or tubes, this permitting the operation of doubling or twisting to be omitted in the process of finishing the silk, and thus bringing the article one step nearer the condition of finished silk, *held*, that this removes the article from the provision in paragraph 660, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], for raw silk not "advanced in manufacture in any way," and brings it within the provision in paragraph 384 of said act, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], for "silk partially manufactured from cocoons, \* \* \* and not further advanced or manufactured than carded or combed silk."

On Application for Review of a Decision of the Board of General Appraisers.

This application was made by the United States, and relates to a decision (G. A. 5,432, T. D. 24,702), which reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Henry D. Klotz.

Note U. S. v. Stewart (C. C.) 133 Fed. 811.

D. Frank Lloyd, for appellant.

Albert Comstock, for appellee.

HAZEL, District Judge. This is a review from the decision of the Board of General Appraisers holding that the merchandise in controversy, consisting of raw silk wound on tubes or cops, is entitled to free entry under paragraph 660 of the tariff act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], which is in the following words: "Silk, raw, or as reeled from the cocoon, but not doubled, twisted, or advanced in manufacture in any way." The collector of customs of the port of New York assessed a duty of 40 cents per pound, under paragraph 384, § 1, Schedule L, of said act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]), which reads as follows: "Silk partially manufactured from cocoons or from waste silk, and not further advanced or manufactured than carded or combed silk, forty cents per pound." The importers duly protested against such classification, claiming that the merchandise was raw silk, and not "raw silk partially manufactured from cocoons," nor "doubled, twisted, or advanced in manufacture in any way." The Board of General Appraisers, to whom the protest was transmitted, were not agreed as to the proper classification. The prevailing and dissenting opinions of the board exhaustively and comprehensively review the facts, and the reasons assigned therein for reaching diametrically opposite conclusions are worthy of careful consideration. The cogency and persuasiveness of the minority opinion, however, in which it is held that the winding of the silk on tubes or cops is an advance in manufacture, is thought to be controlling. The single inquiry presented is whether the silk was "advanced in manufacture." Ordinarily the trained officials of the customs department have little difficulty in determining questions of this character, but it must be admitted that the problem here has varying phases. The facts, briefly stated, are that the raw silk, as imported, had been re-reeled by machinery from skeins upon tubes or spools which were adapted to fit into a silk loom and immediately woven without further manipulation, instead of being imported in skeins, as was the custom. This method of importation on tubes or cops, according to the evidence, enables the artisan, technically called the "throwster," to begin the next essential step in the operation of finishing the raw product, namely, that of doubling or twisting, and he is thereby deprived from performing one of the necessary operations. The importer claims that the silk was wound on tubes or spools in Italy, the place of exportation, for convenience in transportation, and to lessen the expense of freight. The facts disclosed on the hearing before the board, however, establish that the raw silk, as imported, was, as stated in the minority opinion, intended "as a substitute for such on bobbins, and can, in every case where similar goods are used, be substituted for such, even upon the loom, which could not be done without this winding." This view finds support in the following testimony of the importer:

"Q. The labor cost of transferring the silk from the reel or skein to the tubes or spool is less in Italy than in this country? A. It would depend upon the given silk. Q. Given this silk? A. I should say yes."

The argument in behalf of the importer proceeded upon the theory that winding the silk on tubes or cops does not change its character from that of raw silk, and therefore the article, for tariff purposes, remains squarely within the provisions of the free list. To this contention I must withhold my assent. Though it is conceded that the physical status of the raw silk still attaches to the material after winding upon tubes or cops, it nevertheless clearly appears from the evidence that the American silk throwster is deprived of performing one of the operations necessary to finishing the raw product. Upon this point the importer testifies as follows:

"Q. Then I understand, as a matter of fact, this particular lot was put on tubes by means of some machine you sent to Italy? A. Yes. Q. You know exactly by what process? A. Yes. Q. How did it happen in this particular case—how is this silk put on these tubes? A. It is wound on the bobbin, and then from the bobbin or spool on these tubes. Q. Wound upon the bobbin from the skein? A. Yes. \* \* \* Q. But as I understand you, the condition of advance is exactly the same as that when first reeled? A. Physically it is the same thing, but it fits the American machinery, and it is made more valuable."

These facts present insuperable objections to the contention of the importer that the article was not in any way advanced in manufacture. The witnesses for the government admit that the character of the silk is not changed, and that, if imported in skeins, as removed from the reel, it would be entitled to free entry. They maintain, however, that the silk, which has been reeled from the cocoon, and then wound on cops or tubes suitable to be placed in the loom, is not merely a process of re-reeling, but is an advance in manufacture. In order to obtain the commercial raw silk, the cocoon is soaked in heated water to soften the natural gum in the filament, and the raw fiber wound upon reels. In the raw state the nomenclature of the silk is divided into organzine, tram, and floss; each being twisted, spun, or treated according to the quality. In Dr. Ure's Dictionary of Arts, Manufacture & Mines, it is stated that the raw silk, as imported into the United States in skeins from the filatures, necessitates the process of throwing, the first step of which is winding of the skein, as imported, off onto bobbins. This is followed by doubling, twisting, and retwisting, as the case may require. If the raw silk may be wound on tubes, cops, or bobbins adapted to the machinery for weaving or finishing the product at the place where the filature is reeled from the cocoon, then manifestly the labor of the silk throwster is lessened, and the protection to home labor, which Congress undoubtedly intended to give, is diminished. A fair assumption is that Congress, when the tariff act was passed, understood that raw silk was commercially known as silk in skeins; it never having been imported in any other form. The testimony of the witnesses for the government as well as the importer shows that they had a similar understanding. This case is stated to be a test to determine the question here involved. True, Congress might have phrased paragraph 660 so that he who runs may read, and fully comprehend that raw silk in skeins or hanks only should come in free. But it did not do so, and the presumption is pertinent that Congress could not be expected to anticipate that,

in the development of the silk industry, an enterprising American citizen would find it to his pecuniary advantage to transfer machinery to the place of export to facilitate the winding of the raw fiber on tubes or spools suitable for use in the American machinery, instead of importing it as skeined from the reel.

No useful purpose will be served by further discussion of this interesting subject. The conclusion is that the importation was not entitled to free entry, but that it comes within the purview of the qualifying phrase, "advanced in manufacture in any way," and should be dutiable at 40 cents per pound, under paragraph 384.

The decision of the Board of General Appraisers is therefore reversed.

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UNITED STATES v. STEWART.

(Circuit Court, S. D. New York. December 16, 1904.)

No. 3,649.

**1. CUSTOMS DUTIES—CLASSIFICATION—RE-REELED SILK.**

Raw tussah silk, in the same condition as when reeled from cocoons, except that it has been transferred from the large reels on which it was taken from the cocoons to smaller reels, the result of this process not being any change in the condition of the silk other than to adapt the skeins thus produced to American spinning machines, is held not to be dutiable as "silk partially manufactured from cocoons," under paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], but to be free of duty under paragraph 660, as "silk, raw, or as reeled from the cocoon, but not \* \* \* advanced in any way" (chapter 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]).

On Application for Review of a Decision of the Board of General Appraisers.

Note U. S. v. Klotz (C. C.) 133 Fed. 808.

The decision in question relates to an importation at the port of New York by Walter E. Stewart. The nature of the questions raised fully appears from the opinion of the board (G. A. 5,767, T. D. 25,524), which reads as follows:

HOWELL, General Appraiser. The merchandise covered by this protest is described in the invoice as "tussah raw silk water-reel re-reel." It was returned by the appraiser as "raw silk re-reeled and doubled, not spun or twisted." Duty was assessed thereon by the collector at the rate of 40 cents per pound, under the provisions of paragraph 384, Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], which reads as follows: "384. Silk partially manufactured from cocoons or from waste silk, and not further advanced or manufactured than carded or combed silk, forty cents per pound." The claim in the protest is that the merchandise is free of duty under the provisions of paragraph 660 of said act, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], which reads as follows: "660. Silk, raw, or as reeled from the cocoon, but not doubled, twisted, or advanced in manufacture in any way." In forwarding the protest to the board the collector states: "Prior to the liquidation of the entry, I gave the importer an opportunity to be heard as to the proper classification of the merchandise; and after a hearing, which was held on March 23, 1904, I decided to classify the merchandise for duty under paragraph 384, N. T., and assess the same with duty at the rate of 40 cents per pound." We have carefully examined

the testimony taken by the collector at the hearing before him, which is made a part of the record, and we have taken additional testimony, from which it satisfactorily appears that the silk in question is raw tussah silk, reeled from the cocoon in a very crude manner, by what is known as "the water-reel process," and then transferred to smaller reels for the purpose of producing skeins suitable for American spinning machines. The water-reel process consists in placing the cocoons in warm water, and, as they become softened, the filaments of a number of them are joined together and passed through a small hook or "guide eye," and attached to a reel, which, by slowly revolving, unwinds the filaments from the cocoon. The thickness of the thread desired determines the number of cocoons to be used; and when the reeling is carefully done, if a filament breaks in the process, another cocoon is substituted, in order that the thickness of the thread shall not be reduced. No such care seems to have been exercised, however, in the case of this tussah silk, which is a heavy, coarse silk, coming from the interior provinces of China, and which appears to have been reeled from the cocoons in the crudest manner, very little attention being paid to the evenness of the thread. As it was wound on large reels when taken from the cocoons, it became necessary to re-reel it, in order to produce skeins of a suitable size for use in American machines. The silk, as imported, appears to be in precisely the same condition as the re-reeled silk which formed the subject of a letter of the Secretary of the Treasury to the collector of customs at New York, dated October 23, 1857, cited in G. A. 5,432, T. D. 24,702. The Secretary said: "The re-reeled silk in question is neither doubled nor twisted, but is in the same state in which it came from the cocoon, having been merely transferred by reeling from the larger reel on which it is taken from the cocoon to a reel of smaller dimensions, to adapt the skeins thus produced to the reels in use in many manufactories in this country." That describes very accurately the silk here in question. It is simply raw silk re-reeled. It has not been "doubled, twisted, or advanced in manufacture in any way." In G. A. 5,432, the board was divided on the question whether raw silk which has been reeled from cocoons, and then wound on tubes or cops, was entitled to free entry under paragraph 660. The majority held the affirmative of the proposition, and in the course of the opinion stated: "By the very language of paragraph 660 it will be observed that 'manufactured' silk does not refer to the method or form of putting up the raw silk, but refers to doubling or twisting, or some other process of manufacture which changes the character of the silk itself." It was further stated in the majority opinion that: "All of the witnesses for both sides testified that silk which has been removed from the reel upon which it was wound when first taken from the cocoon, and then reeled into other skeins of required size, so as to be serviceable for American machines, and which is known as re-reeled silk, is within the class recognized in trade as raw silk." We find that the merchandise here in question consists of raw tussah silk, which has not been doubled, twisted, or advanced in manufacture in any way, but is in the condition in which it came from the cocoons, having been merely transferred from the large reels on which it was taken from the cocoon to smaller reels, in order to adapt the skeins thus produced to the American spinning machines. We hold that such silk is entitled to free entry under the provisions of paragraph 660. The protest is accordingly sustained, and the decision of the collector reversed.

DE VRIES, General Appraiser (dissenting). For the reasons set forth in the dissenting opinion in G. A. 5,432, T. D. 24,702, now on appeal, I dissent from the conclusions reached by my colleagues herein.

D. Frank Lloyd, Asst. U. S. Atty.  
William B. Coughtry, for importer.

PLATT, District Judge. Judgment affirmed on the decision of the Board of General Appraisers.

In re HERCULES ATKIN CO., Limited.

(District Court, E. D. Pennsylvania. December 17, 1904.)

No. 2,060.

**1. BANKRUPTCY—COMPANIES SUBJECT TO ACT—LIMITED LIABILITY ASSOCIATIONS.**

A mercantile association organized under Act Pa. 1874 (P. L. 271), providing for "the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association," is within the terms of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended (Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), and subject to be adjudged an involuntary bankrupt, whether regarded as an unincorporated company or a corporation.

**2. SAME—DISSOLUTION OF ASSOCIATION—ELECTION OF LIQUIDATING TRUSTEES.**

A mercantile association organized under Act Pa. 1874 (P. L. 271), does not cease to exist, so as to preclude bankruptcy proceedings against it, by its election of liquidating trustees as provided in the act, which further provides that, upon their giving notice by publication, "said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof."

**3. SAME—ACTS OF BANKRUPTCY—ELECTION OF LIQUIDATING TRUSTEES BY INSOLVENT COMPANY.**

The provision of Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended (Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), making it an act of bankruptcy on the part of a debtor where "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory or of the United States," does not mean exclusively that a trustee must have been put in charge by order of a court, but embraces as well a case where liquidating trustees have been elected by an insolvent company or corporation, as provided by the statute under which it is organized.

In Bankruptcy. On motion for adjudication on petition and answer.

George W. Carr and J. Siegmund Levin, for petitioners.

M. J. O'Callaghan, for alleged bankrupt.

J. B. McPHERSON, District Judge. The bankrupt is an association organized in September, 1893, under the Pennsylvania Act of 1874 (P. L. 271), and its supplements, and has been doing a mercantile business in the city of Philadelphia. On October 8, 1904, a majority of its members in number and value voted to dissolve the association, and elected three liquidating trustees, to whom the supplement of 1889 (P. L. 183) gave "full power to settle the affairs of the association and distribute the assets thereof after the payment of its debts among the members, under the direction of the court of common pleas of the proper county." On October 10th these trustees gave notice of the intended winding up of the association by publication in two newspapers of the city of Philadelphia, as required by section 8, p. 273, of the act of 1874,

¶ 1. What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.



and thereupon the association ceased to carry on its business. The answer does not deny insolvency, but sets up two defenses: First, that such an association as this, formed under the Pennsylvania act of 1874, is not embraced by the bankrupt act, and is therefore not subject to adjudication; and, second, that when the liquidating trustees began to publish notice of the proposed winding up, the association ipso facto ceased to exist, and the title to its property passed to the trustees, an adjudication being thus precluded because the bankrupt is civilly dead and no longer amenable to process.

Not much time, I think, need be spent upon either defense. Section 4b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended in 1903 (Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), provides, *inter alia*, that “\* \* \* any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits \* \* \* may be adjudicated a voluntary bankrupt.” If the Pennsylvania act of 1874 falls short of incorporating the bankrupt, the association must then necessarily be regarded as an unincorporated company, and therefore expressly within the terms of section 4b, above quoted; for the Supreme Court of Pennsylvania has authoritatively described the nature of joint-stock associations under the act of 1874 in numerous decisions, of which *Hill v. Stetler*, 127 Pa. 161, 17 Atl. 887, may stand as an example, and has declared them to be a cross between a partnership and a corporate body. In that case Mr. Justice Williams, speaking for the court, used this language:

“The persons composing a partnership may agree with each other to invest a certain fixed sum each in the common venture, and no more. Such an agreement may limit the interest of each in the property and profits of the firm, but it will not limit the liability of any for the firm debts. Each member will be liable individually for the entire indebtedness of the firm. The act of 1874 was passed to relieve against the risk and inconvenience attending general partnerships, by providing a mode by which individuals might invest a fixed sum in a business enterprise, without liability to loss beyond the sum so invested. The method provided is the creation of a new artificial person to be called a ‘joint-stock association,’ having some of the characteristics of a partnership and some of a corporation.”

This seems to be conclusive concerning the character of the bankrupt, and to fix its status as an unincorporated partnership or company. But even if this be not true, it cannot be doubted, I think, that the bankrupt is a “corporation” within the definition of that word given in section 1, subd. “a,” cl. 6, of the act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]:

“‘Corporations’ shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association.”

This is precisely descriptive of an association under the Pennsylvania statute, for the title declares it to be “An act authorizing the formation of partnership associations, in which the capital sub-

scribed shall alone be responsible for the debts of the association, except under certain circumstances," and its first section provides the method by which such an association, thus privileged, may be organized. Clearly, therefore, as it seems to me, the Hercules Atkins Company, Limited, is within the scope of the bankrupt act, and the first defense must be overruled.

Neither is the second defense more effective. Section 8 of the Pennsylvania statute permits the dissolution of such associations:

"First. Whenever the period fixed for the duration of the association expires.

"Second. Whenever, by a vote of a majority in number and value of interest, it shall be so determined, and notice of such winding up shall be given by publication in two newspapers published in the proper city or county at least six consecutive times, and immediately upon the commencement of said advertising, said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof."

Section 9, p. 273, provides for the election of three liquidating trustees, who are to have full power to wind up the association and distribute its assets, but the association does not disappear as soon as a vote to wind up has been passed. On the contrary, the statute distinctly recognizes that it continues to exist for certain purposes. No doubt it must cease doing business, but even this is a qualified prohibition, for section 8 immediately adds, "except so far as may be required for the beneficial winding up thereof." To hold that the association passed out of existence as soon as it appointed liquidating trustees and they began to advertise, would result in the anomalous situation that the commission of an act of bankruptcy would prevent the bankrupt act from taking effect: for it cannot be doubted, I think, that the appointment of liquidating trustees was an act of bankruptcy under clause 4 of section 3a, (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), which declares that such an act has been committed where, "because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States." This does not mean exclusively that the trustee must have been put in charge by the order of a court, but embraces all other methods whereby the property of an insolvent is committed to a trustee for the creditors, under the laws of a state, of a territory, or of the United States, including such a method as was employed in the present case. The two important matters that were in the mind of Congress when the above amendment was adopted were the insolvency of the bankrupt, and the fact that his property had been put in charge of a trustee for the purpose of distribution among the creditors. The method by which the property is thus transferred to a trustee for purposes of distribution is immaterial, so long as such method has the sanction of the law. The association having committed an act of bankruptcy, therefore, became at once potentially subject to the federal jurisdiction, and could not escape it merely by ceasing to do business. The title to its property may have passed to the liquidating trustees, but it passed subject to be divested in favor

of the trustee in bankruptcy, if proceedings in the District Court should be afterwards begun and carried forward to adjudication.

The petitioners' right seems to be clear, and the clerk is therefore directed to enter the proper order of adjudication.

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CLARK v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(Circuit Court, E. D. Pennsylvania. December 30, 1904.)

No. 57.

1. **INSURANCE—ASSIGNMENT—RIGHTS OF PLEDGOR.**

An assignment of a life policy as collateral vests in the assignee a title sufficient to enable him to collect the proceeds thereof.

2. **SAME.**

An assignment of a life policy as collateral security does not divest the assignor of the general property therein, and hence a tender of the debt extinguishes the assignee's lien, and entitles the assignor to possession of the policy.

3. **SAME—PAYMENT—LIABILITY OF INSURER.**

Where an insurance company had knowledge that a pledgee of a policy, though having received an amount thereon exceeding the debt, improperly declared his intention to collect and appropriate the balance due on the policy, and the company, not disputing its liability, agreed to hold such balance until legally authorized to dispose thereof, the insured was entitled to maintain an action at law against the company therefor.

Albert B. Weimer, for plaintiff.

Thomas De Witt Cuyler and Burr, Brown & Lloyd, for defendant.

HOLLAND, District Judge. This is a demurrer to the statement of the plaintiff's claim, and the facts necessary to a correct understanding of the questions involved are to be taken as admitted. They are as follows:

The defendant, on October 20, 1883, issued a 20-payment life insurance policy upon the life of the plaintiff, payable, with accumulated dividends thereon, October 20, 1903, to Nina S. Clark, his wife. The plaintiff duly paid the premiums up until the 5th of September, 1893, upon which date the plaintiff and his wife made an assignment of this policy, absolute upon its face, with a collateral agreement, however, that it should be taken as collateral for a loan of \$1,000, and all premiums that might in the future be paid by the assignee. This agreement was made in Philadelphia by the assignee's agent, and he executed the collateral document to the assignors of the policy, agreeing that it should be regarded as collateral; and the assignment must be so regarded for the purposes of this demurrer. The company had assented to this assignment, and the assignee paid all the subsequent premiums until the maturity of the policy on October 20, 1903. The defendant company, on April 16, 1903, paid to the assignee of the policy the sum

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 492, 1509.

of \$9,744.44, which was the face value of the policy of \$10,000, less the discount for the period between April 16 and October 20, 1903. There was, however, still due on the policy accumulated dividends amounting to \$4,897.20. The plaintiff, some time before October 15, 1903, had interviewed the assignee, Richard Herzfeld, in New York, and ascertained from him the fact that he (Herzfeld) repudiated the claim of the plaintiff, that the assignment was made as collateral security, and informed him that he (Herzfeld) intended to claim the entire proceeds of the policy, together with accumulated interest. The plaintiff immediately, on the 15th day of October, 1903, notified the defendant company of the fact that the policy was assigned to Herzfeld as collateral security for the sum of \$1,000, and inclosed a copy of the paper executed by the assignee's agent to establish that claim, showing that Herzfeld held the policy as collateral for the sum mentioned, with interest, and all premiums paid or to be paid by the assignee. The notice also stated that Herzfeld repudiated the true contract of assignment, and told plaintiff that "he would never get a dollar of it." The notice further set forth:

"I am entitled to the entire proceeds of the policy after deducting therefrom One Thousand Dollars (\$1000) with interest and all premiums that have been paid since the date of the assignment and whatever other costs have accrued. \* \* \* Please take this letter as notice not to pay over any money whatever on account of the policy to any one except me. Will this notice be sufficient to stop payment of the money, or will it be necessary for me to bring suit? The time is very short, and you will protect me and confer a favor on me by answering immediately by telegraph, at my expense, care of my attorney, Frederick M. Leonard, Esq., 119 South Fourth Street, Philadelphia."

In reply to this notice, the defendant company, on October 20, 1903, by letter, informed Frederick M. Leonard, Esq., that the plaintiff's notice of October 15th had been received in regard to the policy on his life, and that no further payments on account of this policy would be made until they were legally authorized to do so. At this time the defendant company had paid to Herzfeld more than he was entitled to receive under his agreement, which fact appeared from the notice served upon it by plaintiff.

The defendant demurs to this statement (1) as insufficient in law to maintain the plaintiff's action; (2) there are other persons who are necessary parties, and particularly Richard Herzfeld, the assignee; and (3) that the proper remedy of the plaintiff, if any, is by bill in equity against the defendant and assignee of the plaintiff.

Before the possessor of a residuary interest has a right to control or in any way interfere with the collection of an insurance policy assigned, with the assent of the company, for a bona fide loan, he must allege the insolvency of the assignee, or fraud committed or about to be committed by him, or some other substantial reason (*Widaman v. Hubbard* [C. C.] 88 Fed. 806), otherwise the assignee may enforce the collection of the security to the full amount, holding any surplus, after payment of the loan, advance premiums, and assessments, for the persons equitably entitled thereto (*Widaman*

v. Hubbard, *supra*; Warnock v. Davis, 104 U. S. 775, 26 N. E. 924; Burroughs v. Assurance Company, 97 Mass. 359).

An assignment of an insurance policy as collateral security vests in the assignee a title to enable him to collect the proceeds thereof, yet it does not divest the assignor of the general property in the policy, and, notwithstanding his assignment, the assignor has title to the property subject to the assignee's lien. *New York Life Ins. Co. v. Smith*, 67 Fed. 694, 14 C. C. A. 635.

A tender of the debt extinguishes this lien on the collateral security, and entitles the pledgor to the possession of the collateral (*Mitchell v. Roberts* [C. C.] 17 Fed. 776); and where, as in this case, as the record stands on the facts admitted by the demurrer, the assignee has been paid more than the amount, for which he holds the policy as collateral, by the insurance company, and declares to the assignor his intention to collect and appropriate the amount yet due on the policy, contrary to his agreement to hold the same as collateral, and the insurance company is informed of this fact and agrees to hold the balance due on the policy until legally authorized to dispose of the same, the insured has a right in an action at law against the insurance company, especially when the liability to pay on the policy is not disputed.

The demurrer is therefore overruled, and defendant allowed 15 days within which to file an affidavit of defense.

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#### CAVANAGH v. MANHATTAN TRANSIT CO.

(Circuit Court, D. New Jersey. January 6, 1905.)

1. FEDERAL COURTS—REMOVAL OF CAUSE—SERVICE—MOTION TO VACATE—APPEARANCE.

After a case has been removed from a state to a federal court, the defendant may move to vacate the service, if a special appearance only is made for that purpose.

2. SAME—FRAUDULENT SERVICE—EVIDENCE.

Where plaintiff's agent induced the secretary of defendant corporation, which was a resident of New York, to come into New Jersey for an interview with reference to certain machinery purchased from defendant, and at the close of the interview, as such secretary was leaving the place where it was held, he was served with process, which was dated the day that he had notified plaintiff's agent that he would be at the place of the interview, such facts, unexplained, warranted a finding that the service was obtained by fraud.

On Motion to Set Aside Service of Summons.

George H. Peirce, for the motion.

W. L. Edwards, opposed.

LANNING, District Judge. This is an action on contract. It was commenced in the New Jersey Supreme Court, and the defendant, before filing its plea or demurrer, and before entering any appearance therein, had the cause removed into this court. It now seeks to have the service of summons set aside on the ground that the secretary of the defendant company, which is a corporation of

the state of New York, was inveigled by the plaintiff's agent into the state of New Jersey, where the summons was served upon him. But one deposition has been taken—that of Robert G. McDonald, the secretary of the defendant company. The plaintiff's counsel was present at the examination and cross-examined Mr. McDonald. At the close of the examination he announced that he had no deposition to take on behalf of the plaintiff. The facts appear to be as follows: The defendant company, having its place of business in New York City, held the promissory note of the plaintiff. On September 24, 1904, the defendant company sent a letter to the plaintiff, who resides in Newark, N. J., requesting payment of the note. On September 30th, Frederick C. Cavanagh, the son of the plaintiff, wrote to the defendant company a letter as follows:

"Your letter of the 24th inst. regarding the payment of note of Emma Cavanagh which you hold for \$850, received. In reply I wish to say that this plant is not at all satisfactory and not as agreed it would be, as you know, and I would like to see your secretary Mr. McDonald at the Palace Hotel, this City, address above, on Tuesday October 4th, or Wednesday October 5th, between the hours of three and four o'clock in the afternoon on either of those days, in order to make arrangements regarding the matter. I should have answered your letter before this but I have been out of town and have just returned."

Mr. McDonald says he answered the letter, stating that he would be in Newark, at the place designated, on Wednesday, October 5th, between the hours of 3 and 4 o'clock, and that he went there at that time and had some "talk" with Frederick C. Cavanagh. The subject-matter of the conversation appears to have had relation to a proposed settlement between the plaintiff and the defendant. Mr. McDonald says he told Frederick C. Cavanagh that the suggested settlement which Mr. Cavanagh had made would have to be reported to a committee of the defendant company. He also says that after the conversation was ended he left the hotel, and as he stepped out upon the street a man approached him and asked if he was Robert McDonald, and that, on his replying that he was, the summons was served upon him.

After a case has been removed from a state court to a federal court, the defendant may have the service of process set aside, provided a special appearance for that purpose, and not a general appearance, be made. *Bentlif v. London & Colonial Finance Corporation (C. C.)* 44 Fed. 667; *Cady v. Associated Colonies (C. C.)* 119 Fed. 420; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

In *Reed v. Williams*, 29 N. J. Law, 385, the Supreme Court of the state of New Jersey held that, where a party upon whom summons is served is induced to come into the state of New Jersey by a deception practiced upon him by the plaintiff for the purpose of serving the summons, such service will be set aside. In the course of the opinion in that case the following language was used:

"The plaintiff was himself examined at some length in the matter, but he does not in any way deny or contradict the charge brought against him. I shall consider, therefore, that the fact is abundantly proved that the plaintiff, under a mere show or false pretense, decoyed and inveigled the defendant, when he would not otherwise have come from the state of New York,

into our jurisdiction, for the sole purpose of having this process served upon him, the arrangements for doing which had been previously made; and the question is whether the court should sustain this proceeding—whether this is a proper or an improper use of the court's process. I cannot suppose the courts were established for any such purpose. To aid in fraud, deceit, or wrong in any form is no part of their business. To prevent and suppress all such things is their highest duty. To permit a party to take advantage of his own wrong is what the law abhors."

And in this court the late Judge Nixon, in *Steiger v. Bonn* (C. C.) 4 Fed. 17, expressed the same rule of law. In that case it appears that the defendant was a citizen of the state of New York, and that he was induced by a forged telegram to come to Newark, where summons was served on him. There was no express proof that the plaintiff, or any one representing him, sent the telegram, but Judge Nixon said: .

"The question involved must be decided by ascertaining upon which party the burden of proof lies. There is no pretense that the deputy marshal had any knowledge of the forged telegram. Do the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant? I am of that opinion. The presumption of the plaintiff's participation in the deception is stronger here than in the case of *Hevener v. Heist*, 30 Leg. Int. 46, and yet in that case the court set aside the writ. The defendant had been brought to Philadelphia from Bucks county, Pa., by a forged telegram, and on his arrival he was served with the writ by the deputy sheriff. Judge Sharswood thought the burden of proof was upon the plaintiff to explain how the officer knew that the defendant was coming. There was no evidence as to who sent the telegram, and yet the learned judge held that the failure of the plaintiff to show that he did not direct the officer in the service was fatal to the legality of the proceedings. 'I am clearly of the opinion,' he says, 'that it was incumbent on the plaintiff to produce the sheriff's deputy who made the arrest, in order to show that it was not by the instruction of the plaintiff or his attorney that he went with the writ at that time to that place to arrest the defendant.'"

In the case at bar the summons was issued on October 5th, the same day that Mr. McDonald visited Newark. The sheriff, or his deputy, was waiting outside of the Palace Hotel to serve the summons upon Mr. McDonald the moment he should leave the hotel. Why was the summons dated on the very day when Mr. McDonald had notified Mr. Cavanagh that he (McDonald) would be in Newark? How did it happen that the sheriff, or his deputy, was at the Palace Hotel in Newark on the very day and hour of Mr. McDonald's visit there? The plaintiff should have furnished answers to these questions. Mr. Cavanagh was the agent of the plaintiff, and neither he nor the officer who served the summons was called as a witness.

The principle upon which the opinions above referred to rest controls me in this case. The conclusion reached is that Mr. McDonald was induced by the plaintiff's agent to come from New York City to Newark to the end that process might be served on Mr. McDonald in New Jersey. Such use of the process of a New Jersey court cannot be upheld. This conclusion renders it unnecessary to consider the other objections raised by the defendant's counsel.

The motion to set aside the service of the summons will be granted.

## In re WUNDER.

(District Court, E. D. Pennsylvania. January 5, 1905.)

No. 1,976.

**1. BANKRUPTCY—EXEMPTIONS—STATE LAW.**

A bankrupt is entitled only to such exemptions as he would be entitled to if proceeded against under the state law.

**2. SAME—CLAIM—TIME.**

Where an involuntary bankrupt neglected to file his claim for exemptions within the time specified by Bankr. Act July 1, 1898, c. 541, § 7, cl. 8, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], or before a sale of his assets as required by the state law, which sale would be rendered nugatory by the allowance of the exemptions, his right thereto was waived, though he gave notice of his claim of exemptions in his schedules.

**3. SAME—OBJECTION TO SALE.**

Where a bankrupt neglected to file a claim for exemptions until after a sale of his assets, his claim thereto was not saved by his having appeared and objected to the order of sale on the ground that his exemptions had not been allowed.

In Bankruptcy. Overruling exceptions to referee's disallowance of exemption.

C. Wilfred Conard, for trustee.

M. B. Elwert, for bankrupt.

HOLLAND, District Judge. The certificate of the referee in this case raises the question as to whether the bankrupt is entitled to his exemption, claimed under the following circumstances: A petition in involuntary bankruptcy was filed against him on June 23, 1904; a receiver and appraisers were appointed July 2, 1904; and on August 12, 1904, a schedule of personal property appraised was filed by the appraisers. Wunder was not adjudicated a bankrupt until August 25, 1904, because he had left his former place of residence, and the subpoena was returned "not found," and an alias issued and publication ordered, returnable August 19, 1904. He filed his schedules of assets and liabilities on September 2, 1904, and in the former he claimed his exemption in the following words: "Claims personal property to the value of \$300.00 under Act of Assembly of April 9th, 1849, and its supplements, to be selected by the bankrupt after the same is duly appraised." At this time the schedule of personal property had been filed by the appraisers. On September 15, 1904, Daniel G. Endy was selected by the creditors as trustee, and on November 11, 1904, filed a petition before the referee for leave to sell the personal property appraised at Milford, N. J., at private sale. The creditors were notified of a meeting, to be held at the office of the referee on November 22, 1904, for the purpose of passing upon the advisability of making an order of sale as suggested by the petition. They appeared upon this date, and agreed on a private sale upon the terms set forth in the petition. At this time the bankrupt appeared by his counsel and filed objection to an order of sale, upon the ground that he had not been allowed his exemption. The referee overruled his objection to the sale, and made an order, as of that date, directing



the trustee to sell the personal property at Milford, N. J., for the sum of \$1,125. Thereupon the trustee sold the same to the L. W. Miller-Romig Company for that sum. Subsequently, on December 2, 1904, exceptions were filed to the referee's decision made November 22, 1904, disallowing the exemption, and with these exceptions the bankrupt filed a schedule of personal property claimed by him out of the personal property in New Jersey as found in the appraisalment filed in this court on August 12, 1904, and as valued therein. These exceptions were overruled by the referee, and the question was then certified, to this court.

Upon the facts as above stated, the referee was entirely justified in his ruling. A bankrupt is entitled to the same exemption as if proceeded against as a debtor under the state law, and to none other. In *re Manning* (D. C.) 112 Fed. 948; *Loveland's Bankruptcy*, § 177. In order that he may be allowed his claim, he must comply with the requirements of the state law, as well in regard to the manner of making the claim as to the articles claimed, and, as to whether he has done this or not, the law, as construed by the highest court of the state, will be conclusive. *Loveland's Bankruptcy*, p. 223, and cases cited, note 6. If the bankrupt does not comply with these requirements, the property will pass to the trustee, to be distributed among the creditors like other assets of the bankrupt, and he is deemed to have waived his right of exemption, unless he asserts his claim at a time long enough before the time of sale to prevent a postponement of the same. His right of election is gone if he waits until the sale has taken place. *Hammer v. Freese*, 19 Pa. 255; *Loveland's Bankruptcy*, p. 434, and cases cited, note 70.

The fact that he has given notice, in his schedule filed, that he will claim \$300 worth of property to be appraised, will not entitle him to the amount of \$300 in cash out of the proceeds, or to property of that value, where he has not specified the articles, as claimed by the state law. In *re Manning* (D. C.) 112 Fed. 948. He could, no doubt, have filed a schedule of property claimed as an amendment to his notice in the schedule, as was done in *Re Duffy* (D. C.) 118 Fed. 926, if done in time, and before the creditors have gone to the trouble and expense of a meeting for the purpose of passing upon the advisability of a sale, and have carried the sale into execution.

We do not think the claimant is in any better position because of his having appeared on November 22, 1904, and objected to the order of sale, because, at that time, he had not filed his claim according to law, and postponed it thereafter until after the sale had been made. He is clearly guilty of such negligence as under the Pennsylvania practice would be regarded as a waiver, and in the bankrupt court the claimant cannot be permitted to neglect the filing of his claim for exemption until after the trustee has incurred expense, and the creditors have devoted time and attention to the disposition of the assets the most advantageously, upon a basis that may be entirely disarranged and upset by a subsequent claim of exemption. Bankr. Act July 1, 1898, c. 541, § 7, cl. 8, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], requires the bankrupt to file within 10 days, unless further time is granted after the adjudication in involuntary petitions, a claim for such exemption

as he may be entitled to. It is important that this requirement of the act be complied with, in order that the trustee, under general order 17 (89 Fed. viii, 32 C. C. A. xix), may be able, within 20 days after his appointment, to make report of the articles set off to the bankrupt by him, according to the provisions of the bankrupt act allowing such exemptions. When the trustee in this case was appointed on September 15, 1904, he failed to find a specific claim of personal property by the bankrupt as his exemption, which should have been filed by the bankrupt within 10 days of the date of adjudication, to wit, August 25, 1904. He, therefore, had a right to assume that the claim was waived by the bankrupt, and it was his duty to proceed as rapidly as possible to a final distribution of the proceeds of the estate. An efficient administration of the bankrupt law can only be accomplished by the encouragement of as prompt and speedy action on the part of a trustee as the circumstances of the particular case will warrant, and the bankrupt, while entitled to every protection in his claim for exemption, will be required to file the same, in accordance with law, within the time required by the act; and where his delayed claim, if allowed, as in this case, would require a sale to be set aside, and negotiations to be renewed for a resale, and the reconvening of the creditors for the purpose of passing upon the same, the claim will not be allowed.

The exceptions to the rulings of the referee are overruled, and the claim for exemption disallowed.

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In re HAMILTON et al.

(District Court, W. D. New York. November 30, 1904.)

No. 587.

1. **BANKRUPTS—DISCHARGE—BURDEN OF PROOF.**

On an application for a bankrupt's discharge the burden of proof is on the opposing creditors to establish the truth of the charge set out in the specification by clear and convincing evidence.

2. **BANKRUPTCY—DISCHARGE—ACCOUNT BOOKS—MISLEADING ENTRIES.**

Where the books of a bankrupt firm fully disclosed a transaction alleged to be fraudulently entered, and though the entries were made to deceive general creditors they were not made with an intent to falsify the books, which were kept by a bookkeeper, such entries were insufficient to bar a discharge in bankruptcy of the member of the firm responsible for the entry.

3. **SAME—DISCLOSURE OF ASSETS—FALSE OATH—INTENT.**

Where a bankrupt firm did not anticipate any reversion in certain lumber transferred to a creditor, and one of the partners testified that the firm was morally certain that the creditor would not realize near the amount of the firm's debt, such partner's oath to the schedules, omitting such reversionary interest, was insufficient to bar his discharge.

Crangle & Burke, for trustee.

H. G. Richardson, for bankrupt Howard A. Hamilton.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 720.

HAZEL, District Judge. Specifications filed on behalf of the trustee in opposition to the discharge of the bankrupts herein were referred to a special master, who found that the discharge of Howard A. Hamilton, one of the firm of the Hamilton Door Manufacturing Company, should be denied on account of the bankrupts' failure to keep the books of account required by the bankruptcy act. This motion is for confirmation of such decision. The discharge is opposed on the ground that false books of account were kept by crediting an unsecured creditor with having paid freight, amounting to \$787.22 on a consignment of lumber, when in fact the freight was paid by the bankrupts; also with having made a false oath, prohibited by sections 14b and 29b, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, 554 [U. S. Comp. St. 1901, pp. 3427, 3433].

The questions presented are: (1) Whether the bankrupt Hamilton, with fraudulent intent to conceal the financial condition of the copartnership, of which he was a member, and in contemplation of bankruptcy, failed to keep books of account from which its true financial condition might be ascertained; and (2) whether the bankrupts made false oaths in the bankruptcy proceeding, in that they willfully and fraudulently omitted from the partnership "Schedule B" certain material assets, namely, a contingent remainder in six cars of lumber transferred to one A. J. De Laplante, and in one car of lumber transferred to A. J. Walsh, in trust to pay certain indebtedness of the said bankrupts. The value of the asserted contingent interest is stated to be \$386.08. It is conceded that at the time the certain entries here involved were made on the books of the firm the bankrupts were unquestionably insolvent, and that such entries were preferential in their character. This concession necessitates a brief statement of the facts. On April 17, 1901, Hamilton entered into an arrangement with A. J. De Laplante, representing the firm of R. Laidlaw Lumber Company, creditor in the amount of \$807.46, by which such creditor was to advance \$1,600 to the bankrupts, and take six cars of lumber consigned to the bankrupts at Middleport, N. Y., upon which the freight was unpaid, and which the railroad company refused to deliver before payment. It was arranged that upon the sale thereof De Laplante was to apply the proceeds thereof to the freight advanced and to the unsecured debt of his firm. The books of the bankrupts show that De Laplante paid the sum of \$2,387.22, receiving a credit on the books of \$1,600 cash and \$787.22 for freight paid. The account, therefore, is untrue, in that it credits the transferees of the lumber with having actually paid a greater sum than was received. The bankrupt's right to a discharge prior to the amendatory act of 1903 must depend upon the question whether there was an intent to conceal the true financial condition of the firm of which he was a member, and if such concealment was in contemplation of bankruptcy. The offense, it will be seen, combines two essential elements. The proofs show that the true condition of the bankrupts was ascertainable from an examination of the books; that the entries therein fully disclosed the transaction between the bankrupts and the Laidlaw Lumber Company, including the pay-

ment of the freight by the bankrupts themselves. This point is practically admitted in the brief of the opposing creditors. The bankrupt contends that the entries were a mistake, but fails to make any reasonable explanation of how they arose. Indisputably, through his efforts an unlawful preference within the meaning of the bankrupt act was created, and obviously such was the intention. That it was his intention, however, to falsify the books, which were kept by a bookkeeper, with the object of concealing the true financial condition of the partnership, does not satisfactorily appear. The evidence on this point is thought to fall short of establishing the conclusion of the special master. As already stated, the sale of the lumber in cars was entered in the firm books, and the excessive credit noted by the bookkeeper. Apparently the entries were made solely to deceive the general creditors into the belief that an ordinary sale of lumber had been made to an unsecured creditor. Such method of bookkeeping, however reprehensible, is not made a sufficient ground for denying a discharge to the applicant. *In re Steed et al.* (D. C.) 107 Fed. 682. There were no series of false entries to indicate a purpose by the bankrupts to conceal their true condition. Hence it is not to be presumed from the untrue accounts contained in the books, namely, those of De Laplante and Walsh, both of which were in the interest of the R. Laidlaw Lumber Company, that any intention was in the minds of the partners other than to create an unlawful preference, for which relief has already been had in a proper action at the instance of the trustee. The burden of proof is upon the opposing creditors to establish by clear and convincing evidence that the charge set out in the specification is true. *In re Howden* (D. C.) 111 Fed. 723; *In re Gaylord* (D. C.) 106 Fed. 833; *In re Corn* (D. C.) 106 Fed. 143. This they have failed to do. The discharges should not be refused on suspicious appearances and mere surmises, where proof is lacking. Moreover, it does not clearly appear from the evidence which of the partners gave instructions for the making of the untrue entries. The bookkeeper testifies that he does not clearly remember whether it was Hamilton or Hogg. The bankrupt Hamilton testifies that he did not give any specific instructions to the bookkeeper to make the objectionable entries. In explanation of them, he stated that he informed the bookkeeper of the transaction, who thereupon made the entries on the assumption that he knew how they should properly be made. In this connection it may be noted that the specifications were withdrawn by the opposing creditors as to the bankrupts Hogg and Cramer, members of the copartnership, and continued against Hamilton, on the theory that he was the senior member of the firm and in charge of the office, and more directly responsible for the transaction referred to.

The objection charging the bankrupt with having made a false oath is not sufficiently sustained by the evidence. The record does not, as claimed by the opposing creditors, establish that the arrangement between the Laidlaw Lumber Company and Hamilton consisted of a secret trust for the benefit of the bankrupt, or a

fraudulent concealment of property from his trustee. It must be conceded that, if Hamilton did not anticipate any reversion in the lumber transferred, there was no intent to violate the statute. Upon this point he testified as follows:

"Q. There is nothing to show on the books, Mr. Hamilton, that there was to be any accounting made by these people? A. No, and it wasn't understood only between ourselves that there was to be any accounting. \* \* \* Q. You didn't include in your schedules any of this money that was coming from any of these parties? A. We didn't anticipate that there would be any money coming. In fact, we were morally certain there would not. I don't believe that McLeod, or McBierney, or Laidlaw will come out anywheres near what they have got to pay for us. Q. Notwithstanding the fact that it was billed to them at such a low price? A. No, sir; that is my opinion."

The testimony taken on examination of the bankrupts before the referee, considered in its entirety, leaves the question of remaining equities in the lumber transferred indefinite and uncertain. The evidence of Hamilton on that subject may have been evasive and disingenuous, but it has been held that testimony of that character is not a ground for denying a discharge. In *re Gaylord*, 112 Fed. 668, 50 C. C. A. 415; In *re Leslie* (D. C.) 119 Fed. 406. The authorities uniformly hold that the objection of making a false oath in bankruptcy proceedings must be established by clear and convincing evidence. In *re Gaylord*, *supra*; In *re Ferris* (D. C.) 105 Fed. 356; In *re Fitchard* (D. C.) 103 Fed. 742. This, as has been stated, the opposing creditors have failed to do, and therefore it is thought that the bankrupt Hamilton is entitled to a discharge.

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#### LE MARCHEL v. TEEGARDEN.

(Circuit Court, W. D. Arkansas, Harrison Division. September 16, 1904.)

#### 1. PUBLIC LANDS—FINDINGS OF FACT BY LAND DEPARTMENT—REVIEW BY COURTS.

One who would attack a patent issued by the Land Department for fraud or a mistake of fact must plead and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of the original issue of fact determined by the department.

In Equity. On demurrer to bill.

See 129 Fed. 487.

J. C. Floyd, G. J. Crump, and Woods Bros., for complainant.  
Seawell & Seawell and J. W. Story, for defendant.

ROGERS, District Judge. The bill in this case assails a patent issued to the defendant by the United States, to which a general demurrer is interposed. The sole question raised by this demurrer

¶ 1. Conclusiveness and effect of decisions of Land Department, see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & Silver Min. Co. v. North Star Min. Co.*, 28 C. C. A. 344; *Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co.*, 57 C. C. A. 207.

is, under what conditions can a patent regularly issued by the Land Department of the United States be assailed in a court of equity?

I have examined with care every decision cited by counsel, but I do not deem a review of them at all important. The question of practice raised by this demurrer is so well set forth in the case of *James et al. v. Germania Iron Company*, decided by the Circuit Court of Appeals for the Eighth Circuit (Sanborn, J., delivering the opinion, and Caldwell and Thayer, JJ., concurring), and reported in 107 Fed. 597, 46 C. C. A. 476, that I quote the language of Judge Sanborn as authority for sustaining the demurrer.

"The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land, of the disposition of which the department has jurisdiction, is both the judgment of that tribunal, and a conveyance of the legal title to the land. Act March 3, 1849, c. 108, § 3, 9 Stat. 395; Rev. St. §§ 441, 453 [U. S. Comp. St. 1901, pp. 252, 257]; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283. But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it, on either of two grounds: (1) That, upon the facts found, conceded, or established without dispute at the hearing before the department, its officers fell into an error in the construction of the law applicable to the case, which caused them to refuse to issue the patent to him and to give it to another (*Bogan v. Mortgage Company*, 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; *U. S. v. Northern Pacific R. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. Ed. 462; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, 15 L. Ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. Ed. 801; *Lytle v. Arkansas*, 22 How. 193, 16 L. Ed. 306; *Lindsey v. Hawes*, 2 Black, 554, 562, 17 L. Ed. 265; *Johnson v. Towsley*, 13 Wall. 72, 85, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 538, 24 L. Ed. 848; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (*Gonzales v. French*, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. Ed. 458). If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing. *U. S. v. Northern Pacific R. Co.*, 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; *U. S. v. Atherton*, 102 U. S. 372, 374, 26 L. Ed. 213; *U. S. v. Budd*, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. Ed. 384; *U. S. v. Mackintosh*, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; *U. S. v. Throckmorton*, 98 U. S. 61, 66, 68, 25 L. Ed. 93; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. Ed. 800; *Steel v. Refining Company*, 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. Ed. 226; *French v. Fyan*, 93 U. S. 169, 172, 23 L. Ed. 812; *Earhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. Ed. 346; *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. Ed. 1063; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992."

The bill in this case, so far as I can judge from its allegations, does not rest upon the first ground, but solely upon the second. Resting upon that ground, the bill is defective, in this: that it fails to "allege and prove not only that there was a mistake in the finding, but it also fails to allege and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it." This is absolutely essential in a bill of this character. The demurrer is therefore sustained, and leave is given the complainant until the rule day in November, 1904, in which to amend his bill. If more time is required for that purpose, leave can be had by applying to the court when in session.

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**NARETTI v. SCULLY.**

(District Court, E. D. Pennsylvania. December 6, 1904.)

**No. 1.**

**1. RELEASE—EXECUTION—DURESS.**

Evidence reviewed, and *held* to negative a claim that a release of a cause of action for injuries was without consideration, and was executed by libelant through fear of imprisonment.

**2. SAME—DEFAULT—COSTS.**

Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs authorized by Rev. St. § 983 [U. S. Comp. St. 1901, p. 706].

Petition Directing Clerk to File a Release Allowed Upon Payment of Costs.

See 131 Fed. 399.

Joseph Hill Brinton, for libelant.

George Hart, for respondent.

HOLLAND, District Judge. The libelant sued Scully in admiralty for damages resulting from a personal assault on January 7, 1904, and he (Scully), after entering bail in the sum of \$500, failed to appear or do anything else in defense of the cause. Judgment pro confesso was entered March 18, 1904, and on the 23d day of the same month a meeting by the commissioner, Jasper Yates Brinton, Esq., was called, for the purpose of assessing damages, and attended by respondent's counsel, Mr. Hart, among others, who, however, withdrew before the meeting adjourned. Subsequently, on June 22, 1904, a decree was entered against Scully directing him to pay \$300 damages, together with interest and costs. It appears, however, that on May 28, 1904, the libelant executed a release in full to Scully for any claim of damages then resulting in this suit, or that might afterwards be charged against him, and he presented this paper to the clerk of the District Court,

with a request that it be filed in satisfaction of the judgment entered in the case, without offering to pay the costs accrued to that time. The clerk rightly refused to file the same with that effect. Scully, by his attorney, in July, 1904, presented a petition asking the court to direct the clerk to file this release in satisfaction of the judgment. Naretti, the libellant, now repudiates this release, and alleges it was secured from him by threats to incarcerate him, and as a result of a fear of imprisonment he executed the paper without a consideration. An examination of the whole case convinces me that these are not the facts. The notary public before whom the paper was executed, and two of Naretti's own countrymen, together with another witness, were called to show that he voluntarily, and with knowledge of what he was doing, executed this paper, and there is further evidence to establish the fact that he received \$5 for so doing; and, moreover, during the pendency of the suit he had worked for Scully again from April 2d to June 16th, and in fact was working for him when the paper was executed. It is not necessary, nor is it relevant, to inquire who was in the right and who in the wrong in the affray which resulted in Naretti bringing this suit. Scully failed to appear and present his side of it, and we only hear his explanation upon this rule to file what purports to be a release. The respondent is to blame primarily for not having appeared as he should have done, and the costs in this case have accumulated as a result of his negligence. He should, therefore, in any event, pay this amount. It is the practice, as well as the law, that when a plaintiff in a case requires satisfaction to be entered on a judgment the clerk can require him to pay his costs before entering the satisfaction (*Osborn v. U. S.*, 131 U. S. cxxxvii), and this is true whether the plaintiff appears in person, or through some one else to whom he has given authority by executing a power of attorney, or any other form of instrument authorizing him to have satisfaction recorded. If this power be placed in the hands of the defendant in the case when he presents his authority to have the judgment in the suit satisfied, it is his duty to present the amount of the costs accrued to that time, if they have not already been paid. It is necessary that he should do so in this case before his paper can be filed as a satisfaction in the case. The supplemental bill of costs was incurred as a result of Scully's neglect to appear at the proper time, and of the fact that, instead of coming into court in answer to the summons, or as soon thereafter as he knew of the existence of the judgment, he went about to settle the case with the plaintiff outside of court. He should therefore be required to pay all the costs before being permitted to file his release, which is practically a power of attorney from the libellant to enter satisfaction. The costs as filed in the supplemental bill are in accordance with section 983, Rev. St. U. S. [U. S. Comp. St. 1901, p. 706].

Let a decree be entered that upon John Scully, the respondent in this case, paying to the clerk of the District Court for the Eastern District of Pennsylvania the sum of \$134 costs in the above case within 10 days from this date, then and in that case the clerk



is directed to file the said paper set forth in the petition as a satisfaction of said judgment, and if, at the expiration of this time, the said costs be not paid, the petition will be dismissed, and the prayer of the petitioner refused.

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LYDON v. ROBERT SMITH ALE BREWING CO.

(Circuit Court, E. D. Pennsylvania. December 21, 1904.)

No. 13.

1. CARRIERS—RELATION OF CARRIER AND PASSENGER—PRESUMPTION FROM CARRIAGE IN PRIVATE VEHICLE.

There is no presumption that a person riding in a private vehicle of another is being carried as a passenger for hire, as would be the case if the owner of the vehicle were a common carrier of passengers, and an allegation of such fact in a pleading must be sustained by proof.

2. NEGLIGENCE—ACTION FOR DAMAGES—SUFFICIENCY OF PROOF.

Plaintiff brought an action to recover for the death of her intestate, alleged to have resulted from the negligence of defendant's servant in driving a wagon owned by defendant and employed in its business as a brewer, in which it was alleged the decedent was being carried as a passenger for hire. *Held*, that the allegation that deceased was being carried for hire was an essential part of plaintiff's case, and must be proved.

At Law. On motion for new trial.

Thomas J. Meagher, for plaintiff.

Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. The plaintiff is the mother of the decedent, John B. Lydon, and sues to recover damages for the death of her son, stating her cause of action in the following language:

"The said defendant was, at the time of the grievances hereinafter set forth, to wit, on the 12th day of December, 1903, possessed of a certain vehicle, to wit, a wagon, and of certain horses drawing the same. The said defendant did then as well receive in the said wagon so drawn as aforesaid John B. Lydon, a son of the said plaintiff, as a passenger therein to be carried by and in the said wagon, so drawn as aforesaid, from below the junction of certain streets of the city of Philadelphia, in the above-named Eastern District of Pennsylvania, to wit, Girard avenue and Thirty-Eighth street, to above the same, as obtain hire from the said John B. Lydon for the said carriage of him, the said John B. Lydon. The said wagon, so drawn as aforesaid, was then under the care, custody, and control of a certain servant of the said defendant; and the said servant of the said defendant was then driving the said wagon, so drawn as aforesaid, in which the said John B. Lydon was a passenger, as aforesaid, near the said junction of the said Girard avenue and the said Thirty-Eighth street. Thereupon it then and there became and was the duty of the said defendant to use due care that the said John B. Lydon should be safely carried by and in the said wagon, so drawn as aforesaid; yet the said defendant, not regarding its said duty, did not use due care that the said John B. Lydon should be safely carried by and in the said wagon, so drawn as aforesaid, but then and there wholly neglected so to do. The said defendant by its servant then so negligently drove the said wagon, so drawn as aforesaid, that the same then, near the said junction of the said Girard avenue and the said Thirty-Eighth street, came into collision with a certain street railway car, whereby the said John

B. Lydon was then and there thrown about with great force and violence and was thereby greatly cut and bruised and otherwise grievously injured in body and in mind, by reason whereof the said John B. Lydon afterward, to wit, on the 19th day of December, 1903, died."

At the trial the plaintiff proved that, although her son was riding on the wagon at the time of the collision, he was not a servant of the defendant, and had no part in driving the vehicle. She offered no explanation of his presence upon the wagon, and made no attempt to prove the foregoing averment that he was being carried for hire. Thereupon the court directed a verdict for the defendant, upon the ground that the plaintiff had failed to establish an essential part of the cause of action set forth in her statement, and it is this instruction that is now attacked as erroneous. The driver's negligence is, for present purposes, to be taken for granted, and the sole question now is whether the testimony offered by the plaintiff should be helped out by any presumption of fact that requires the case to be submitted to a jury.

If the defendant were a common carrier of passengers, there would no doubt have been a rebuttable presumption that the decedent was lawfully upon the vehicle. In *Pennsylvania Railroad v. Books*, 57 Pa., on page 346, 98 Am. Dec. 229, the Supreme Court of Pennsylvania laid down the rule of evidence as follows:

"Every one riding in a railroad car is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable when called on to pay, his fare, and the onus is on the carrier to prove affirmatively that he was a trespasser."

And in *Creed v. Pennsylvania Railroad*, 86 Pa. 146, 27 Am. Rep. 693, the court again declared:

"It was certainly correct to say 'that if a person, not connected with the company, travels by a passenger train, presumably he is traveling as a passenger, and for consideration'; in other words, he is presumed to have paid his fare, or to be ready to pay it when called upon. To presume otherwise would be to presume that such an one was a trespasser; but this is an affirmative proposition, the proof of which rests upon the one alleging it."

But the defendant was not a common carrier of passengers, and I see no good reason for extending the presumption that grows out of that kind of business so as to include a person riding upon a private vehicle such as the defendant's wagon. The presumption that assists one who is riding upon a railway train is based upon the observed facts that the vast majority of persons aboard such a train are passengers who have paid, or are ready to pay, their fare. *Prima facie*, therefore, every one upon the train who is not engaged visibly as a servant of the carrier is a passenger, and the burden of proof is upon the carrier to rebut the presumption. But there is no such foundation in the observed facts of daily life for a similar presumption concerning a man who is not a brewer's servant, but is nevertheless found riding upon the brewer's wagon. How he comes to be there may be surmised, but cannot be certainly known without evidence. He may be an idle friend of the driver, taking the air merely for his own pleasure; he may be a neighbor, who is being carried part of the distance to his home; he may be a customer on his way to the brewery, who is willingly afforded the

opportunity to ride to his destination, instead of being obliged to walk, or to pay his fare in the street cars; he may be on the wagon by direction or by permission of the defendant, or he may be there in spite of the defendant's positive orders to the contrary; or he may have paid for his transportation, and thus be entitled to his seat by virtue of a contract for a valuable and sufficient consideration. In brief, his presence can be accounted for in so many ways of equal, or of nearly equal, probability, that I cannot believe there is any presumption on the subject, and (in consequence) that the plaintiff was relieved from the obligation of proving affirmatively how her son came to be in a place so unusual. Moreover, since the plaintiff deliberately chose one method of accounting for the decedent's presence upon the wagon, and distinctly averred that he was riding upon this private vehicle by virtue of a contract of hire, I am unable to see upon what principle she might repudiate the ordinary obligation to prove what she had thus averred, and might turn the whole matter over to the jury in order that they might guess at the true explanation. Until such explanation was given, the defendant's duty could not be properly measured, and, in my opinion, therefore, the plaintiff was bound to offer evidence in support of the particular averment in this respect upon which her case was put.

The motion for a new trial is overruled.

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In re OLIVER.

(District Court, D. New Jersey. January 3, 1905.)

**1. BANKRUPTCY—DISCHARGE—VACATION—PETITION—AMENDMENT.**

Where a petition for the vacation of a bankrupt's discharge was defective for failure to show that petitioner acquired knowledge of the alleged facts since the granting of the discharge, as required by Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], but in an affidavit annexed to the petition petitioner verified that such information was obtained by him on a date which was subsequent to the discharge, the petitioner was entitled to cure the defect by amendment.

**2. SAME—PRESUMPTIONS.**

Where a petition for the vacation of a bankrupt's discharge failed to state the time when the alleged fraudulent transaction between the bankrupt and an agent of his creditor took place, it would be presumed to have taken place before the petition in bankruptcy was filed.

**3. SAME—FRAUD.**

A petition for the vacation of a bankrupt's discharge on the ground of fraud alleged that the claim of one of the bankrupt's creditors on which petitioner was also liable as the bankrupt's partner, was not paid by the bankrupt as alleged by him, but that as a mere pretense, and in order to cheat such creditor and other creditors of the bankrupt, especially petitioner, who was not included as a creditor in the bankrupt schedules, the latter handed certain moneys or checks to the creditor's agent, who immediately returned the money to the bankrupt, who thereupon converted the same to his own use, etc. *Held*, that the petition was insufficient to show fraud on any of the bankrupt's creditors, as he might have used such money to pay just debts.

On Petition of John Van Deursen to Vacate Order of Discharge.

Silas D. Grimstead, for petitioner.

J. Kearny Rice, for bankrupt.

LANNING, District Judge. The petition of John Van Deursen alleges that on March 1, 1901, he and Harry Oliver formed a copartnership; that on March 23, 1903, the partnership was dissolved, Oliver taking the partnership property and assuming the partnership debts, and giving to Van Deursen a bond, with surety, to indemnify Van Deursen against loss by reason of the debts and liabilities of the partnership; that on May 6, 1903, the Mack Manufacturing Company commenced a suit against Van Deursen and Oliver, as late partners, in the Circuit Court for the Eastern District of Pennsylvania for about \$4,000; that Oliver filed a plea in that suit, with affidavit, that he had paid the amount in full; that on July 20, 1903, Oliver filed his petition in bankruptcy in this court, and was adjudged a bankrupt; that Oliver did not include in the schedules annexed to his petition the Mack Manufacturing Company as one of his creditors; that on October 5, 1903, Oliver received his order of discharge in bankruptcy; that on February 26, 1904, Oliver secured leave to amend the schedules annexed to his petition in bankruptcy, and did amend them by adding the Mack Manufacturing Company as one of his creditors, though denying that the amount claimed by it was due or owing from him; that on April 8, 1904, the Mack Manufacturing Company recovered a judgment in the Circuit Court for the Eastern District of Pennsylvania against the copartnership for \$4,164.40, Oliver not appearing at the trial; and that suit has now been instituted by the Mack Manufacturing Company upon the above-mentioned judgment in the United States Circuit Court for the District of New Jersey against the said late firm of Van Deursen & Oliver, and that Oliver has filed an affidavit of merits, but, as yet, no plea thereto. The petition, after making the above-mentioned allegations, contains the following charge:

"That your petitioner is informed in such way that he believes it to be true, and he therefore alleges the fact to be, that the claim of the Mack Manufacturing Company was not paid by the said Harry V. Oliver, as alleged by him; that as a pretense, and in order to cheat and defraud the Mack Manufacturing Company and the other creditors of the said Harry V. Oliver, and more especially your petitioner, who was not included in the bankrupt's schedules, he, the said Harry V. Oliver, handed the money or checks to one Thomas Armstrong, who claimed to be an agent of the said Mack Manufacturing Company; that the said Armstrong immediately returned the money to the said Harry V. Oliver, who thereupon converted the money to his own use, and was not paid to the Mack Manufacturing Company nor given up to the receiver of the said Harry V. Oliver for the benefit of his creditors."

The prayer of the petition is that the order of discharge be vacated.

The counsel for the bankrupt now moves to dismiss the petition on the ground that it sets forth no facts which will justify the court in vacating the order of discharge. He plants himself upon

the provisions of section 15, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], which is as follows:

"The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

There is nothing in the petition showing that the knowledge of the alleged facts came to the petitioner since the granting of the discharge, but in an affidavit of the petitioner annexed thereto he swears "that the information regarding the payment of the claim of the Mack Manufacturing Company by the said Oliver as in said petition set forth was obtained by deponent on the 5th day of September, in the year 1904." I think, therefore, the petitioner may be permitted to amend his petition to cure this defect. But, if it be so amended, it must further appear, in order to justify the court in vacating the order of discharge, "that the actual facts did not warrant the discharge." At the time when the order of discharge was made—which was on October 5, 1903—the court was required by section 14 of Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], to grant it unless the bankrupt had—

"(1) Committed an offense punishable by imprisonment as herein provided; or, (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The petition does not state any time when the alleged transaction with Armstrong took place. It must be presumed to have taken place before the petition in bankruptcy was filed. If Oliver paid the money over to Armstrong, and Armstrong immediately handed it back to Oliver, the transaction, in legal effect, was the same as if Oliver had transferred it from one of his pockets to another and then back again to the first pocket. In such circumstances there was no fraud upon any creditor of the bankrupt. While it is alleged that Oliver converted the money to his own use, he may have used it in the payment of just debts. Fraud cannot be presumed. Facts must be averred which tend to prove it. There is no allegation in the petition showing the violation of any of the provisions of the fourteenth section.

I am satisfied that the petition is defective, and that it must be dismissed.

## ROWLAND et al. v. AUTO CAR CO. et al.

(Circuit Court, E. D. Pennsylvania, December 31, 1904. On Rehearing, January 12, 1905.)

No. 38.

1. **BANKRUPTCY—ACTION BY TRUSTEES—RECEIVERS.**

Where, in a suit by a bankrupt's trustees, the answer showed that there was no money in the possession of defendant association, and that on an accounting it was doubtful whether defendants' claim of set-off would not wipe out the indebtedness sued for, an application by plaintiffs for the appointment of a receiver for defendant association will be denied.

2. **SAME—INJUNCTION.**

Where, in a suit by trustees in bankruptcy, they alleged, as a ground for a preliminary injunction restraining defendants from collecting or receiving any of the debts due defendant association, of which defendants were members, that defendants had no funds which could be distributed, and it appeared that no injury could result to plaintiffs from permitting defendants to collect such debts, the injunction will be denied.

On Rehearing.

3. **SAME—PARTNERSHIP—DISCRETION.**

Where, in a suit for an accounting or the winding up of a partnership by one claiming to be a partner, his right as a partner is wholly denied, and it is not clearly established that defendant association is a partnership, the court in its discretion will not appoint a receiver or issue an injunction pendente lite; there being no proof that the fund is in danger, or that the association or its members are insolvent.

In Equity. Overruling motion for the appointment of a receiver and an injunction.

Frank A. Harrigan and John F. Gorman, for complainants.

Betts, Betts, Sheffield & Betts and John G. Johnson, for respondents.

HOLLAND, District Judge. The plaintiffs' motion is for the appointment of a receiver for the Association of Licensed Automobile Manufacturers, and for a preliminary injunction against the defendants to restrain them from collecting or receiving any of the debts due the copartnership, and from paying out any moneys now in the treasury of the said copartnership pending this suit.

Upon the argument of the case it was practically admitted that there is no necessity for the appointment of a receiver, and the answer shows there is no money in the possession of the association; and, further, that upon an accounting it is very doubtful upon which side the indebtedness will appear, as there is a claim of set-off by the association against plaintiffs.

Preliminary injunctions are only issued when it is necessary to prevent irreparable injury, and, as these defendants have no funds that can be distributed—as alleged by the plaintiffs as one reason for this order—there can be no injury resulting from such distribution, and I am unable to see how the plaintiffs can be injured by permitting the defendants to collect such debts as are now due the association; in fact, it seems that would rather be in the interest of the plaintiffs;

at any rate, there is no showing in this case to warrant the court in issuing a restraining order.

The motion for the appointment of a receiver and for a preliminary injunction is overruled.

#### On Rehearing.

This is a motion for a reargument on the refusal of this court to appoint a receiver and issue a preliminary injunction. The plaintiff is a citizen of the state of New York. The Auto Car Company is a corporation located in this district and a citizen of Pennsylvania. The Electric Vehicle Company is a corporation organized under the laws of New Jersey and a citizen thereof. The other unknown defendants, we learn from the bill and affidavits filed in this case, are copartners and corporations, with their respective habitats in various cities of the Union. The main office of the Association of Licensed Automobile Manufacturers is located in New York, the same state with the plaintiff.

It is alleged in the bill that this is a copartnership, although this is denied by an affidavit filed by the president of the association, and from this and the statements in the plaintiff's bill it is evident that it was not intended that this should be a copartnership in the general acceptance of that term; and if, on final hearing, it is held to be such an association, it will only be so as a matter of legal construction. The affidavits filed by George H. Day, general manager of the Association of Licensed Automobile Manufacturers, state that the office of the Association is located at 7 East Forty-Second street, borough of Manhattan, city and state of New York, at which place all the meetings of the association have been held. He also gives the names and addresses of the officers of the association, and the addresses and names of all the corporations belonging to this association, together with the state in which they have been incorporated. It is denied that either of the defendants, the Auto Car Company or the Electric Vehicle Company, has moneys, assets, royalties, or other funds whatsoever belonging to the said association; and it is further alleged that there are no moneys, assets, royalties, or other funds whatsoever now due to the said association from the Electric Vehicle Company or from the Auto Car Company, nor were there any such due on December 13, 1904, the day the suit was filed, and neither of these companies has any control whatever over the other member, or over the other members, of the said association. It is further denied that there is anything due from the association to the plaintiff, or from any of the members of the association; but it is claimed, upon the other hand, that the plaintiff is indebted to the association.

From this state of facts, as they appear from the statements made in the plaintiffs' bill and their injunction affidavit, taken together with the affidavits of Mr. Day, the whole controversy is involved in doubt. The jurisdiction of this Circuit Court is denied; it is denied that the association is one which is regarded in law as a copartnership; and it is doubtful whether the plaintiff is a debtor or creditor of the association. The only fact that seems to be well established is that the Auto Car Company, one of the defendants within the jurisdiction of this court, has no property whatever belonging to the association in its possession,

and there is nothing to show that the association, or its members, are insolvent. The appointment of a receiver or the issuing of an injunction are matters in the sound discretion of the court. In a suit for an accounting or winding up of a partnership by one claiming to be a partner, but whose right as a partner is wholly denied, and is not clearly established by the affidavits, where it is further denied that the association is a partnership, the court will not appoint a receiver or issue an injunction; there being no proof that the fund is in danger, or the association or its members insolvent. *Goulding v. Bain*, 4 Sandf. (N. Y.) 716; *Smith on Receivership*, § 192, par. b, and cases cited, note 4.

The motion for a reargument is refused.

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In re CANNON.

(District Court, E. D. Pennsylvania. December 16, 1904.)

No. 1,766.

**1. BANKRUPTCY—OBJECTIONS TO CLAIM—FORM.**

While, as a rule, objections to a claim by a trustee should be filed in writing prior to the hearing thereon, such practice is not imperative, and an oral statement of the objections may be permitted by the referee, in his discretion.

**2. SAME—HEARING BEFORE REFEREE—CREDIBILITY OF WITNESSES.**

Upon the hearing on a contested claim, the referee should of his own motion consider the credibility of the witnesses and of their testimony; and he is not obliged to allow the claim, even if the testimony in its support is uncontradicted.

In Bankruptcy. On certificate of referee concerning rejection of certain claims.

Greenwald & Mayer, for trustee.

Higgins & Higgins, for claimants.

J. B. McPHERSON, District Judge. Formal proof was filed before the referee by each of three wage claimants on December 29, 1903, and upon the same day the trustee objected orally to each claim, stating that he would afterward file objections in writing. In consequence of this action of the trustee, the claims were not allowed, but were held under advisement. On January 11, 1904, the trustee called the bankrupt and the respective claimants as witnesses, and examined them concerning the validity of these accounts. The written objections of the trustee were filed on January 12th, and the claims were disallowed by the referee on April 5th; his disallowance being the principal subject of the certificate now under review.

A preliminary question is raised by the refusal of the referee to sustain the objection of the claimants' counsel to the examination of the witnesses "because no formal exception to the claim

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 526.



has been filed by the trustee." This position is based upon the assumption that the trustee must put his objections in writing before the claim can be attacked by testimony or other evidence. No doubt, it is desirable that the trustee's objections shall be clearly and distinctly stated in advance of the investigation, so far as this may be possible, in order that the claimant may know what he is to be called upon to meet. But this information may be communicated to him in several ways. The trustee's objections may be noted by the stenographer, as was the case in *Re Shaw* (D. C.) 109 Fed. 780; or they may be stated orally, as was done in the instance now under consideration, if the referee permits this course to be pursued; or they may be filed in writing, this being the method which the claimants insist upon as the exclusive method. Undoubtedly the last-named practice has obvious advantages, and should be followed, as a rule, wherever reasonably practicable; but the bankrupt act does not require objections to be always in writing, section 57d (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) directing the allowance of claims that have been duly proved, "unless objection to their allowance should be made by parties in interest, or their consideration be continued for cause by the court upon its own motion." The manner of making such objection is thus left open, and should, I think, be largely committed to the discretion of the referee. It is conceivable that, while a trustee might have enough information to justify him in entering objection to a particular claim upon a ground which he might be able to state in general terms, he might not have information sufficiently precise to permit him to file specific objections in advance of the hearing; and I think it would be going too far to require him to make an attempt that could only result in failure. Whatever will give sufficient preliminary information to the claimant concerning the character of the trustee's objection is, I think, all that can fairly be required, especially when this is afterwards supplemented, as in the present case, by specific objections in writing. As the burden is on the trustee to overcome the prima facies of the formal proof (*Re Sumner* [D. C.] 101 Fed. 224; *Re Shaw* [D. C.] 109 Fed. 780; *Re Wooten* [D. C.] 118 Fed. 670), no harm is done to the claimant by allowing the trustee a reasonable latitude for investigation. It is clear that no harm was done to these particular claimants, for they understood distinctly that each claim was objected to in its entirety, on the ground that nothing whatever was due, and the examination of the witnesses was directed to this point alone.

On the merits, I see no reason to differ from the referee's findings. He has found that the testimony in support of each claim was so unsatisfactory that he could not accept it, and my own consideration has led me to the same conclusion. I adhere to what was said in *Re Domenig*, 11 Am. Bankr. R. 555, 128 Fed. 148, in reference to the credibility of witnesses:

"Much will necessarily depend on the manner of the witness while under examination, and referees should feel themselves obliged to consider of their own motion the credibility of the witness and of the story that is told, even

if there should be no opposing testimony. The mere fact that the witness has not been contradicted does not require the acceptance of the testimony."

It seems to me that no impartial mind can examine the evidence offered in support of these claims without finding itself unable to rely upon the accounts that were presented to the referee for acceptance.

The rejection of the claims is accordingly approved.

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UNITED STATES v. BODEN.

(Circuit Court, N. D. California. November 14, 1904.)

No. 13,145.

1. CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLES IN OWN JUICE—FRUIT PRESERVED IN SUGAR.

In construing paragraph 263, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1651], providing a certain rate of duty on "fruits preserved in sugar, molasses, spirits, or in their own juice," and a lower rate on "pineapples preserved in their own juice," *held*, that it was not the intention of Congress to impose the added duty in the former provision on account of sugar added for preservation of the fruit, and that the latter provision applies to preserved pineapples, as distinguished from other fruits, without reference to whether sugar is used in their preparation. *Held*, also, that certain canned pineapples, containing an amount of sugar that is not sufficient to preserve the fruit from spoiling if exposed to the open air, but serves as a flavoring only, are dutiable under the latter provision.

On Application for Review of a Decision of the Board of General Appraisers.

Marshall B. Woodworth, U. S. Atty.

Page, McCutchen & Knight, for importers.

MORROW, Circuit Judge. This is a petition by the collector of the port of San Francisco for a review of the decision of the United States Board of General Appraisers at New York as to the rate and amount of duties chargeable on certain pineapples in cans, imported by John H. Boden & Co., S. L. Jones & Co., Getz Brothers & Co., Field Mercantile Co., and Macondray & Co. This merchandise was classified by the collector at the port of San Francisco as "fruit preserved in sugar," and dutiable at the rate of 35 per cent. ad valorem and 1 cent per pound, under the first clause of paragraph 263 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1651]). The importers appealed from this decision to the Board of General Appraisers. The decision of the collector was there reversed; the board deciding that the merchandise should be classified as "pineapples preserved in their own juice," and therefore dutiable at 25 per cent. ad valorem, under the last clause of paragraph 263 of the same act. The entire paragraph reads as follows:

"Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juice, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum

of alcohol and not specially provided for in this act, thirty-five per centum ad valorem, and in addition, two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum; jellies of all kinds, thirty-five per centum ad valorem; pineapples preserved in their own juice, twenty-five per centum ad valorem."

The controversy between the collector and the importers is whether the merchandise in question is dutiable as a "fruit preserved in sugar," or as "pineapples preserved in their own juice."

It is an established rule of construction that, where there are both general description and specific designations of an article in the same act, it is the intention of Congress that the article be classified by its specific designation, rather than under the general description. *Homer v. The Collector*, 1 Wall. 486, 490, 17 L. Ed. 688; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. Ed. 566; *Smythe v. Fiske*, 23 Wall. 374, 380, 23 L. Ed. 47; *Movius v. Arthur*, 95 U. S. 144, 146, 24 L. Ed. 420; *Arthur v. Lahey*, 96 U. S. 112, 113, 24 L. Ed. 766; *Arthur v. Stephani*, 96 U. S. 125, 126, 24 L. Ed. 771; *American Net Co. v. Worthington*, 141 U. S. 468, 474, 12 Sup. Ct. 55, 35 L. Ed. 821.

The general description in this paragraph, covering the pineapples in question, is "fruits preserved in sugar, molasses, spirits, or in their own juice." No distinction is made in the rate of duty between fruits preserved in sugar or in their own juice, showing that it was not the intention of Congress to impose an added duty because of the sugar used in the preservation of the fruit. But this description is modified by the following clause, "not specially provided for in this act." At the end of the paragraph, after stating the rates of duty imposed when alcohol is contained in the article, a rate of duty is specially provided for "pineapples preserved in their own juice." This special provision applies to pineapples, as distinguished from other fruits, in the opinion of the court, and not to the quantity of sugar used in their preparation. In other words, it is the particular variety of canned fruit that is entitled to the lower rate of duty (for reasons sufficient to the framers of the act), and not the manner of its preservation. But even if the contention of the collector be correct, that the difference in rate of duty was made because of the greater amount of sugar contained in the articles mentioned in the first clause of the paragraph, this court is of the opinion that the quantity of sugar found in the merchandise in controversy, as appears from the chemical analyses introduced in evidence, is not sufficient to bring the merchandise within the classification covered by the higher rate. It would not preserve the fruit from spoiling if exposed to the air, but serves as a flavoring only.

The decision of the Board of General Appraisers is affirmed.

## UNITED STATES v. PERRY.

SAME v. LELAND.

(Circuit Court; S. D. New York. October 27, 1904.)

Nos. 3,505, 3,507.

**1. CUSTOMS DUTIES—CLASSIFICATION—STATUARY—STATUES IN PIECES.**

The provision in paragraph 454, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1678], for statuary produced from "a solid block or mass of marble," etc., is not limited to statuary made from single blocks, and is held to include certain statues, each carved from three solid blocks of marble.

On Application for Review of Decisions of the Board of General Appraisers.

The decisions in question reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Perry, Ryer & Co. and Wirt Leland. The following is the opinion of the board in one of the decisions in question (G. A. 5,571, T. D. 25,986):

WAITE, General Appraiser. The articles subject of this protest are two marble statues or caryatids from 150 to 200 years old, representing a faun and Flora, the net value of the two pieces being 3,000 francs. It is not disputed that the articles are of Italian production. The goods were assessed for duty at 50 per cent. ad valorem as manufactures of marble under paragraph 115 of the tariff act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1636], and are claimed to be dutiable at 15 per cent. ad valorem as "statuary," within the meaning of paragraph 454 of said act. Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1678], and the reciprocal commercial agreement with Italy, July 18, 1900, 31 Stat. 1979, made pursuant to Act July 24, 1897, c. 11, § 3, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690].

We find from the evidence, including verified photographs of the statues in question, that they are the professional productions of a sculptor, within the meaning of paragraph 454 of the act, as construed by the courts and the board. In *re Vandegrift*, G. A. 5,501, T. D. 24,822; In *re Bing*, G. A. 5,196, T. D. 23,955; *Townsend v. United States* (C. C.) 108 Fed. 801, affirmed by the Circuit Court of Appeals, 113 Fed. 442, 51 C. C. A. 276.

A further question arises from the fact that the statues are each of three pieces, and were in all probability each sculptured from three separate blocks of marble for convenience in handling, the figures being about eight feet in height. It is necessary to determine whether these works are made from "a solid block" of marble, within the meaning of the clause in paragraph 454 defining the term "statuary" wherever used in the act, which reads as follows:

"454. \* \* \* The term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

Many of the best statues, especially those of heroic size, are executed from more than one piece of marble, and a construction which produces the inequitable result of excluding such productions from the comparatively low rate of duty on statuary is to be avoided if possible. It is very probable that the purpose of the qualifying expression, "cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone," etc., was to restrict paragraph 454 to statuary made from solid marble, stone, etc., as distinguished from statuary made from composition stone or similar materials by molding. To admit under its provisions statuary made from more than one solid block of marble would not defeat this object. Such an interpretation is, we think,

rather in harmony with the spirit of the law, and accords with the elementary principle of statutory construction that singular expressions in a statute may include the plural, and vice versa. Endlich on Interp. of Stats. § 388. We believe it should be adopted as the more reasonable construction. The board is now of opinion that its decision in *Re Joseph, G. A. 1,191, T. D. 12,453*, where the contrary view was taken, is erroneous, and should be overruled.

The protest is accordingly sustained, and the collector's decision reversed, with instructions to reliquidate the entry accordingly.

Henry A. Wise, Asst. U. S. Atty.

Frederick W. Brooks, for the importers.

HAZEL, District Judge. Judgment affirmed on the decisions of the Board of General Appraisers.

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UNITED STATES v. ACKER, MERRALL & CONDIT (two cases).

UNITED STATES v. HOLTZ & FREYSTEDT.

(Circuit Court, S. D. New York. October 28, 1904.)

Nos. 3,571, 3,581, 3,602.

1. CUSTOMS DUTIES—STORAGE OF MERCHANDISE DETAINED BY GOVERNMENT.

The expense for storage of imported merchandise during its detention by order of the Secretary of the Treasury, pending an inspection and analysis by the Department of Agriculture, under the provisions of the so-called "Pure Food Law" of March 3, 1903, c. 1008, 32 Stat. 1157 [U. S. Comp. St. Supp. 1903, p. 373], should be borne by the government, and not the importer.

On Application for Review of Decisions of the Board of General Appraisers.

These proceedings were instituted by the United States, and the decisions in question cover merchandise imported at the port of New York by Acker, Merrall & Condit and Holtz & Freystedt. The questions at issue appear from the opinion (per Hay, General Appraiser) filed by the board in one of the cases in controversy, as follows (G. A. 5,689, T. D. 25,331):

"This protest raises the question as to the legality of a charge for storage, imposed by the collector upon an importer, upon certain wine detained by order of the Secretary of the Treasury until the purity of the wine could be established by the Department of Agriculture under the provisions of the act of March 3, 1903, c. 1008, 32 Stat. 1157 [U. S. Comp. St. Supp. 1903, p. 373]. This act is one of the regular appropriation bills, and the item in question is that which makes an appropriation for the Bureau of Chemistry of the Department of Agriculture. The appropriation is for the sum of \$85,300. Among the other items stated in the act, for which this appropriation is to provide, is the following:

"To investigate the adulteration of food, drugs, and liquors, when deemed by the Secretary of Agriculture advisable; and the Secretary of Agriculture, whenever he has reason to believe that articles are being imported from foreign countries which by reason of such adulteration are dangerous to the health of the people of the United States, or which are forbidden to be sold or restricted in sale in the countries in which they are made or from which they are exported, or which shall be falsely labeled in any respect in regard to the place of manufacture of the contents of the package, shall make a request upon the Secretary of the Treasury for samples from original packages of such articles for inspection and analysis; and the Secretary of the Treasury

is hereby authorized to open such original packages and deliver specimens to the Secretary of Agriculture for the purpose mentioned, giving notice to the owner or consignee of such articles, who may be present and have the right to introduce testimony; and the Secretary of the Treasury shall refuse delivery to the consignee of any such goods which the Secretary of Agriculture reports to him to have been inspected and analyzed and found dangerous to health, or which are forbidden to be sold or restricted in sale in the countries in which they are made or from which they are imported, or which shall be falsely labeled in any respect in regard to the place of manufacture or the contents of the package.'

"Under this statute the wine in question was detained for examination, and the charge herein disputed is that for storage of the wine pending this examination. We are furnished with a copy of the letter from the Assistant Secretary of the Treasury in which the collector is directed to impose this charge. But our attention has not been called to any statute authorizing the same, and we know of none; nor are we familiar with any principle of law, relative to customs administration, upon which the right to impose this charge could be placed, and the government officers have not directed our attention to any.

"Undoubtedly, under the police power of the federal government, all merchandise brought in from other ports may be detained for such examination as is necessary to guard the public health, welfare, and safety, and we are not prepared to say that the expense of this examination might not be imposed upon the importer. But this, like the examination itself, must be under express provision of statute. We know of no general provision of the law which would authorize the imposition of the expense of this charge upon the importer; and the specific provision quoted above, under which this examination is made, being, as it is, one of several items for which there is a specific appropriation, would leave at least a reasonable inference that the purpose and intention of Congress were that all expense in connection with the examination therein provided for should be borne by the government. But whether this be true or not, we cannot see that it in any way differs from the ordinary administration of a public law, the expense of which is uniformly borne by the government, unless there is express provision for imposing this expense upon some party in interest.

"For the reasons herein given, the protest is sustained, and the collector is directed to reliquidate the entry accordingly."

Henry A. Wise, Asst. U. S. Atty.

Edward Hartley, for Acker, Merrill & Condit.  
Comstock & Washburn, for Holtz & Freystedt.

HAZEL, District Judge. Judgment affirmed, on the decisions of the Board of General Appraisers.

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#### HELLYER v. TRENTON CITY BRIDGE CO.

(Circuit Court, E. D. Pennsylvania. December 19, 1904.)

No. 69.

1. BRIDGES—INJURY OF PERSON FROM DEFECT—LIABILITY OF BRIDGE COMPANY.

An instruction that a bridge company is liable for an injury resulting to a person crossing its bridge without negligence, from a defect in the bridge, whether it had notice of the defect or not, is too broad, even under the Pennsylvania rule, and properly refused, where it makes no exception as to the cause of the defect.

2. DAMAGES—AMOUNT—PROVINCE OF JURY.

Damages awarded by a jury for a personal injury on conflicting evidence held not so insufficient as to justify the granting of a new trial.

At Law. On motion for new trial.

H. W. Scarborough, for plaintiff.

A. T. Ashton, for defendant.

J. B. McPHERSON, District Judge. The defendant was charged with negligence in failing to keep the carriageway of its bridge in repair, in consequence whereof the plaintiff was thrown from his bicycle and suffered injury in the fall. The verdict was for the plaintiff, but in so small an amount that he asks for a new trial, arguing, *inter alia*, that the court erred in matter of law by refusing to instruct the jury as requested by his second point. The point is as follows:

"If you find that this accident was caused by a defective plank or hole in the floor of the bridge, and also that the plaintiff was himself not guilty of negligence, then the plaintiff is entitled to recover, even though the defendant had no notice of the defect."

This request is intended to follow the two cases of *Pennsylvania & Ohio Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549, and *Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128; but an examination of these decisions will show, I think, that the point is probably too broadly drawn. The doctrine of these cases is thus stated by Mr. Justice Sharswood in *Canal Co. v. Graham*, on page 297, 63 Pa., 3 Am. Rep. 549:

"Where a corporation, in consideration of the franchise granted to it, is bound by its charter to keep a road or bridge in repair, it is liable for any injury to a person, arising from want of repair, whether the defect be patent or latent, unless he be in default, or unless the defect arose from inevitable accident, tempest, or lightning, or the wrongful act of some third person, of which they had no notice or knowledge. It matters not that ordinary care was used in the erection or repair of it, and that such work was done under contract, by competent workmen."

Assuming this rule to be correct, I think it is clear that the point ignores the possibility that the defect in the bridge may have been due to some one of the excepted causes referred to by the court, and asks an unqualified instruction that whatever may have caused the defect in the plank or the hole in the floor of the bridge the defendant was liable, although it may have had no notice of the defect. I have considered again the answer of the court to this point, and am not convinced that the reason there given for the refusal was wrong. Under some circumstances, I think that the company would not be liable unless it had either actual or constructive notice of the defect.

But it is unnecessary to discuss the subject further. The jury found in favor of the plaintiff, as I have already said, and of necessity, therefore, determined that the defendant had been negligent in the discharge of its duty to repair. It follows that the correctness of the court's answer to the second point ceased to be important, for an affirmation could have had no more favorable result than to lead the jury to the conclusion that the plaintiff was entitled to recover a verdict in some amount at least, and to this conclusion the jury came under the instructions in the general charge. What is really complained of is the smallness of the verdict, but for this grievance I find myself unable to afford the plaintiff any redress. The amount of the damage that he suffered was a much disputed question on the trial, and the

facts relevant to this subject were within the province of the jury to determine. I should not be justified in setting the verdict aside merely because I should myself have inclined to name a somewhat larger sum.

The motion for a new trial is refused, and judgment is directed to be entered upon the verdict.

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In re BLUMBERG.

(District Court, E. D. Pennsylvania. December 10, 1904.)

No. 2,035.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

Petitioning creditors are bound to as full a disclosure in their petition in respect to the acts of bankruptcy charged as their information enables them to make, supplemented by an explanation of its lack of completeness, so far as it may be thus lacking, and their case must rest on something more than rumor or vague hearsay or mere suspicion.

2. SAME.

An averment of an act of bankruptcy in a creditors' petition by the making of a transfer of property for an "improper" consideration is not sufficient, nor is a general averment of the payment of money with intent to prefer creditors, unless the names of such creditors and the amounts paid are set out with as much detail as possible.

In Bankruptcy. On demurrer to petition and motion to amend.  
Greenwald & Mayer, for petitioning creditors.  
Henry N. Wessel, for alleged bankrupt.

J. B. McPHERSON, District Judge. The acts of bankruptcy set out in the petition are as follows:

"And your petitioners further represent that said Louis Blumberg, trading as L. Blumberg & Co., is insolvent, and that within four months next preceding the date of this petition the said Louis Blumberg, trading as L. Blumberg & Co., committed an act of bankruptcy, in that he did heretofore, to wit, during the months of July, August and September, 1904, while engaged in the manufacture of clothing at No. 36 North Third street, in the city of Philadelphia, convey, transfer, conceal or remove part of his property by delivering merchandise to an amount of more than five thousand dollars to Hymen Finberg, Gittelmacker & Son, and divers other persons known to the bankrupt, for improper considerations, with intent to hinder, delay, and defraud his creditors.

"That the said Louis Blumberg, trading as L. Blumberg & Co., while insolvent, within four months next preceding the date of this petition, committed an act of bankruptcy, in that during the months of August and September, 1904, he transferred, while insolvent, some of the moneys received by him from the improper sale of said merchandise unto the Tradesmen's National Bank of the City of Philadelphia, with intent to prefer said bank, and the indorsers and makers of promissory notes held by said bank, and relieve them from further liability to said bank over and above his other creditors."

These averments are demurred to as insufficient, and I think the objection must be sustained. What is an "improper" consideration is not a fact, but a conclusion of law, and for this reason the petitioners should set forth the details of the transaction in sufficient



fullness to enable the court to judge for itself concerning the character of the consideration. I think, also, that the facts concerning the payments to the Tradesmen's National Bank should be set out more specifically. As the petition stands, no amount is named, nor is it even averred, except by inference, that the payments were made upon the bankrupt's promissory notes, to say nothing of the vagueness of the reference to "the indorsers and makers of promissory notes held by said bank," whom the bankrupt is charged with intending to prefer. The petition to amend does not touch the matters herein referred to, but is concerned entirely with other defects in the original petition that are also declared to exist by the demurrer. The amendments prayed for will be allowed, but, as the averments above quoted will even then be insufficient, the petitioners have leave to amend still further in these two particulars within 10 days, in default whereof the clerk will enter an order that the petition be dismissed.

The difficulty of obtaining accurate information concerning fraudulent transfers of property or preferential payments has been suggested as an excuse for the vagueness of such averments as are found in this petition, and I am not insensible that such difficulty may often exist. Due allowance should be made for it, but the petitioning creditors are nevertheless bound to as full a disclosure as their information may enable them to make, supplemented by an explanation of its lack of completeness, so far as it may thus be lacking. Impossibilities are not expected of petitioning creditors, more than of other suitors; but they must found their case on something more than rumor, or vague hearsay, or mere suspicion. If they cannot aver the necessary facts on personal knowledge, or credible information, which is full enough to supply details that will justify the inference that is sought to be drawn, they simply furnish one more example of an intending litigant who may believe that his opponent has done wrong, but is unable to prove it.

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SOWLES v. FIRST NAT. BANK OF PLATTSBURGH et al.

(Circuit Court, D. Vermont. November 29, 1904.)

1. EQUITY PRACTICE—REHEARINGS—NEWLY DISCOVERED EVIDENCE.

Defendant agreed to pay plaintiff one-half of anything she could collect on a judgment held by defendant. An attachment suit was accordingly brought, but defendant dismissed the same, and compromised with the judgment debtor. Plaintiff sued to recover her proportion of the amount due on the judgment, but failed to show, by competent evidence, that the debtor owned any particular property which was covered by the attachments. Consequently a decree was entered allowing plaintiff merely one-half of what defendant actually received from the judgment debtor. On motion for rehearing plaintiff offered to show, by alleged newly discovered evidence, certain facts as to the interest the judgment debtor had in his father's estate which could be reached by the attachment. The inventory of the estate had been on file in the probate court for years, and the interest of the judgment debtor could have been proved before the testimony was closed, by proving the appraisal and calling the administrator. So, in the attachment suit, judgment could have been

taken and execution levied upon such interest, or the administrator could have been followed and compelled to make disclosure under the state procedure. None of these things was done. *Held*, that no sufficient diligence was shown to warrant a rehearing.

2. PARTIES—PERSONS BENEFICIALLY INTERESTED—PROTECTION OF RIGHTS.

The court will protect a party interested in the judgment to be obtained in a suit, and who has control of the same by counsel, against any unjust discharge by the plaintiff of record and party interested in the remainder of the judgment.

3. COURTS—JURISDICTION OF FEDERAL COURTS—WANT OF DIVERSE CITIZENSHIP.

One not a party to a suit in a federal court, and who, for want of diverse citizenship, cannot be made a party, cannot be followed in that court on the ground of collusion between himself and defendant to defeat plaintiff's rights.

In Equity.

See 130 Fed. 1009.

Edward A. Sowles, for plaintiff.

Fuller C. Smith, for defendant bank.

WHEELER, District Judge. This cause has been heard upon a motion for rehearing by the plaintiff because of alleged newly discovered evidence, and of the defendants Sowles for leave to file a cross-bill. The evidence relates to the interest of D. Noyes Burton, as only son and heir in the estate of Oscar A. Burton, which the oratrix might reach under the agreement with the defendant bank that she might have half of what she should collect of him for the bank. What there is that is really new is the entry of a formal settlement of the administrator's account on consent of Burton in the probate court. The important thing was the interest he had in his father's estate that could be reached. The inventory of that estate had been on file in that court for years and showed the estate which could have been followed up by the oratrix, as a person interested, in that court, and she could have taken judgment in the suit in the name of the bank, and have levied execution upon the interest of the son as heir. And she could have proved that interest in this case before the testimony was closed by proving the appraisal and calling the administrator. Nothing appears to have been done and no diligence is shown in that behalf. It would be contrary to all principles of due procedure in ending litigation to open the case for further testimony after the oratrix had so long a time in which to collect the judgment against Burton, and so full an opportunity to show that she could have collected more if the bank had not discharged the claim. The administrator was summoned as trustee of Burton, and could have been followed, and compelled to make disclosure under the state procedure in such cases; but nothing appears to have been done in that or any direction from the commencement of the suit, in August, 1895, to the time of the discharge of Burton by the bank, April 1, 1899. The O'Neil farm appears to have been the clearest property to reach which descended to Burton, as sole heir, and could have been levied upon between those dates as well as now; but it was appraised at \$10,500, and mortgaged for \$7,000, with interest bond running, and it is not clear that much of anything could be realized on exe-

cution from it. Besides this, the plaintiff had control of the suit in the state court by her counsel, and that court would, on familiar principles, have protected her rights against any unjust discharge by the bank. And Burton is not a party here, and could not be, for want of diverse citizenship; so he cannot be followed here for any collusion with the bank to defeat the plaintiff's right.

Motions denied, and decree as before directed.

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SNYDER et al. v. HOME INS. CO.

(District Court, S. D. New York. November 10, 1904.)

1. MARINE INSURANCE—WATCHMAN—WARRANTIES—BREACH.

Where a marine policy on a canal boat contained a provision that it was "warranted by the insured that the said vessel \* \* \* shall at all times have a competent watchman on board," and she sunk at a dock, during the absence of the master and crew, without any person in charge, insurer was not liable.

In Admiralty.

Action upon insurance policy to recover damages caused by the sinking of a steam canal boat while lying at a dock in Jersey City on the night of June 10, 1903, during the absence of the master and crew. Several persons visited the boat at intervals to see that she was in safety, but between the times of their visits she filled and sunk. The policy contained the following provision: "Warranted by the insured that the said vessel \* \* \* shall at all times have a competent watchman on board."

John F. Foley, for libelants.

James J. Macklin, for respondent.

HOLT, District Judge. I think that the admitted breach of the warranty that the canal boat should at all times have a competent watchman on board bars a recovery. The cases of *Lewis v. Aetna Ins. Co.* (D. C.) 123 Fed. 157, and *Lewis v. Barber Asphalt Co.*, Id. 161, do not seem to me to hold to the contrary. In those cases there was a warranty of seaworthiness. The owners had provided a competent master and crew, but the master was not on board. The court held that the warranty was not broken. In this case there was an express warranty that the boat should at all times have a competent watchman on board. The proof does not establish what caused the vessel to sink, but there were various intimations on the trial that it was due to the malicious acts of certain men, hostile to the boat, engaged in a labor strike. There is no proof that this was the cause of the accident, but, if that was the cause, the absence of the watchman undoubtedly gave opportunity for the acts which caused the boat to sink. In any case a breach of an express warranty in a policy of insurance bars a recovery, whether it caused any injury or not. *Arnould on Marine Insurance* (7th Ed.) vol. 2, § 632, and cases cited.

The libel is therefore dismissed.

OLSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1904.)

No. 2,074.

1. CRIMINAL LAW—CONSOLIDATION OF INDICTMENTS.

Indictments against the same person for conspiracy to defraud the United States by means of illegal entries of public lands by different persons are for the same class of offenses and may properly be consolidated for trial, under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720].

2. PUBLIC LANDS—LEGALITY OF ENTRY UNDER TIMBER AND STONE ACT.

Any citizen of the United States may purchase lands under Timber and Stone Act June 8, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], where such purchase is for his own exclusive use and benefit, notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit; but any previous agreement by him, by which directly or indirectly "the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself," is in violation of the act, and his verified statement to the contrary constitutes a criminal offense thereunder, although such agreement may have been in parol and within the statute of frauds.

3. CONSPIRACY—EVIDENCE—RELATED TRANSACTIONS.

Under an indictment charging the defendants with conspiracy to defraud the United States of a large quantity of public lands, the overt act charged being the causing of an illegal entry of a tract described by a person named for their benefit, evidence tending to show that defendants induced the entry of other tracts by different persons at the same time and under similar circumstances is competent, in proof of the conspiracy and the fraudulent motive; and hence, where such indictment was consolidated with others covering such other entries, the dismissal of the latter after the evidence had been taken thereon was not prejudicial to the defendants.

4. SAME—VARIANCE—IMMATERIAL AVERMENT IN INDICTMENT.

Under an indictment against a number of defendants for conspiracy to defraud the government out of certain public lands, charged to have been illegally entered for the benefit of the defendants, it is not a fatal variance that the proof shows that some of them only shared in the benefit; the offense being complete if the conspiracy is established and an overt act committed in pursuance thereof.

5. CRIMINAL LAW—EVIDENCE.

On the trial of an indictment for conspiracy to defraud the government by procuring other persons to make entries of public lands under the timber and stone act for the benefit of defendants, the intent and motive of such entrymen in making the entries is the material question in issue; and where they are placed on the stand by the prosecution, and testify to facts and circumstances from which it is sought to infer an illegal purpose and agreement, it is competent for the defendants, on cross-examination, to question them directly as to the purpose with which the entries were made, and as to whether they had made any contracts to sell or convey the lands to others.

6. SAME.

Where circumstantial evidence is relied on to show that entries of lands under the timber and stone act were fraudulent, and made for the benefit of others than the entrymen, to whom the timber on the lands was subsequently conveyed for a consideration shown, it is competent for either party to show the value of such timber, as a circumstance bearing upon the bona fides of the transaction.

In Error to the District Court of the United States for the District of Minnesota.

J. L. Washburn and C. A. Severance, for plaintiff in error.  
Charles C. Houpt, U. S. Atty.

Before SANBORN and HOOK, Circuit Judges, and MUNGER,  
District Judge.

MUNGER, District Judge. To undertake to present sufficient of the testimony in this case to determine what proper inferences might be drawn therefrom would require practically a statement of the entire evidence. The following synopsis, however, will be sufficient to indicate the character of the case and the application of the questions of law which are presented:

The testimony discloses that the plaintiff in error was by profession what is known and designated as a "timber cruiser"; that in June, 1901, he asked several parties if they wished to make \$50. Being inquired of as to how it could be done, he told them by taking a claim under the stone and timber act, explaining somewhat to the parties the provisions of the act. On being informed that the parties had no money for expenses, he said that would be arranged for. At his suggestion these parties informed other persons, who called upon Olson to know if they, also, could take lands under the same conditions. This resulted in Olson taking about 25 persons from Duluth by rail to the station or town of Ely, from there by stage to Winton, from there by tugboat and rowboats or canoes up the shores of the lake to a certain point, where they disembarked and went but a few hundred feet back from the shore of the lake into the timber. After remaining there a few hours, they returned to Duluth by the same route. None of the entrymen paid any of the expenses of the trip, consisting of railroad, stage fare, hotel bill, etc. The testimony does not specifically show who paid the expenses, but the fair inference from the testimony is that they were paid by the defendant, Olson. They were all informed by Olson that they could make \$50 by taking a piece of land under the stone and timber act, but were also informed by him that under the law they could not offer to sell it until after they had made final proof. Upon their return Olson notified the parties to go to the office of A. L. Agatin to arrange for filing upon the land. The parties, at various dates between June 24th and July 2d, met Olson at the office of Agatin, and from there went to the land office and made their filing upon lands, the description of which they did not personally know, but which was furnished them by Olson at Agatin's office. Nothing seems to have been said to any of the parties about the publication of any notice of their application, but such publications were prepared and made by A. L. Agatin for the respective parties without any suggestion from the parties that he should do so, and we think the evidence fairly discloses that the parties had no knowledge that any such publications were made until the time of making their final proofs. Afterwards, and between the 20th and 25th of September, the several parties made their final proofs at the land office, but before making their proofs they received notice through Olson to go to the office of Agatin for that purpose. Upon going to Mr. Agatin's office they were in-

formed by him that certain questions would be asked them at the land office, and that under the law the questions would have to be answered in a certain manner. Each one was then requested to give a mortgage upon their respective tracts of land to cover the amount required to be paid to the government and the expenses incurred. Said mortgages amounted each to approximately \$450, varying in amount according to the number of acres and the sum paid to the government. These mortgages were made to the defendant Ross L. Mahon. The parties went to the land office and made their proofs, Mr. Olson acting as a witness for many of them. None of the entrymen expended any money of their own, and when one step in the transaction was taken they apparently did not know what the next step would be, until notified by Olson. After the proofs were made Olson was asked by most of the parties how about their \$50, and were informed by him that that would be attended to or arranged in a few days. Between September 21st and 30th, inclusive, each of the parties, at the instance of Olson, executed a deed to the defendant George C. Swallow for all the timber upon their respective tracts of land; the consideration in each of said deeds, with the exception of five, being stated as the sum of \$500, and each of the parties receiving therefor the sum of \$50. Of the parties who thus entered land were Ella Phillips, Albert B. King, and Eugene N. Dwello. At the May term, 1903, of the United States District Court for the District of Minnesota, sitting at Duluth, the grand jurors presented an indictment against said Olson, Ross L. Mahon, Arcadius L. Agatin, Lewis W. Hopkins, and George C. Swallow, charging them with the crime of conspiracy to defraud the United States out of the title and possession of large tracts of land situated in the county of Lake and state of Minnesota, of great value, specifically describing one tract of land, and that in pursuance of said conspiracy they caused said Ella Phillips to enter the said tract at the United States land office, under the stone and timber act, not for her own use, but for the use and benefit of said Olson, Mahon, Agatin, Hopkins, and Swallow, said indictment being No. 3,189; and at the October term, 1903, of said court, the grand jurors presented two other indictments against defendants for like offenses, one based upon the entry of said King, known as "Indictment No. 3,254," and the other upon the entry of said Dwello, known as "Indictment No. 3,253." In December, at a sitting of the court, a separate trial was granted to the defendant Olson, and the court, upon application of the United States Attorney, consolidated the three indictments for the purposes of the trial, to which the defendant objected. At the close of the evidence indictments 3,189 and 3,254 were dismissed, on motion of the United States Attorney. The trial resulted in a verdict of guilty. Motions in arrest of judgment and for a new trial were made and overruled, and judgment of sentence pronounced, to reverse which judgment he has brought the case to this court. As there are only 365 assignments of error, they may for convenience be grouped together and all properly considered under a few heads.

We think the three indictments were properly consolidated for

the purpose of the trial. Whether they arose out of the same transaction, it is unnecessary to state. They were of the same class of crimes and offenses, and might have all been joined in one indictment in separate counts thereof. Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720]; U. S. v. O'Callahan, 6 McLean, 596, Fed. Cas. No. 15,910; United States v. Devlin, 6 Blatchf. 71, Fed. Cas. No. 14,953; Pointer v. United States, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. Ed. 208; Williams v. United States, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. Ed. 509. Where several indictments are presented, embracing offenses which might have been joined in one indictment, they may be consolidated for the purpose of trial. Rev. St., § 1024; Williams v. U. S., supra. As the indictments charge a conspiracy to defraud the United States out of the lands in question in violation of Stone and Timber Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], it becomes necessary before passing upon some of the questions urged against the sufficiency of the indictment, to consider the correct meaning and interpretation of said act. The act provides that any citizen of the United States may purchase, under certain conditions, lands of the United States which are valuable chiefly for stone or timber and are unfit for cultivation, to an amount not exceeding 160 acres. One of the conditions of such purchase is that the party seeking to make such purchase shall—

"File with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and chiefly valuable for its timber or stone; that it is uninhabited; \* \* \* that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated."

The provisions of this statute were before the Supreme Court, and considered in United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, and by this court in United States v. D. T. & L. Co. (C. C. A.) 131 Fed. 668. In the first case the Supreme Court held that the statute did not "limit the dominion which the purchaser has over the land after its purchase from the government or restrict in the slightest his power of alienation"; that the statute only prohibited his entering the land under an agreement whereby he was acting for another; that he might make a valid entry of such lands, though with a view of disposing of the same after he had completed the purchase, provided that at and before the time of such purchase he had not entered into an agreement with another, whereby such other should receive any of the benefit of such purchase. In United States v. D. T. & L. Co., this court held that what the statute prohibited was not alone a prior agreement that the title, or any part thereof, which the purchaser should ac-

quire, should be conveyed to another, but that the land should not be acquired on speculation for the use and benefit of another. In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase lands as therein provided, where such purchase is for his own exclusive use and benefit, notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit; that what the statute denounces is that a party shall not, at the time of the purchase, have directly or indirectly made any agreement or contract in any way or manner, with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for some one besides himself. This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that there can be no violation of the act unless an enforceable agreement was made by the applicant before his application to enter the land whereby the title should inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any way or manner, directly or indirectly, made any agreement or contract whereby the title which he may acquire shall inure to the benefit of any one except himself, contemplates an agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute.

It is urged that the indictments were insufficient, in that they do not set forth facts sufficient to constitute a public offense. Much of the argument in support of this proposition is based upon the theory that the indictment should show an enforceable agreement, one good under the statute of frauds. This question we have already disposed of against such contention. In every other respect we think the indictment upon which defendant was convicted unassailable. It charges the several defendants with having entered into a conspiracy. To do what? To defraud the United States out of the title and possession of a large quantity of lands in the district of Minnesota, a portion of which are specifically described. How was this fraud to be consummated? The indictment says by means of false, fraudulent, feigned, untrue, and illegal entries of said lands under that certain act of Congress approved June 3, 1878, etc. The indictment then charges the overt act, to wit, that Olson, Mahon, and Agatin persuaded and induced Dwello upon entering the land, in the United States Land Office at Duluth, Minn., to make a false oath, etc., specifying the particulars in which the oath was false. Thus it will be seen the indictment charges the unlawful combination, the illegal purpose to be attained, the means by which it was to be attained, and the overt act upon the part of some of the alleged conspirators. This, we think, sufficient. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545.



We see no objections to the validity of the indictments which were dismissed; but, even though they were invalid, no prejudice resulted, as all the evidence received was admissible under the indictment upon which the conviction was had. The charge was conspiracy to defraud the United States out of a large tract of land. A portion of the lands were embraced in each indictment, and in the trial of either case evidence which tended to establish other related acts of the same character, done at or about the same time, were admissible as tending to establish the motive and intent of the defendants. In *Wood v. United States*, 16 Pet. 342-360, 10 L. Ed. 987, it was said:

"Fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive, but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. The case of *Irving v. Motley*, 7 Bing. 513, turned upon this very point. There the action was trover to recover back goods which had been purchased by an agent for his principal by means of a fraud. In order to establish the plaintiff's case it became necessary to show that other purchases had been made by the same agent for the same principal, under circumstances strongly presumptive of a like character. No doubt was entertained by the court of the admissibility of the evidence."

To the same effect are *Castle v. Bullard*, 23 How. 172, 16 L. Ed. 424; *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106; *Butler v. Watkins*, 13 Wall. 456-464, 20 L. Ed. 629; *N. Y. Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Continental Ins. Co. of N. Y. v. Ins. Co. of Penn.*, 51 Fed. 884, 2 C. C. A. 535; *American Surety Co. v. Pauly*, 72 Fed. 470, 18 C. C. A. 644.

It is assigned as error that the court erred in not directing the jury to find a verdict of not guilty at the close of the testimony, as requested by defendant. There was in our judgment sufficient evidence to warrant the jury in finding that Olson and some of his codefendants did enter into the conspiracy charged to defraud the United States out of the lands in question by means of the false entries described. The evidence, it is true, was circumstantial; but it is rarely that a conspiracy or fraud can be established by direct and positive evidence. It is usually shown by a series of acts and circumstances. It would extend this opinion to an unnecessary length to undertake to recapitulate in detail the evidence which we think justified the jury in finding the existence of the conspiracy with the intent to defraud. It is sufficient to say that we have carefully read all of the evidence, and we are satisfied that the evidence justified such a finding.

It is said, however, that as the indictment charged that the land was entered for the benefit of all of the defendants named, and that, giving the evidence the most favorable construction, it failed to show that all of the defendants were to participate in the benefit of the entries, but that a portion only of the defendants were to receive the benefit, the variance is a fatal one. We do not agree to this proposition. The essence of the offense was the unlawful conspiracy for the purpose of defrauding the United States out of certain lands. The particular persons who were to be bene-

fited by the conspiracy and fraud was not a material issue. It was sufficient to establish the existence of the conspiracy for the purpose of defrauding the United States as alleged, and one of the overt acts alleged in furtherance of the conspiracy. It was not necessary to establish each and every overt act alleged, nor was it material or necessary to show that all of the persons alleged to be benefited by the conspiracy were to or did receive such benefit. Indeed, the offense is a completed one when the conspiracy is established, and an overt act committed in pursuance of that conspiracy, notwithstanding the ultimate object may not be accomplished. The authorities cited by counsel to the effect that the charge in an indictment for larceny that the property was that of A., the proof showing that it was the property of B., is a fatal variance, have no application. In this case the charge was that the parties entered into a conspiracy to defraud the United States out of certain of its lands. Had the proof been that the land belonged to some individual or to some government other than the United States, then the authorities cited would be applicable, and the variance would be fatal. It was sufficient in this case to simply show the unlawful combination to defraud the United States out of its lands, and the overt act by procuring the entrymen to file the false oath in the land office, that the entry was not bona fide for their own use and benefit, but for the use and benefit of some of the persons named in the indictment, but the fact that the entry was not for the benefit of all of them does not constitute a fatal variance; and in this case we think the jury was justified, under the evidence, in finding that the entry was made not for the sole use and benefit of the entrymen, but for the use and benefit of some, at least, of the defendants.

Indictment No. 3,189 was based upon the entry of Ella Phillips. She was called by the government as a witness, and examined in detail relative to the transaction. Upon cross-examination she was asked the following questions:

"Q. I want to know whether what you did in the taking of that claim, whether you did it for the purpose of making what you did out of it yourself, for yourself, for your own benefit?"

"Q. Did you take this claim, Miss Phillips, for the purpose of selling it when you saw fit, to sell it for what you could get out of it?"

"Q. Had you, prior to taking this claim, promised anybody to convey it to them or to deed it to them?"

"Q. Had you made any contract to sign any paper, or agreed in any manner before you took this claim, before you proved up on this claim, to sell it to anybody else?"

"Q. Or to sell any interest in it, or the timber thereon?"

"Q. Was any other person interested in any way with you in the taking of this claim?"

Objections to each of these questions were sustained by the court, to which counsel for defendant excepted.

Indictment No. 3,254 was founded upon the entry of Albert B. King, who was examined in detail as a witness by the government relative to the transactions, and upon cross-examination he was asked the question:

"Q. Had you made any contract or agreement by which the title you were to acquire from the government should inure to the benefit of any other person than yourself?"

This was objected to as immaterial, incompetent, and not proper cross-examination. The objection was sustained, to which defendant excepted.

Questions of like character were asked upon cross-examination of the parties whose entries were claimed to have been fraudulent, and who were called as witnesses by the government, and objections sustained thereto, to which exception was duly taken by defendant. We think that in sustaining the objections to these questions the trial court committed an error. The indictment was based and the trial had upon the theory that these entries were not made in good faith by the several entrymen for their own use, but were made for the use and benefit of one or all of the defendants. A large amount of testimony was introduced for that purpose; in other words, it was sought to establish that the various entrymen, at the time they made their entries at the land office, did not intend the purchase to be for their own use and benefit, but as the agent or hireling of the defendants, for the use and benefit of the defendants, or some of them. We have before said that it was not necessary for the government to establish any express agreement that the entry was made for some one other than the entryman, but that it was competent to show that the motive and intent of the party making the entry was that it was for the use and benefit of another; that the question for the jury to determine was, what was the purpose, intent, and motive of the parties when they made the entry? That being so, it follows that the intent and motive of the party was the subject of inquiry; and the law we think to be that, whenever the motive, belief, or intention of the person is a material fact to be proved under the issue, it is competent to prove what such motive, belief, or intention was by the direct testimony of such person, whether he happens to be a party to the action or not. *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Mannheimer*, 24 Minn. 193; *Gardom v. Woodward*, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310; *Frost v. Rosecrans*, 66 Iowa, 405, 23 N. W. 895; *Bradner on Evidence*, 390. The testimony of such party as to his intent and motive is not conclusive, but is competent. We do not wish to be understood as saying that, had the government shown a specific, express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants, such testimony would be admissible. It is unnecessary to now pass upon such a case. What we do decide is that, where it is sought to show by a chain of circumstances that a party in doing an act was actuated by an illegal purpose and motive, it is competent for the party to testify directly that he had no such purpose or motive; and also, where it is sought to show by a chain of connected acts and circumstances that an agreement existed, an agreement requiring the concurrence of minds, that it is competent for a party to such alleged agreement to testify directly that no such agreement existed.

Defendant offered evidence to show the value of the timber upon the land in question. This was objected to as incompetent and imma-

terial, and the objection sustained. While it is true that, if the evidence established the existence of the conspiracy and the overt act as alleged, it would be immaterial what the value of the timber was, yet we think its value competent evidence to be considered in connection with all the other facts and circumstances as bearing upon the question whether or not the entry was made in good faith or for the use and benefit of another. We think it would have been competent for the government to have shown, had it been a fact, that the timber upon each tract was worth, say \$1,500, and that the same was sold for \$500, as bearing upon the question whether the entry was made pursuant to a prior arrangement or agreement that it should be for the benefit of the purchaser. In all cases involving the fraudulent transfer of property we understand the law to be that inadequacy of consideration is a circumstance to be considered in determining the bona fides of the transaction; and if it would be competent for the government to show inadequacy of consideration as a circumstance bearing upon the good faith of the transaction, we see no reason why it was not competent for the defendant to show that full consideration was paid, as bearing upon the bona fides of the transaction. We adhere to the rule announced in *Golden Reward Min. Co. v. Buxton Min. Co.*, 97 Fed. 413, 38 C. C. A. 228, wherein it was announced by this court:

"That testimony which does have some tendency to establish a material fact may be rejected by a trial judge, and should be rejected when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case and protract the trial beyond reasonable limits."

We do not think, however, that the qualification of the general rule there announced applicable to this case, as it does not appear that this question of value would have necessarily protracted the trial or had a tendency to divert the attention of the jury from the real question; and, as we think the question of value a proper circumstance to be considered in determining the good faith of the transaction, the testimony should have been admitted. There is, however, another reason why this testimony should not have been excluded. The government gave in evidence the affidavits of the various parties, when filing papers in the land office, showing the value of the timber upon each quarter section to be from \$700 to \$800. True it is that this was not offered by the government for the purpose of showing the value, yet the value thus stated was before the jury, and we cannot say that it did not have some influence, when considering the other evidence in the case, in determining the good faith and bona fides of the various entries. Where the government gives in evidence the declaration of a party upon a material matter, we think it competent for the party to show what the real fact is in respect thereof.

Numerous objections are made to the charge of the court to the jury. Some of the paragraphs in the charge, when considered alone, might be subject to criticism; but, taken, as a whole, we think the charge was a clear and comprehensive statement of the case, and pronounced the law correctly.

Complaint is made to the refusal to give certain instructions requested. We think they were sufficiently covered by the general

charge, and that it was not error to refuse to give them in the language of counsel.

For the reasons stated, the judgment is reversed, and a new trial granted.

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RUCKER v. BOLLES.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1904.)

No. 1,863.

1. APPEAL—REVIEW—RULINGS RELATING TO AMENDMENT OF PLEADING.

Rulings in respect to the amendment of pleadings or process are largely within the discretion of the trial court, and constitute no ground for reversal unless a gross abuse of that discretion is shown.

2. PLEADING—VARIANCE—NECESSITY OF PLEADING NEW MATTER IN ANSWER.

Under Mills' Ann. Code Colo. § 56, which requires the answer to contain a statement of any new matter constituting a defense or counterclaim, a defense which admits the making of the contract sued on, but seeks to avoid it by reason of some fact outside of the statements in the complaint which renders it champertous or void as against public policy, is based on new matter, and cannot be proved unless it is pleaded.

3. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.

Where a written contract entered into without fraud, accident, or mistake purports on its face to be a complete memorial of the whole agreement, the conclusive presumption is that the parties have written into the contract every material item and term of their engagement, and it is not permissible to contradict, vary, or add to its terms by parol evidence.

4. ACTION ON CONTRACT—PLEADING—ISSUES.

The pleadings construed in an action on a contract, and held to present the issue upon which the jury determined the case.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by Bolles against Rucker upon the following contract, which was set forth at length in the complaint:

"This agreement made this sixteenth day of April, A. D. 1892, by and between A. W. Rucker, of the County of Arapahoe and State of Colorado, party of the first part, and Richard J. Bolles, of the City of New York and State of New York, party of the second part, Witnesseth:

"That said party of the first part in consideration of the sum of twenty-seven thousand five hundred (\$27,500) dollars to him in hand paid by said second party, the receipt of which is hereby acknowledged and confessed, has and does hereby sell, assign, and convey unto said second party his heirs and assigns, one-fourth ( $\frac{1}{4}$ ) of the amount of any judgment that may or shall be recovered by said first party in a certain cause or proceeding now pending in the District Court of the County of Arapahoe, in the State of Colorado, wherein said A. W. Rucker is plaintiff and Harvey Young, Jerome B. Wheeler and others are defendants, in which action said plaintiff seeks to recover an interest in the Aspen lode mining claim, situate in Pitkin County in said State of Colorado, and an accounting and judgment for the value of the ores and minerals taken from said premises, and for a conveyance of an interest in said premises and the value of certain interests therein sold by defendant Wheeler.

"Hereby selling and conveying one fourth ( $\frac{1}{4}$ ) of any judgment for money that may or shall be found or entered in said cause in said court, or in any court to which the same may or shall be removed, also in and to all contracts and agreements relating to said cause of action, to the extent of one-fourth ( $\frac{1}{4}$ ) of all moneys that shall or may be collected or otherwise, but no part of

the interest or title that shall be recovered in and to said lode mining claim shall be held to be assigned under this contract.

"Said first party further agrees that he will prosecute said action, and all actions, and proceedings relating thereto that are now pending, or that shall hereafter be begun, to a final determination at his own proper costs.

"Said first party hereby reserves the right to settle said cause for a sum not less than three hundred thousand (\$300,000) dollars, one-fourth ( $\frac{1}{4}$ ) of which shall belong to, and be paid to said second party upon his compliance with the terms hereof.

"In consideration of which said second party agrees to and with said first party, that upon the final determination of said cause in the courts in which it is now pending, or in any court or courts to which it may be removed or appealed, and all proceedings relating thereto or affecting said cause, he will pay to said first party an additional sum sufficient to make a total payment hereunder of twelve and one-half ( $12\frac{1}{2}$ ) per cent. of the amount of said judgment, and all moneys belonging thereto, and shall receive one-fourth ( $\frac{1}{4}$ ) of all moneys collected upon said judgment and all moneys deposited in court or in any manner collected under or by virtue of said proceedings, which additional sum shall be paid within ninety (90) days after the second party shall have received notice of the final determination of all such proceedings, provided if said second party shall not pay said additional sum within said time or shall elect not to do so, said first party shall repay to said second party the said sum of twenty-seven thousand five hundred dollars (\$27,500) with interest thereon from this date at eight per cent. per annum; which payment shall be made by said first party from the first proceeds received by said first party in said action, or any settlement or compromise of the same, or any part thereof, but not otherwise: Provided, also, that in any settlement or compromise made of said cause, said second party shall receive a sum of not less than seventy-five thousand dollars (\$75,000) upon paying the further sum of ten thousand dollars (\$10,000).

"It is further agreed that the said first party reserves the control and management of said cause, subject only to the limitations herein. This contract shall extend to and bind the heirs and assigns of each party hereto.

"In witness whereof, the parties hereto have set their hands and seals the day and date first above written.

"[Signed]

A. W. Rucker. [L. S.]

"Rich. J. Bolles. [L. S.]"

After stating the execution of the contract and the payment by the plaintiff of the original consideration of \$27,500, therein recited, the complaint alleged that the defendant subsequently recovered a judgment against Wheeler for \$801,670.87 in the suit to which the contract relates; that this judgment was superseded by appellate proceedings, and during their pendency, on June 8, 1893, defendant made a compromise and settlement with Wheeler, whereby the former received from the latter in full satisfaction of the judgment a sum not exceeding \$300,000; that the defendant paid to plaintiff \$5,000 on account of the contract on May 28, 1892; that after the compromise and settlement, and before commencing the present action, plaintiff tendered to defendant the \$10,000 contingently provided for in the contract, and demanded from him the payment of the full sum of \$75,000, less the \$5,000 theretofore paid, which tender and demand were then refused; and that by reason of these facts defendant was indebted to plaintiff under and by virtue of the contract in the sum of \$60,000, being \$75,000 less the \$5,000 theretofore paid by defendant and less the \$10,000 so tendered to him and refused. The prayer was for a judgment for \$60,000, with interest.

The answer contained: (1) A denial of the allegations of the complaint other than the execution of the contract and the payment of the original consideration of \$27,500; (2) a plea to the jurisdiction; (3) a statement of new matter, intended to show that the contract was champertous and void; (4) a statement that the contract had been rescinded and terminated by the mutual agreement of the parties and upon good and sufficient considerations; and (5) an allegation that plaintiff had failed and absolutely and finally refused to perform the contract, or to be further bound thereby, and had "utterly renounced, rescinded, and abandoned the same, and all and every part thereof,

and thereupon released the plaintiff [defendant] from the same, and all the obligations thereof." In his reply the plaintiff denied the allegations of the fourth and fifth defenses. A demurrer to the defense of champerty was sustained by the Circuit Court, and that ruling was approved by this court upon a former writ of error. 25 C. C. A. 600, 80 Fed. 504. The plea to the jurisdiction has been abandoned. A second trial, had in June, 1902, resulted in a verdict for plaintiff for \$40,853.26, the amount of the original consideration of \$27,500 paid by plaintiff April 16, 1892, with interest thereon, less a credit because of the payment of \$5,000 by defendant May 28, 1892. To reverse a judgment upon this verdict, defendant prosecutes this writ of error.

Lyndon S. Smith, for plaintiff in error.

William W. Field (Joel F. Vaile, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the court refused to permit the defendant to amend his answer, but, as the record does not disclose the nature of the amendment which was proposed, the presumption is that the refusal was right. Rulings in respect of the amendment of pleadings or process are largely within the discretion of the trial court, and constitute no ground for reversal unless a gross abuse of that discretion is shown. Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]; *Lange v. Union Pacific R. Co.*, 62 C. C. A. 48, 126 Fed. 338; *Sawyer v. Piper*, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757. By the terms of the contract sued upon Rucker sold and assigned to Bolles an interest in any judgment which the former might recover in a suit then pending against one Wheeler, and it was stipulated that Rucker should retain the control and management of the suit, and should prosecute it to a final determination at his own proper costs, subject to a right reserved by him to effect a compromise and settlement with Wheeler for a sum not less than \$300,000. Upon the trial, after the plaintiff, by the introduction of the contract and other evidence, had established a prima facie case against the defendant, the latter sought to prove by parol evidence that the contract did not express the actual agreement between the parties, and had been purposely so written by them as to conceal their real purpose; that when the contract was entered into Wheeler was prosecuting a suit against Bolles and others; that it was in fact agreed that Rucker, in addition to selling and assigning to Bolles an interest in any judgment which might be obtained in the suit against Wheeler, should not compromise that suit, but should permit Bolles to control its prosecution as a means of destroying the credit of Wheeler, and disabling him from prosecuting his suit against Bolles and others, thereby forcing its abandonment; and that in fact it was agreed that the money paid and to be paid by Bolles to Rucker under the contract was to be used by him in defraying the expense of so prosecuting and maintaining his suit against Wheeler as to accomplish Bolles' wrongful purpose. The court excluded this evidence, and that ruling is assigned as error. It may be conceded that, had the contract been so written as to express what the defendant sought to prove was in fact in the minds of the parties, it would have been champertous and void,

and no recovery could have been had thereon; but the evidence was not relevant to the issues made by the pleadings, and it was not permissible to thus contradict, vary, or add to the terms of a written contract.

Under the plea of non assumpsit at common law it was admissible to give in evidence any matter which showed that no cause of action existed at the commencement of the action, either because the contract was originally void or because its obligation had been subsequently discharged by payment, release, or otherwise; and, in consequence, defenses of which the pleadings gave no notice were not infrequently presented at the trial. The injustice resulting from this practice was remedied in England by the rules of Hilary Term, 4 William IV (1 Chitty on Pleadings [16th Am. Ed.] \*pp. 492, 497, 506), and it is avoided in the states which have adopted the Reformed Code of Civil Procedure by a provision which declares literally or in substance: "The answer of the defendant shall contain: First, a general or specific denial of each material allegation in the complaint intended to be controverted by the defendant; second, a statement of any new matter constituting a defense or counterclaim." There is such a statute in the state of Colorado. Mills' Ann. Code, § 56. Whatever operates by way of confession and avoidance, as distinguished from denial, is new matter within the meaning of this provision. It includes everything outside of the material statements of fact in the complaint which operates to avoid their legal effect, but not to impugn their truth. To be provable by the defendant, the new matter must be specially pleaded, so that the plaintiff may be informed of the defense, and may prepare to meet it. In an action upon a contract a defense which expressly or impliedly admits the making of the contract and seeks to show that it is in contravention of public policy and void by reason of some fact outside of the statements in the complaint is based upon new matter, which cannot be proved by the defendant unless it is pleaded. Pomeroy's Code Remedies (3d Ed.) §§ 691, 692, 708; Bliss on Code Pleading (3d Ed.) §§ 327, 352; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454; *Finley v. Quirk*, 9 Minn. 194 (Gil. 179), 86 Am. Dec. 93; *Dodge v. McMahan*, 61 Minn. 175, 63 N. W. 487; *Denton v. Logan*, 3 Metc. (Ky.) 434; *Casad v. Holdridge*, 50 Ind. 529; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507; *Moore v. Ringo*, 82 Mo. 468; *St. Louis, etc., Ass'n v. Delano*, 108 Mo. 217, 18 S. W. 1101; *Cummiskey v. Williams*, 20 Mo. App. 606; *Atchison & Nebraska R. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. 451; *Buchtel v. Evans*, 21 Or. 309, 28 Pac. 67; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117; *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614.

The Supreme Court of Colorado does not seem to have considered the immediate question presented in this case, but that the general rule prevailing in other code states respecting the pleading of new matter has been approved by that court is shown in *De Votie v. McGerr*, 15 Colo. 577, 23 Pac. 980, where it was held that an estoppel in pais cannot be proved under the general or specific denial provided by the Code, but must be specially pleaded as new matter to be available as a defense. The Court of Appeals of that state has also held that evidence of additional facts showing that the contract sued upon is



champertous cannot be given by the defendant unless they have been specially pleaded. *Mining Co. v. Bentley*, 10 Colo. App. 271, 50 Pac. 920.

The decision in *Oscanyan v. Arms Co.*, 103 U. S. 261, 266, 26 L. Ed. 539, which is especially relied upon by the plaintiff in error, was partly rested upon what has since proved to have been an erroneous view of the defenses admissible under a general denial in the state of New York (*Milbank v. Jones*, *supra*); but in other respects it is entirely consistent with the recognized rule in code pleading that, if the facts which render the contract sued upon illegal or void are not disclosed by the plaintiff's pleadings or evidence, they cannot be shown except according to the rule which entitles the plaintiff to notice of the defenses intended to be interposed, and restricts the evidence to matters presented and put in issue by the pleadings. *Greenhood on Public Policy*, 125; *Milbank v. Jones*, *Buchtel v. Evans*, *Ah Doon v. Smith*, and *Maitland v. Zanga*, *supra*. In that case the plaintiff's counsel in the opening statement to the jury fully and deliberately admitted the existence of facts which necessarily rendered the contract void as forbidden by public policy. That admission was as binding upon the plaintiff as if it had been made in his pleadings or evidence, and, as no injury could be done to him by accepting and acting upon his deliberate admission, made in open court, the character of the defendant's answer was not controlling. *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695. In the present case the contract as set forth in the complaint and produced in evidence by the plaintiff was upon its face apparently valid, and there was no suggestion of any fact rendering it invalid or void, either in the allegations of the complaint or in the plaintiff's evidence. The defendant, without having laid any foundation therefor in his answer, sought at the trial to establish the invalidity of the contract by giving evidence of facts which did not tend to controvert those alleged and proved by the plaintiff, but confessed their truth, and tended to avoid their legal effect. This he was not entitled to do. For another reason this evidence was not admissible. Where a written contract, entered into without fraud, accident, or mistake, purports upon its face to be a complete memorial of the whole agreement, the conclusive presumption is that the parties have written into the contract every material item and term of their engagement, and it is not permissible to contradict, vary, or add to its terms by parol evidence. *Union Selling Co. v. Jones*, 63 C. C. A. 224, 128 Fed. 672; *Kilby Manufacturing Co. v. Hinchman-Renton Fire Proofing Co.* (C. C. A.) 132 Fed. 957; *Montgomery v. Ætna Life Ins. Co.*, 38 C. C. A. 553, 558, 97 Fed. 913; *McKinley v. Williams*, 20 C. C. A. 312, 319, 74 Fed. 94; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993. The evidence which was excluded was clearly in contradiction of some of the express terms of the written contract, and tended to insert new terms therein. It did not, as claimed, relate primarily to the nature of the consideration moving to the defendant, but to the terms and nature of his engagement. If they were as stated in the contract, there was no element of invalidity in any part of the transaction.

The contract, which is set forth at length in the statement preceding this opinion, shows that in consideration of \$27,500, recited to have been paid by Bolles to Rucker, a one-fourth interest in any judgment which the latter might recover in his suit against Wheeler was assigned to Bolles, and that the assignment extended to all moneys in any manner collected in or by virtue of that suit, whether the proceeds of a judgment or of a compromise and settlement. The assignment was not unqualified, but was upon such terms and conditions that Bolles' rights were as follows: (1) To demand the repayment of the \$27,500, with interest, subject to no other condition than that Rucker should realize that sum from the prosecution of the suit, or from a compromise and settlement; or (2) to demand one-fourth of the amount realized by Rucker upon any judgment recovered in the suit, subject to the condition that within 90 days after notice of its final determination Bolles should pay to Rucker an additional sum sufficient, with the \$27,500, to make a total payment of 12½ per cent. of the judgment; or (3) to demand one-fourth of the amount realized by Rucker upon any compromise and settlement, but not less than \$75,000, subject to the condition that Bolles should pay to Rucker the fixed and additional sum of \$10,000, instead of the stated percentage of the amount realized. The payment of the \$10,000 was to be optional with Bolles, and was not made a condition to the right to demand repayment of the \$27,500, with interest, from the proceeds of a compromise and settlement, but only to the right to demand the full sum of \$75,000 therefrom. The defendant, being of opinion that the provision for an additional payment of \$10,000 was ambiguous and uncertain in respect of the time when it was to be made, sought by parol evidence to show that it was agreed when the contract was executed that this sum was then presently due; but that its payment should be forborne until the incoming and approval of the referee's report in the suit against Wheeler. The court excluded this evidence, and later instructed the jury that under the terms of the contract this additional payment was optional with the plaintiff, and, if made, was to be contemporaneous with the payment of the \$75,000 by the defendant. These rulings are assigned as error. The excluded evidence was clearly in contradiction of the terms of the contract, and inadmissible, because it tended to show that the fixed sum of \$10,000 was payable in advance of any compromise and settlement, when the contract contemplated its payment only in the event of a compromise and settlement, and therefore after such event; and because it tended to show that the obligation to pay that sum was absolute, and not optional. Whether this payment, if made, was to be contemporaneous with the payment of the \$75,000 by the defendant, has become altogether immaterial, because the verdict, when read in the light of the evidence and the instructions of the court, conclusively shows that the jury found that the plaintiff had elected not to make any additional payment, and had thereby renounced or waived the right which could have been perfected by a timely payment of the \$10,000. The evidence showed that the \$27,500 was actually paid when the contract was made; that a compromise and settlement with Wheeler was effected by the defendant, under which he received a sum approximating, but not amounting to, \$300,000; and that the plaintiff had not made any addi-

tional payment under the contract, but on December 6, 1893, immediately before commencing the action, had tendered \$10,000 to the defendant as an additional payment, which was declined. There was evidence on the part of the plaintiff tending to show that he had not been notified of the compromise and settlement, and had learned of it only casually. There was also testimony by the defendant, which was directly opposed by that of the plaintiff, tending to show that in November, 1892, the plaintiff elected not to make any additional payment under the contract, renounced all rights thereunder, and authorized the defendant to compromise and settle with Wheeler upon any terms satisfactory to himself; and that upon the faith thereof the defendant proceeded to make and did make a compromise and settlement for a much less sum than he would otherwise have done.

In its charge the court, in effect, stated three propositions to the jury: (1) The tender of \$10,000 to the defendant just prior to the commencement of the action was sufficient in point of time and otherwise, and entitled the plaintiff to a verdict for \$75,000, less the amount of the tender and of an admitted credit of \$5,000, unless the defendant had established the fourth or fifth defense in his answer. (2) If in November, 1892, the plaintiff elected not to make any additional payment under the contract, renounced all rights thereunder, and authorized the defendant to compromise and settle with Wheeler upon any terms satisfactory to himself, and upon the faith thereof the defendant made a compromise and settlement for a less sum than he would otherwise have done, the contract was entirely rescinded by mutual agreement and the verdict should be for the defendant. (3) If what occurred in November, 1892, was that the plaintiff merely elected not to make any additional payment under the contract, that was a renunciation or waiver of the right which otherwise could have been perfected by a timely payment of the \$10,000, and the plaintiff would be entitled to a verdict for the amount of the original payment of \$27,500, with interest, less the admitted credit of \$5,000. The jury returned a verdict for the plaintiff conforming to the third proposition, which was necessarily a finding that there had been no complete rescission of the contract, and that what occurred in November, 1892, was that the plaintiff merely elected not to make any additional payment. It is objected that the third proposition was not within the issues, that the complaint did not state a case for the recovery of the original payment of \$27,500, that the fifth defense did not admit of a construction that would render such a recovery permissible, and that there was no evidence to sustain it. The objection rests upon a misconception of the pleadings and evidence and of the duty of the jury. The contract sued upon is an entirety, and relates to a single matter. While the rights of the plaintiff are not the same in each of the contingencies provided for, they are in each restricted to the proceeds of the defendant's suit against Wheeler, and they vary only in respect of the extent to which the plaintiff is to share therein. The complaint sets forth the entire contract, alleges its execution, the original payment of the \$27,500, the compromise and settlement of the suit against Wheeler, and the receipt by the defendant of a large sum thereunder. At the trial these facts were all established without contradiction, and all of them were as essential to a right to enforce

the repayment of the \$27,500 from such proceeds as they were to a right to enforce the payment of the full sum of \$75,000 therefrom. It is not questioned that the complaint stated a good cause of action for the recovery of the larger sum, and it is conceded that if, instead of alleging a tender of the \$10,000, it had alleged that the plaintiff had elected not to make any additional payment, it would have stated a good cause of action for the recovery of the smaller sum. In the fifth defense it was alleged that the plaintiff had failed and refused to perform the contract, or to be further bound thereby, had renounced, rescinded, and abandoned the same, and had released the defendant from all obligations thereunder. The fourth defense adequately alleged a complete rescission, but the fifth defense, in legal contemplation, states nothing more than that the plaintiff had failed and refused to perform the contract. It is entirely wanting in the statement of any facts amounting to a complete rescission, or to a release of the defendant. Neither of these would result from any action of the plaintiff, for which there was no consideration, unless the defendant acted thereon under circumstances giving rise to an estoppel. The contract placed no obligation upon the plaintiff other than to pay an additional sum in the event that he desired to obtain more than the repayment of the \$27,500, with interest. The allegation that he had failed and refused to perform the contract was therefore only an allegation that he had failed to make, and had elected not to make, any additional payment, the legal effect of which would be to restrict the right of the plaintiff and the obligation of the defendant to the repayment of the \$27,500, with interest, from the proceeds of the compromise and settlement. At most the fifth defense was partial, and directed, not against all right of recovery under the contract, but against the right to recover more than the amount of the original payment, with interest. We think every fact essential to the plaintiff's recovery of that amount was within the issues.

Whether there was any evidence to sustain either of the fourth and fifth defenses rested entirely upon the personal testimony of the parties, in which they gave opposing versions of a conversation between them in November, 1892. The defendant testified that in that conversation the plaintiff said that he did not intend to make any further payment, but did intend to throw up the contract, and lose what he had paid; that he had obligated himself to Wheeler to obtain a settlement of the suit; that the defendant could go on and settle with Wheeler on any terms satisfactory to himself; and that, being released from the contract, the defendant could afford to settle on better terms than otherwise. The defendant further testified that, acting upon the faith of the plaintiff's statement, he proceeded to make and did make a compromise and settlement for a much less sum than he otherwise would have done. The plaintiff, while admitting that the conversation related to the suit against Wheeler, to his financial worth, and to what could be settled by him, denied every part of the statement attributed to the plaintiff in the defendant's testimony. Neither the court in instructing the jury nor the jury in determining what its verdict should be was required to act upon the assumption that one of the two opposing versions of this conversation was entirely true and the other entirely untrue. The thing to be done was to extract the truth from them, and as one means to

this end it was the province and duty of the jury to consider the relative probability or improbability of the two versions, not merely in their entirety, but in respect of every part of each. We think it cannot reasonably be said that upon the application of this and other recognized tests it would not be a permissible conclusion from this testimony that the defendant's version was true in so far as it represented the plaintiff as electing not to make any additional payment, and as therefore foregoing such rights under the contract as were dependent upon the payment of an additional sum, but was untrue in so far as it represented him as also surrendering the rights acquired by his original payment which could be retained without any further expenditure. We are therefore of opinion that this testimony justified the submission to the jury of the second and third propositions in the court's charge as respectively applicable to the fourth and fifth defenses.

There are other assignments of error, but no useful purpose would be served by discussing them. They have been attentively considered, and have been found untenable.

The judgment is affirmed.

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BALTIMORE & O. R. CO. v. DOTY.

(Circuit Court of Appeals, Sixth Circuit. December 29, 1904.)

No. 1,309.

1. MASTER AND SERVANT—RAILROADS—ENGINE HOSTLERS—INJURIES—PETITION.

Where a petition for injuries to an engine hostler alleged that plaintiff, being ordered to take a particular engine to a coal chute by the boss hostler, communicated his instructions to a fellow hostler then on the engine, and himself went ahead of the engine to flag and switch it, "as it was his duty to do," and while so engaged his foot was caught in a loosely covered trench, so that he fell toward the track, and was struck by the engine and injured; that he did not know of the existence of the trench, and could not have seen the same by the exercise of ordinary care; and that defendant was guilty of negligence in not causing the trench to be carefully covered or guarded, and in not warning plaintiff of its existence, etc.—it was not demurrable for want of facts.

2. SAME—FEDERAL COURTS—JURISDICTION.

Where a petition in an action in the federal court sitting in Ohio for injuries to a servant alleged that plaintiff was a citizen of Ohio, and that defendant was a citizen of Maryland, it alleged facts sufficient to sustain the jurisdiction of the federal court, without an allegation that either party resided in the district where the suit was brought.

3. SAME—VENUE—WAIVER.

The statute prescribing the place where actions in the federal courts may be brought, having reference to the residence of the parties, accords a privilege only, which is waived by defendant uniting a plea to the merits with a plea claiming his privilege to be sued in another district.

4. SAME—ENGINE HOSTLER—WATCHMAN—EXCHANGE OF DUTIES.

Where plaintiff, an engine hostler, who, by the rules of the railroad company, was required to ride on the engines, exchanged duties with a watchman whom he found in possession of an engine he had been ordered to shift, and permitted the watchman to run the engine while plaintiff ran

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¶ 2. Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

ahead to flag and switch it, and, in so doing, he was injured by falling into an insufficiently covered steam box, the existence of which, though well known to workmen in the yards, was unknown to plaintiff, he was not entitled to recover.

5. SAME—CUSTOM—EVIDENCE.

In an action for injuries to an engine hostler while performing the duties of a watchman with whom he had exchanged work, evidence held insufficient to sustain a finding that there was a custom in the railroad yard where plaintiff worked for engine hostlers to perform the duties of the watchman under similar circumstances.

6. SAME—INSTRUCTIONS.

Where plaintiff, an engine hostler, was injured while performing the duties of a watchman, an instruction that if plaintiff was not in the performance of duty, if he was not entirely outside of his duty, so as to occupy practically the position of a stranger, a trespasser, then he could not claim the benefit of the requirement that the railroad exercise reasonable care to make the place safe, etc., was erroneous.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

F. A. Durban, for plaintiff in error.

Ulric Sloane, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff, who is the defendant in error here, brought suit in the circuit court to recover damages resulting to him in consequence of the alleged negligence of the railroad company while he was in its employment as a hostler in its yards at Newark, Ohio. A hostler, in railway parlance, is one employed in taking the locomotives as they come into the yard, and are left by the engineer who has been in charge, to the roundhouse, or other place of shelter, security, or repairs, or for supplies, and bringing them out again, as occasion requires, to the place where the engineer assumes charge for the purpose of making his trip. He is also more or less employed in conducting the engine about the yard for the purpose of shifting cars in making up trains and in distributing them. In respect to the citizenship and residence of the parties, the allegation is that "the plaintiff, Frank C. Doty, is a citizen of the state of Ohio, and the defendant, the Baltimore & Ohio Railroad Company, is a corporation duly organized, incorporated, and existing under and by virtue of the laws of the state of Maryland, and is a citizen of the state of Maryland." In his petition the plaintiff states that on April 22, 1902, while he was thus employed as a hostler in that yard, and under the direction of a boss hostler, whose orders he was bound to obey, he was ordered and directed by the said boss hostler to cause a certain locomotive engine then standing on the north side of a coal chute to be brought to the south side of said chute and set for coaling; that he went to the engine and communicated his instructions to a fellow hostler then on the engine, and himself went ahead of said engine for the purpose of flagging it, if necessary, at a switch over which the engine would have to pass, and of throwing the switch for the engine, "as it was his duty to do"; that while he was thus proceeding on the north side of the track, and before he got to the switch, his foot was caught in a hole or

trench loosely covered with round sticks, so that he fell toward the track, and was struck by the engine and seriously injured; that he did not know of the existence of said hole or trench, and could not by ordinary care have seen the same. And he charges that "the defendant was guilty of negligence, which proximately caused his injury as aforesaid, in not causing said hole or trench to be securely covered or in some way guarded, and in not warning him of its existence, location, and dangerous condition at and before the time of his said accident." The defendant appeared and demurred to the petition upon these grounds:

"(1) Said petition does not state facts sufficient to constitute a cause of action in favor of the said plaintiff and against the defendant herein. (2) The said petition does not show that this court has jurisdiction over the parties herein, or the cause of action set forth in said petition."

The demurrer was overruled, and the defendant excepted. In pursuance of leave, the defendant answered, setting up as grounds of defense that the plaintiff at the time of the injury was under a duty, as well as specific instructions, to ride upon the engine, and not to be walking in front of it, and that he was violating this duty, as well as his specific instructions, in being at the place where the accident occurred. At the trial it was proven that the defendant employed the plaintiff as a hostler some three months before the accident, and that he had continued under that employment to serve in the yard at Newark to that time; that about 9 o'clock in the evening, and shortly before the accident occurred, the plaintiff was directed by Mollinix, an assistant to the foreman or boss hostler, to take this engine, then standing on the north side of the coal chute, around to the south side. To do this, it was necessary to take the engine some distance eastward over the track on which it stood to a switch, where it would be transferred to the track running to the south side of the chute. On coming to the engine, the plaintiff found on or near it an engine watchman, named Guensler, to whom he communicated the directions he had received from Mollinix about taking the engine around to the south side of the chute. Thereupon the two proceeded on the engine eastward, the watchman handling the engine. As they approached the switch, the plaintiff got down from the engine, and, with a lantern in his hand, walked along the north side of the track, in advance of the engine, until he came to a sunken box running parallel with the track, and three or four feet distant therefrom, a few feet deep, six or eight feet long, and two or three feet wide, planked up at the ends and sides; its top being a few inches above the surface of the ground, and covered over with plank or boards. The pit thus constructed was used as a receptacle for spent steam and water coming from a shop not far off. The plaintiff went over this box, and, either from a displacement of the plank or boards of the cover, or their weakness from decay or other cause, his foot went down through it, and his body was so turned that the advancing engine struck him in the back and side, and inflicted the injury for which he sues. It further appeared that the proper duties of an engine watchman, when not affected by any custom or usage, were to provide the engines with water and fuel, get up steam, and have them ready for starting, and further to do the yard switching necessary for

them to be moved to their destination into the charge of the engineer, or about the yard for local purposes. In regard to all these things there was no substantial controversy. But the following questions were in dispute—that is to say, whether the defendant was guilty of negligence in not maintaining the covering of the box above mentioned in a safe condition; whether the plaintiff was guilty of contributory negligence in failing to know of the existence of the box or its condition, or seeing it before walking over it; and whether there was such a prevailing custom in that yard for a hostler and an engine watchman to perform each the duties of the other as would justify the plaintiff in leaving the conduct of the engine in the hands of the watchman, and himself performing the duties of switchman.

With respect to the questions raised by the demurrer there is no serious difficulty. The first ground is, generally, that the petition does not state a cause of action, and the objection is not leveled at any specific defect in the mode of stating the substantial facts. Referring to the allegations of the petition above set forth, we see no reason for doubting that they embody substantive facts which are *prima facie* sufficient to constitute a cause of action. It is not necessary that the plaintiff, in his petition, should negative defenses which the other party may advance, or should exclude his case from possible exceptions. In regard to the jurisdiction, it is urged that the petition fails to state that the plaintiff is a resident, and more especially that it fails to state that the defendant is a resident, of the district in which the suit is brought. But the petition does state that the plaintiff is a citizen of Ohio, and that the defendant is a citizen of Maryland. That is enough to found the jurisdiction. The provision of law which prescribes the place where the action may be brought, having reference to the residence of parties, concerns only matters of convenience and privilege, which a party may waive, and which he does waive when, as here, he appears and unites a demurrer to the merits with a plea claiming his privilege. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.

Coming then to the trial of the issues of fact, the record shows that, at the close of the testimony, counsel for the defendant moved the court for an instruction to the jury to return a verdict for that party. This the court declined to do, assigning reasons presently to be stated. The defendant excepted to the refusal, and thereupon presented several requests for instructions, which were refused, and which are also the subjects of assignments of error. The assignment of error in refusing the defendant's request for peremptory instructions is maintained in argument upon several grounds—first, that it was not shown that any defect existed in the box before the accident; second, that, if any defect did exist, no prior knowledge or opportunity of knowledge by the exercise of ordinary care on the part of defendant was shown; third, that the plaintiff had equal means of knowledge with the defendant, and that his own evidence shows that he did not use his opportunity of knowledge; and, fourth, that if the defendant was negligent in not maintaining the box in safe condition, and the plaintiff was injured in consequence, he was performing duties not required or expected of him, and was violating his general and specific instructions. In respect



of the first and third of these grounds, without further detail of the evidence, we are of opinion that they presented questions for the jury. With respect to the second, we have grave doubt, for the evidence did not clearly show for how long a period before the accident the defect in the box had existed, and the burden was on the plaintiff to prove that it had existed so long that the railroad company ought to have had knowledge of it. In *Southern Ry. Co. v. Rhodes*, 86 Fed. 422, 30 C. C. A. 157, this court reversed the judgment of the lower court for the reason that although there was some proof of negligence in certain persons, which imposed a duty on the company to correct it, yet there was no substantial evidence that the negligent practice had existed for any length of time. But having regard to the fourth, we cannot avoid the conclusion that the instruction should have been granted. It was shown, and, indeed, was alleged in the petition, that the defendant employed the plaintiff as a hostler. He was not employed to do the work of an engine watchman, which belonged to another class of employes. It is a matter of common knowledge that the operation of railroads is a complex and dangerous business. For this reason, as has been often observed, a system of rules and regulations is indispensable to its proper and safe conduct—indispensable alike to successful management and the safety of employes. The duty which is thereby devolved upon the employer is recognized and affirmed by former decisions of this court. *Railroad Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, per Taft, J.; *Lake Erie & W. R. Co. v. Craig*, 80 Fed. 488, 495, 25 C. C. A. 585, where Judge Clark refers to other authorities. And it has been held that a railroad company which fails to provide proper and reasonably adequate regulations is guilty of actionable negligence. In 20 *Am. & Eng. Encycl. of Law*, 101 (2d Ed.), it is said:

"It is the duty of persons or corporations having many men in their employ, and carrying on a dangerous and complicated business, to make rules which, if observed, will afford reasonable protection to the employes against the dangers incident to the performance of their respective duties. Failure to do so is negligence, and for injuries to an employé resulting from such failure of duty the master is liable."

And numerous authorities, English and American, are cited in support of the statement.

It is a necessary counterpart of this requirement that the company's employes shall observe and conform to such regulations. The obligations are mutual. And if the employé will not conform to them to the extent that he reasonably can, and suffers an injury not wantonly inflicted, he forfeits his claim to protection from his employer, and must himself bear the consequences. It is equally necessary in such business that the several duties of the service shall be distributed and assigned to different classes of employes according to their qualifications. Otherwise confusion in operation and danger from lack of special qualification for the particular service must ensue. In short, all those reasons which support the expediency and necessity of the requirement of rules and regulations apply with full force to the specification of duties, and the classification of employes who are to perform them. The wages paid vary according to the nature of the employment, whether of special skill and ability, or sometimes of special danger. The duty of the em-

ployer to provide a safe place for the workman is affected by the skill and experience in that line of work of those whom the employer associates with him. The obligation of the employer to provide a safe place for his employés is one which springs out of the contract of employment, and is personal to each. It derives its character and limitations from the principal contract, and the relations of the parties thereby assumed. The obligation to those of each class of employés is different from that to another, and often it is different toward the several persons in the same class. Moreover, the employer is entitled to have his work done by those to whom it is assigned. From their familiarity with it and the conditions in which it is performed, they would be more likely to know and guard against defects and dangers which are presented to them; and the employé is better qualified to do the work with safety to himself than one in another class would be. The case before us presents an apt illustration. The plaintiff testified that he did not know of the existence of the box until the moment of the accident. A switchman working in the yard could hardly have failed to have known it. All these considerations make it the duty of the employé to confine himself to the scope of his employment, unless there arise some emergency not contemplated. And hence the rule of law is that if the employé, without necessity, undertakes duties to which he is not assigned, and are without the scope of his employment, he does so at his own risk, and has not that protection from the negligence of the employer which one would have who is assigned to the discharge of that duty. The rule is correctly stated in 20 Am. & Eng. Encycl. of Law, 131, under the title "Master and Servant," as follows:

"When a servant voluntarily, and without the order of the master or vice principal, attempts the performance of hazardous work outside the scope of his employment, he cannot recover for injuries sustained while so doing."

And numerous decisions are cited in support of the doctrine.

How the case would stand if the employé does an act under the positive command of his immediate superior is a different question, which we are not required to decide.

Applying these principles to the case at bar, Doty, who was employed to perform the duties of a hostler, and being under no necessity to perform the duties of an engine watchman, was not in his proper place when he received his injury, and would have no remedy against his employer for the alleged negligence of the latter in failing to maintain the box in proper condition. There was no necessity for his leaving his proper place, on the engine, and performing the duty of the watchman; and, if he had remained where his own duty required, he would have suffered no injury, and perhaps the watchman, from his presumably better knowledge of the situation, might have avoided an accident to himself.

But it is said that there was a custom in this yard for the hostler to perform the duties of the watchman, and that he was therefore entitled to the protection that one in that service should have. And it is no doubt the settled law that if such a custom had been established by the habitual practice of the employés, known and assented to by the employer, so that the scheme of the employment had been displaced and

abandoned, the rule contended for would apply. But the consequences of the substitution of such a custom, adopted without right by the employés in place of the order established by the regulations of the employer, make it necessary to prove that the practice was habitual, and not occasional, and was known, or ought to have been known, by the employer, and was assented to by him. A custom or usage is the result of a long-continued and substantially uniform practice. The evidence contained in this bill of exceptions does, indeed, tend to prove that sometimes, during a short period of time before this accident (for how long does not appear), when two hostlers were riding on an engine, and no watchman was with them, one of the hostlers would get off and flag the engine and throw the switch; and there was evidence that occasionally, when a hostler and a watchman were riding together, the hostler allowed the watchman to handle the engine, and himself went forward and did the flagging and switching, and that at one time the assistant boss hostler stated to the plaintiff that Guensler, the watchman, had authority to run engines. But there was no evidence that this practice, if we call it such, was uniform or habitual, or was known to the company, or any superior officer thereof, unless it is to be imputed from the fact of these occurrences. Nor is it shown that the company assented, unless such assent could fairly be presumed from the fact that no objection to such a practice was expressed. No authority to the assistant boss hostler to make such a statement as the plaintiff imputes to him is shown. It was the expression of his own opinion, and the plaintiff had no right to rely upon it. His contract was with his employer, and it could not be frittered away by the statement of another employé engaged in the common service. In *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768, it was held that a brakeman could not justify himself for disregarding a rule requiring him to be on the top of the car, in a case where he had been standing on the platform with the knowledge and assent of the conductor when he received the injury. Said Mr. Justice Brewer, who delivered the opinion of the court:

"The duty of obedience to the rules of the employer is one resting alike upon all employés; and, when an employé claims to recover from his employer for injuries resulting through the latter's negligence, he cannot escape the consequences of his own act contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation."

And in summing up the conclusion of his discussion, he added:

"It is unnecessary to pursue this matter further. It may be laid down as a general rule that the mere knowledge and assent of his immediate superior to a violation by an employé of a known rule of the company—the employer—will not, as a matter of law, relieve such employé from the consequences of such violation."

The assistant boss hostler denies having ever made the statement which the plaintiff testifies to, but that only raised a question for the jury, as to whether he did or not. If, upon the evidence shown by this record, a jury should find that there was a custom in the yard which would justify him in going outside the scope of his employment upon the occasion in question, we think it would be the duty of the

court to set aside a verdict resting upon such finding. In such circumstances, the duty of the court to take the question from the jury is clear. And in this case there was no other basis for the verdict which the jury rendered than the finding of a custom which justified the plaintiff in thus going outside the duties of his employment.

In denying the request of the defendant for peremptory instructions, the learned trial judge said:

"In this case, however, it cannot be said that the disregard of the rule, if you speak of it as a rule, was the direct cause of the injury. Whether he was off the engine—whether properly so or not—the question is still left open as to whether the company was guilty of negligence in leaving this box in such a condition as that any one in the yard might be injured in passing by."

Subsequently defendant's counsel requested the court to charge the jury as follows:

"The evidence in this case fairly shows that, at the time of the injury complained of, the plaintiff, contrary to instructions received from his superior, had exchanged places and duties with an engine watcher—was engaged in performing the duties of the watcher, while the watcher was in the plaintiff's place performing the duties which plaintiff should have performed—and for this reason the plaintiff is not entitled to recover, and your verdict must be for the defendant."

This request was refused, and the substance was not given in the court's instructions in such manner as to give the defendant the benefit of it. For the reasons we have given, we think the instruction should have been given, but, as it amounts to the same thing as the request to direct the verdict, there is no occasion for discussing it further. It seems that the court, in refusing the motion to direct the verdict, was of opinion that it was immaterial whether the plaintiff was acting within the line of his duties when he was hurt, or not, and that the question still remained open "as to whether the company was guilty of negligence in leaving this box in such a condition as that any one in the yard might be injured in passing by." But that question did not remain open if the plaintiff was improperly off the engine. It necessarily followed that, if he was not discharging his proper duties, he was at fault, and that fault contributed to his injury. Certain other specific requests for instructions were made on behalf of the defendant, and were refused in terms. But such of these as are set out in the record were, as we think, substantially given in the general charge of the court, and we need not express any opinion upon them.

With reference to the defendant's contention that the plaintiff was not in the line of his duty when he was hurt, the court charged the jury as follows:

"If Doty was not in the performance of duty—if he was entirely outside of his duty, so as to occupy practically the position of a stranger, a trespasser—then he could not claim the benefit of the rule which required the railroad company to exercise ordinary and reasonable care to make the place safe; in other words, the railroad company would owe him no duty to make the place safe by putting the box in repair and maintaining it in repair. But you must determine from the evidence whether he was in the line of his duty, or not." And again: "Now, you must determine, gentlemen, from the evidence before you, whether he was within his duty, in accordance with the practice, or whether he was entirely outside of his duty, so as to occupy practically the position of a trespasser."

These portions of the charge were excepted to by the defendant, and error is assigned thereon. It is complained, and we think justly, that this statement of the character which the plaintiff must have taken on, in order to free him from the consequences of his departure from the line of his duties, was prejudicial to the defendant. It is quite probable that the jury would take the word "trespasser" in its common meaning of a positive wrongdoer, and not merely one who is simply negligent, or commits an error prejudicial to another, but without willfulness. It was perhaps inadvertent phraseology, but it is easy to see that the language employed would be very likely to produce a harmful impression upon the minds of the jury. We think this assignment of error should also be sustained.

The judgment should be reversed, with costs, and a new trial awarded.

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LITTLE v. HOLLEY-BROOKS HARDWARE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1904.)

No. 1,329.

1. **BANKRUPTCY—STATUTES—CONSTRUCTION.**

Bankr. Act July 1, 1898, c. 541, § 3b, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], authorizing the filing of an involuntary bankruptcy petition within four months after the commission of an act of bankruptcy, and declaring that such time shall not expire until four months after the registering of the transfer, when the act consists of a transfer with intent to defraud creditors, or to give a preference if by law the transfer may be recorded, otherwise from the date the beneficiary takes notorious, exclusive, and continuous possession or creditors receive actual notice, has no relation to the proving of debts against the bankrupt's estate, or to the surrender of preferences, but only fixes a limitation for the filing of an involuntary petition.

2. **SAME—VOIDABLE PREFERENCES.**

Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], declares that conveyances, etc., by a person adjudged a bankrupt, within four months prior to the filing of the petition, with intent on his part to defraud his creditors, shall be void as against such creditors, etc. *Held* that such section was not applicable to a preferential transfer by a bankrupt, which was neither made within four months prior to the filing of the petition nor with intent to defraud his creditors.

3. **SAME—PREFERENCES REQUIRED TO BE SURRENDERED—TIME.**

Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416], declares that a person shall be deemed to have given a preference which section 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], as amended 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 415], required to be surrendered in order to entitle the preferred creditor to prove his claim, if, being insolvent, the bankrupt has, within four months before the filing of a bankruptcy petition against him, or after the filing and before adjudication, transferred any of his property, which transfer will enable the transferee to obtain a greater percentage of his debt than any other creditor of the same class, and that the period of four months shall not expire until four months after the date of registration of the transfer, if registration is required. Section 3b, providing for the filing of an involuntary bankruptcy petition for acts of bankruptcy committed within four months, declares that the time shall not begin to run until

the transfer is recorded, if record is authorized, and, if not, until the transferee takes exclusive possession of the property, or the creditors have actual notice thereof. *Held*, that section 3b was not intended to be read in conjunction with sections 60a, 60b, and hence the four-months period of limitation as against a preferential transfer which was neither fraudulent nor required to be registered began to run from the date of the transfer, and not from the date the transferee took possession or the bankrupt's creditors acquired notice.

Appeal from the District Court of the United States for the Eastern District of Texas.

J. L. Young, for appellant.

A. P. Park and W. S. Moore, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. A petition in bankruptcy was filed by appellees against Chas. Pratt on April 3, 1903, and he was duly adjudged a bankrupt on his written admission of his inability to pay his debts and his willingness to be adjudged a bankrupt. The claim of the Delta National Bank against the bankrupt, which is involved in this suit, was evidenced by two promissory notes for \$1,000 each, signed by H. S. Little, the appellant, as accommodation surety. Little paid the notes, and the bank assigned them to him. Little proved the claim against the bankrupt's estate, and sought to have it allowed. The appellees contested and objected to the allowance of the claim, alleging:

"That, the said Chas. Pratt being insolvent within four months next preceding the filing of the petition in bankruptcy against him, and with the intent and purpose of further preferring the said Delta County National Bank over his other creditors (of which intent and purpose the said bank or its agent acting in its behalf had notice, or had reasonable cause to believe that a preference was thereby intended), made a pretended sale or transfer of his storehouse, in which he was doing business, and situate in the village of Pacio, Delta county, Tex., to said bank, or to James A. Smith, its cashier, with the agreement or understanding, substantially, that the value of said storehouse should be credited on said bank's debt. Contestants allege that said storehouse was of the reasonable value of \$1,500, and that, if said pretended sale and transfer be not set aside and said storehouse surrendered to the estate of said bankrupt, it will have the effect to enable the said Delta County National Bank to receive a greater percentage on its debt than any of the other creditors of the same class of said bankrupt. Contestants aver that they cannot allege the exact date of said transfer because the pretended instrument of conveyance has never been placed upon record."

The record shows that the bankrupt owned a storehouse, which was personal property, he having the right to remove it from the lot on which it stood. This house he sold to the Delta National Bank, as shown by a writing as follows:

"Cooper, Texas, Oct. 13th 1902.

"Know all men by these presents, that I have this day sold to James A. Smith my storehouse at Pacio, Texas, the same being situated on John Miller's land, and will defend his title to same, for and in consideration of fifteen hundred dollars, cash in hand paid and the receipt of which is hereby acknowledged.

[Signed]

Chas. Pratt."

This sale was made more than four months before the petition in bankruptcy was filed against Pratt. At the time of the sale the bank credited Pratt with \$1,500, the purchase price of the house, on an overdraft of \$1,873.12 due to the bank by Pratt. There was no law which required or permitted the written evidence of this sale to be recorded. Chas. Pratt continued in the actual possession of the storehouse. It was not at any time before his adjudication in bankruptcy in the notorious, exclusive, or continuous possession of the bank. It was held by the referee "that the preference should be set aside on the ground that it was not such a transfer that should be recorded, and that under the bankrupt act it would not become effective until the creditor sought to be preferred took notorious, exclusive, or continuous possession of the property," as required by Bankr. Act July 1, 1898, c. 541, § 36, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. This ruling was approved by the District Court, and the decree is assigned as error.

The main question involved in this case relates to the effect of sections 3a and 3b of the bankruptcy act of 1898. The relevant parts of these subdivisions are as follows:

"Sec. 3. Acts of bankruptcy. (a) Acts of bankruptcy by a person shall consist of his having \* \* \* (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. \* \* \*

"(b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

The first part of this section relates to acts of bankruptcy. The several acts of a debtor which will subject him to involuntary bankruptcy are stated, the second being his having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." The section, in subdivision "b," then fixes four months after the commission of the act of bankruptcy in which the creditors must file their petition against the debtor. Generally, as to other acts of bankruptcy, the four-months limitation begins to run at the time of the commission of the act of bankruptcy, because the petition in involuntary bankruptcy must be filed "within four months after the commission of such act." As to the second act of bankruptcy—that is, the preferential transfer of property to a creditor, just quoted above—this section fixes the date from which the four months will begin to run in cases involving written transfers required or permitted to be recorded, and when there is no provision for such record the date of the beginning of the running of the four months is fixed at the time when the beneficiary of the transfer takes notorious, exclusive, or continuous possession of

the property, unless the petitioning creditors have received actual notice of the transfer. If they had actual notice, the four months would begin to run just as it would on the change of possession described. This subdivision does not relate to the proving of debts against the bankrupt's estate nor to the surrender of preferences which creditors have received. It relates to the grounds of involuntary bankruptcy and the limitation of the filing of the petition. When the alleged bankrupt defends against the petition by averring that the acts of bankruptcy charged against him were not committed within the four months, this subdivision (3b), without necessary reference to others, fixes the time when the four months begins to run. Time exceeding four months from the date of the execution of the transfer will not avail him as a defense if the transfer was one required or permitted to be recorded; and, if the registry laws of the state are not applicable to the transfer, the four-months limitation will begin only on implied notice to the creditors arising from change of possession, or actual notice to them of the transfer. The strictness of the statute is against the bankrupt. The language of the statute limits the use by the bankrupt of the four-months limitation as a defense to the proceeding against him. The Congress in this section is not dealing with the distribution of the bankrupt's assets, nor with the surrender of preferences. The language all relates to the contest preceding the adjudication.

Section 57g, as amended February 5, 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1903, p. 415]), relates to creditors who have received voidable preferences. It is in these words:

"(g) The claims of creditors who have received preferences, voidable under section sixty, subdivision 'b,' or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision 'e,' have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

The general question to be considered and decided is whether or not the statute just quoted requires the appellant to surrender the property transferred to him by the bankrupt before his claim against the bankrupt's estate shall be allowed. The preferences that are required to be surrendered are made certain by reference to other parts of the statute. We shall first see if the transfer to appellant was voidable under section 67, subd. "e," referred to in the statute last copied. It is as follows (section 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]):

"(e) That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void, as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration. \* \* \*"

This statute is not applicable to the transfer in question here, unless it appear that it was made within four months prior to the filing of the petition, and unless it was made with the intent and purpose on the



part of the bankrupt to "hinder, delay, or defraud his creditors." We do not understand the findings of the referee to be to the effect that the transfer was fraudulent within the meaning of 67e, and the transfer for that reason would not be a voidable preference under this statute.

The decision of the referee and the court below, as we understand it, was controlled by the other statute referred to in 57g, to wit, 60b, which must be construed in connection with 60a, the latter describing and designating voidable preferences. Section 60, subds. "a," "b" (as amended February 5, 1903, 32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1903, p. 416]), are as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"(b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. \* \* \*

These subdivisions are found in a chapter dealing primarily with creditors, and in a section treating of creditors who have been preferred, and the limit in which the preference is made illegal. If found to be within this subdivision (60b), the preference is expressly required to be surrendered as a condition precedent to the allowance of the claim by the very terms of 57g. These three subdivisions were made parts of the act by the amendment of February, 1903, and the latter points to the former (60a and 60b) for a description of the preference which must be surrendered to secure the allowance of the claim. So far as applicable to this case, such preference required to be surrendered is a transfer of the property made "within four months before the filing of the petition." The referee has found that the transfer in question here was executed more than four months before the filing of the petition. If the four months, therefore, begins to run at the date of the execution of the transfer, the transfer is not a voidable preference within the statute. So the case is made to turn on the inquiry, when did the four-months limitation begin to run? Section 60a concludes with these words:

"Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The transfer in question, as found by the referee, is not one "required by law to be recorded," so no date of record can be referred to to postpone the beginning of the four months. This is conclusive against making the preference voidable if we are confined to this subdivision. This statute, to which alone on this point 57g refers, contains no language about the change of possession of property such as

is found in section 3b. The contention is that we should, by construction, take from section 3b and add to section 60a the provision in the former that, when the law does not require or permit the transfer to be recorded, the four months shall begin to run "from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment." The referee, whose decision has been affirmed by the court below, has made this language taken from 3b applicable to the case, and has held that the claim of the appellant cannot be allowed unless he surrenders the preference, because, as the referee found, the transferee did not take notorious, exclusive, or continuous possession of the property more than four months before the petition in bankruptcy was filed. As these statutes are written, the clause we have just quoted concerning possession is made to apply only to controversies concerning acts of bankruptcy, but not to a controversy as to the allowance of a claim and the surrender of a preference. If Congress had intended that the same rule as to the date when the four-months limitation should begin to run was to apply to both controversies, it seems probable that the same or similar language would have been used in each of the subdivisions. It has been suggested that, the provision as to notorious possession being in 3b, it was unnecessary to repeat it in 60a, because it was the intention that it should be read there by construction. That such could not have been the intention becomes evident from a careful reading. The two subdivisions each fixes four months as the limitation. Then each subdivision proceeds to fix the time when the four months shall begin to run where the act or the preference consists in the transfer of property. The former (3b) fixes the date of the recording or registering of the transfer, if record is required or permitted, and, if record is not required or permitted, the four months is to begin to run when notorious possession of the property is taken by the beneficiary. The latter (60a) provides that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." The latter section does repeat the former in fixing the date for the beginning of the four-months limitation as to transfers which are "required" to be recorded. Congress did not conclude, therefore, that it was unnecessary to repeat this provision in the latter section, but did repeat it in part, omitting, however, to make the same repetition when the law merely "permitted" registration, and making no reference whatever to possession as affecting the starting of the four-months statute against the creditor. The result is, if we are to be governed by the language used, a difference in the rule as to the beginning of the running of the four months in the two kinds of controversies. The rule is harsher against the bankrupt than against the creditor. When the bankrupt wishes to avail himself of the four-months limitation, and the alleged act of bankruptcy is a transfer, four months must have elapsed from the record of the transfer, if record is required or permitted; if not, four months from the notorious possession of the beneficiary. But when the creditor seeks to avoid by the four-months limitation the surrender of an alleged preference, it is

sufficient if it appear that the transfer was made four months before the filing of the petition in bankruptcy, and it is only when the transfer is required by law to be recorded that the period will begin to run at the date of the recording. It is not unreasonable that Congress should have intended to be more liberal in the application of the limit when it applies to the creditor than when it applies to the bankrupt; for in its application to the creditor the provision avoiding preferences is a statutory infringement on the rule of general law which rewards the diligence of creditors.

It is true, as a general proposition, that where relief is sought in equity on the ground of fraud, where ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute of limitations will not bar relief, provided suit is brought within proper time after the discovery of the fraud. *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636. But this principle has no application here. The acts described in section 60a are not such as were condemned as fraudulent at common law nor by the statutes of the states, nor are they immoral or dishonest. To secure an equal division of the bankrupt's property among his creditors, the statute prescribes a conventional rule to determine the limit of preferences. The limit prescribed is four months before the filing of the petition. Any transfer to a creditor made within that time is voidable if it enables the creditor to obtain a greater percentage of his debt than other creditors of the same class. This is so not because of bad faith, but simply because the statute says they are voidable. If the transfer in question was in violation of other provisions of the bankruptcy act, or contrary to state laws against fraudulent transfers or conveyances, the trustee has his remedy to recover or condemn the property in any court having jurisdiction. But no question is before us, in this case, involving such right.

The decree of the District Court is reversed, and the case remanded for further proceedings in conformity with the opinion of this court.

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MILLER et al. v. CLIFFORD et al.

(Circuit Court of Appeals, First Circuit. November 30, 1904.)

No. 555.

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

In a suit in equity brought in a state court on behalf of all of the creditors of an insolvent bank in Colorado against a number of stockholders to enforce their double liability under the Colorado statute, by requiring them each to pay the full amount of such liability to a master, to be applied pro rata, together with such sums as may be collected from other stockholders, on the debts of the bank—the remainder, if any, to be returned to defendants—there is no separate controversy with a single defendant which entitles him to remove the cause into a federal court.

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¶ 1. Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 15A.

## 2. SAME—REMOVAL BY ONE DEFENDANT.

Where a suit does not present a separable controversy, it can only be removed on a petition in which all the defendants join.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

William Reed Bigelow, for appellants.

William H. Leonard, Charles H. Hanson, and Even Winthrop Freeman, for appellees.

Before PUTNAM, Circuit Judge, and BROWN and HALE, District Judges.

HALE, District Judge. This is a bill in equity filed July 17, 1903, in the superior court of Suffolk county, in the commonwealth of Massachusetts, by Alfred L. Miller and four others, citizens of the state of Colorado, creditors of the State Bank of Monte Vista, in the state of Colorado, acting for themselves and for all other creditors similarly situated who joined or may join in the action, plaintiffs, against George E. Clifford and five others, all of whom are declared in the bill of complaint to be of the commonwealth of Massachusetts, defendants. A list of the creditors who joined in the bill is set forth in a schedule annexed to it, which schedule is alleged to contain over 90 per cent. of all the known creditors of said bank. Further averments of the bill are: That the State Bank of Monte Vista was, and still is, a corporation organized under the laws of the state of Colorado on or before August 1, 1890. That said bank did a general banking business in Colorado until June 15, 1899, when it became insolvent, and made an assignment, under the laws of the state of Colorado, of all its assets to Norman H. Chapman, assignee, who gave bond, and is now acting as assignee. That the plaintiffs and all other creditors who joined in this action, except some who are specifically excepted, filed their claims with the assignee, and that there have been paid on all said claims 19½ per cent. of the original face thereof, exclusive of interest, and that the assets of the bank have been substantially exhausted thereby; that the several plaintiffs deposited in the bank at different times from the organization thereof certain sums, and that the balance due to the plaintiffs by the said bank at the date of its failure was as follows:

Alfred L. Miller.....	\$ 929 68
Dan Workman .....	1,100 00
Phoebe C. Smith.....	1,145 00
Stephen W. Tracy.....	50 00
W. O. Stratton.....	725 00

—That the aggregate amount of all the claims against said bank at the time of the assignment was \$62,475.88. That the total capital of the bank was \$80,000, divided into 800 shares, of the par value of \$100 each. That there has been paid by the assignee on said claims against the bank the sum of \$11,646.90, leaving a balance due of \$50,828.98, with interest thereon at 8 per cent., under the laws of the state of Colorado, from the time of the assignment, June 15,

1899. That the laws of the state of Colorado at the time of the organization of the bank provided as follows: "Shareholders in banks, savings banks, trust deposit and security associations shall be held individually responsible for debts, contracts and engagements of the said associations in double the amount of the par value of the stock owned by them respectively." That the defendants named in the bill are the only stockholders residing within the jurisdiction of the court. That they were stockholders upon June 15, 1899, to wit:

George E. Clifford.....	10 shares
Walter A. Fairbanks.....	40 "
Abbie F. Frost.....	10 "
Roger P. Frost.....	10 "
Mattie A. Ingalls.....	10 "
Leila B. Fairbanks.....	293 "
Caroline B. Farrar.....	20 "

—That the remaining stockholders are as set forth in a certain schedule annexed to the bill. That 77 shares of stock are owned by residents of Colorado, 307 shares by the defendants, and 416 by residents of other states. That there is now unpaid on claims of the plaintiffs and all other known creditors entitled to enforce liability the sum of \$62,475.88, with interest thereon from June 15, 1899, at 8 per cent., under the laws of the state of Colorado, to December 14, 1899, when 15 per cent. of said principal sum was paid by said assignee, with interest on the balance until December 1, 1901, when 4½ per cent. of said principal sum was paid by said assignee, with interest on the balance until the finding of this bill of complaint, which sum amounts to more than \$60,000. Wherefore it says that, if every stockholder should pay \$80 upon every share of his stock in partial satisfaction of his said double liability, this would be insufficient wholly to pay said creditors.

The bill contains certain averments of law and certain other allegations which are not material to be stated here. The bill prays (1) that the defendants be adjudged stockholders; (2) that the defendants be ordered to pay to the plaintiffs named herein, or to a special master appointed by the court, twice the amount of the par value of the shares of stock owned by them, respectively, out of which the plaintiffs and all creditors of the said bank now joined or that may hereafter be joined "shall be paid forthwith, pro rata, such percentage of their claims as they shall be entitled to receive in any event, provided this liability is enforced against all of the stockholders of said bank, and is fully paid by them, and the remaining sum in the hands of the plaintiffs or said special master shall be held to pay to said creditors, pro rata, the balance due upon their claims, if any, after the plaintiffs have recovered all that they are able to recover by process of law and due diligence against the remaining stockholders of the State Bank of Monte Vista, and, if any sum remains in the hands of the plaintiffs or of said special master after said creditors have been paid in full, said remaining sum shall then be repaid pro rata to the defendants"; (3) that the court appoint a special master to receive from the de-

fendants the amounts for which they may be found liable as stockholders under said double liability, and "forthwith to pay pro rata to the creditors now or hereafter joined herein such percentage of their claims as they shall be entitled to receive in any event, provided this liability is enforced against all the stockholders of said bank and is fully paid by them, and to hold the remaining sum until the plaintiffs have recovered all that they are able to recover by process of law and due diligence from the remaining stockholders of said bank of Monte Vista, and then to pay said creditors of said bank, pro rata, all that remains unpaid on their said claims, with interest, and thereafter to repay the balance, if any, pro rata, to the defendants," and for other and further relief.

On September 8, 1903, Caroline B. Farrar, one of the defendants, filed a petition under the act of 1875, as amended by the act of 1887-88 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), for the removal of the case into the Circuit Court of the United States, alleging that the controversy is between citizens of different states; that the petitioner, a defendant in the suit,

s at the time of the commencement of the suit, and still is, a citizen of the state of Maine; that she is a nonresident of the state in which the suit was brought, to wit, the state of Massachusetts, and that the other defendants severally in the above-entitled suit were then, and still are, each and all, citizens of the state of Massachusetts, and that the plaintiffs are, each and all, citizens of the state of Colorado; that "in said suit above mentioned there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between said petitioner, defendant, and the said" several plaintiffs—naming them by name. It appears by the record that on October 17, 1903, the cause was removed to the Circuit Court of the United States. On December 18, 1903, a demurrer was filed by the defendants, and on October 21, 1903, there was filed a motion to remand the case to the state court on the ground that the Circuit Court of the United States is without jurisdiction to hear and determine the cause. April 25, 1904, the cause was heard in the Circuit Court on the motion to remand and upon the demurrer. The motion to remand was denied, the demurrer was sustained, and the bill dismissed. From this decree the complainants have appealed to this court.

The first question to be considered is whether the Circuit Court of the United States properly exercised jurisdiction in the case. The cause was removed from the state court to the Circuit Court of the United States, as we have said, on the ground that there is a controversy wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between the petitioner, defendant, and the plaintiffs. Does the case present a separable controversy?

The question of separable controversy has been fully discussed by the Supreme Court in a long line of cases. The leading case upon the subject is *Torrence v. Shedd*, 144 U. S. 530, 12 Sup. Ct.

726, 36 L. Ed. 528. In that case Mr. Justice Gray, in speaking for the court, said:

"But in order to justify such removal on the ground of a separate controversy between citizens of different states there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them'; and, by the settled construction of this section, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit."

In *Louisville R. Co. v. Ide*, 114 U. S. 56, 5 Sup. Ct. 735, 29 L. Ed. 63, Mr. Chief Justice Waite, announcing the opinion of the Supreme Court, said:

"Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. \* \* \* On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible."

In *Crump v. Thurber*, 115 U. S. 60, 5 Sup. Ct. 1154, 29 L. Ed. 328, Mr. Justice Blatchford, for the Supreme Court, said:

"The jurisdiction of the Circuit Court must be determined, for the purpose of this case, by the status of the parties and the nature of the relief which had been asked by the plaintiff at the time of the application for removal."

*Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987; *Wilson v. Oswego Township*, 151 U. S. 67, 14 Sup. Ct. 259, 38 L. Ed. 70.

These cases decide that the issue brought before the court in cases of alleged separable controversy is not whether the party asking for the removal may have a separate decree and a separate execution, but what the whole case shows the controversy to be. Each case of a defendant petitioning for removal of a cause presents the question whether the whole subject-matter of the suit can be determined between the plaintiff and the petitioning defendant without the presence of the other parties. The policy of courts—especially of equity courts—is not to divide the subject-matter of a great controversy into a multitude of small controversies, and the statute of removal does not call for such division. Mr. Justice Story states with perfect clearness the theory of equity courts upon the subject of parties:

"It is the great object of courts of equity to put an end to litigation, and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject-matter in controversy." *Story's Equity Juris.* vol. 2, § 1526.

The later cases of the Supreme Court also state the rule in conformity with the early and leading cases which we have cited. In

Minnesota v. Northern Securities Co., 194 U. S. 64, 24 Sup. Ct. 602, 48 L. Ed. 870, the court says:

"Under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court as one arising under the Constitution or laws of the United States unless the plaintiff's complaint, bill, or declaration shows it to be a case of that character. 'If it does not appear at the outset,' this court has quite recently said, 'that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed.'"

The court, in its opinion, cites and quotes *Railway Co. v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85. The case contains a further reference to all the leading recent authorities upon this subject. While the doctrine of the Supreme Court is clear that a cause cannot be removed from a state court to the Circuit Court of the United States unless the jurisdiction of the Circuit Court is clearly shown by the plaintiff's statement of his own case, and while that want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings, it ought nevertheless to be said that this rule has no reference to averments of the moving party as to rules of law, or as to any other matters unnecessarily or immaterially stated either in the allegations of a bill or in the prayer for relief. The party invoking the aid of the court to remove a case is entitled to have the court look not only at the pleadings of the moving party, but to look carefully also at the Constitution, statutes, and judicial decisions of any state, so far as they bear upon the question at issue. In examining the case before us in the light of the rule of the Supreme Court, we have no difficulty in coming to a conclusion that the case falls distinctly within the decisions which we have cited.

In *Auer v. Lombard*, 72 Fed. 209, 19 C. C. A. 72, this court had before it the statute of Colorado which is now before us. In that case the court referred to the fact that a single creditor may with great facility proceed against a nonresident stockholder by a suit at law, and referred by way of illustration to *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966. Under the ruling in that case, this court was led to forecast the construction of the statute of Colorado which the courts of that state might fairly put upon it, and concluded that those courts might properly hold that the remedy under these statutes would be at law in behalf of each creditor severally against one or more stockholders. The decision of *Auer v. Lombard*, however, did not necessarily depend upon that construction being given to the statute. The appeal must in any event have been dismissed, in view of *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577, in which the Supreme Court held that in an action of that kind, affecting the corporate rights of a corporation, such corporation is an indispensable party. Since the decision of that cause, the Supreme Court of Colorado has construed the statute in question in *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, and has held that a suit in equity by or for all the creditors is the appropriate mode of enforcing a liability under this statute. The Colorado court, in coming to this



conclusion, cited and relied upon *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864.

In the case at bar we have recited the substantial averments and prayers of the bill of complaint in order to bring clearly before us the subject-matter of the controversy and the precise relief sought, such relief depending, as we have shown, upon the averments which the plaintiff has made in his pleadings. The respondents are stockholders of a state bank in Colorado, which is alleged to have failed and to have become insolvent. The relief sought against these shareholders under the laws of Colorado is for a liability double the amount of the par value of the stock owned by the shareholders. The bill states a cause of action in which all the defendants who have been joined are distinctly interested. The prayers of the bill call for the appointment of a special master, an accounting in favor of all the creditors, and a pro rata payment to them of such percentage as they shall be entitled to receive, "provided liability is enforced against all the stockholders of said bank, and is fully paid by them." The third prayer makes it the duty of the court to cause a final repayment to be made to the defendants of any sum remaining after the double liability of the shareholders has been enforced, and after all the creditors have been paid in full, if that state of fact shall arise. Clearly, the averments and the prayers of the bill do not lead toward relief against any one stockholder without an accounting in which all are interested. The whole subject-matter of the suit is not capable of being finally determined without joining all the defendants who are made parties to the suit. We are not called upon to decide whether or not certain other parties are, indeed, necessary to be joined, in order that complete and conclusive relief may be obtained in equity. The case clearly calls for a proportionate liability of all stockholders, as in *Terry v. Little*, *supra*. In our opinion, no separable controversy is stated against the petitioning defendant.

As we have found that the case does not present a separable controversy, it follows that, in order to effect a removal of it, all the defendants must join in the application for such removal. There can be no doubt but that this is the present rule of the Supreme Court. *Railway Co. v. Martin*, 178 U. S. 248, 20 Sup. Ct. 854, 44 L. Ed. 1055; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Railway Co. v. Dixon*, 179 U. S. 140, 21 Sup. Ct. 67, 45 L. Ed. 121; *Gableman v. Railway Co.*, 179 U. S. 337, 21 Sup. Ct. 171, 45 L. Ed. 220. In this case only one of the defendants has sought to remove the cause. No separable controversy being stated against the petitioning defendant, and all the defendants not having joined in the petition, the case must be remanded to the state court.

The decree of the Circuit Court is reversed, and the cause is remanded to that court, with a direction to remand it, for want of jurisdiction, to the state court whence it came, with costs of the Circuit Court and of this court to the complainants against Caroline B. Farrar.

## STATE OF WEST VIRGINIA v. LAING et al.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 528.

## 1. FEDERAL COURTS—HABEAS CORPUS—JURISDICTION.

Rev. St. § 753 [U. S. Comp. St. 1901, p. 592], confers on a Circuit Court of the United States jurisdiction to issue a writ of habeas corpus to bring before it a person imprisoned by a state for an act alleged in his petition to have been done in the lawful execution of a writ issued by said court, and to discharge him if it be found that such allegation is true.

## 2. SAME—PERSONS IMPRISONED FOR ACT DONE PURSUANT TO LAWS OF UNITED STATES.

Petitioners were called upon to act as members of a posse comitatus to assist in the arrest of a man indicted in a federal court for resisting its officers. He was a dangerous and desperate man, and had declared that he would not be taken alive, as petitioners knew, and they also knew that he had been an active member of an armed mob which had previously resisted the officers and prevented their service of a process of the court. They were ordered to go toward his house from the rear while the officers approached it in front. Seeing the officers coming, he ran out at the rear with a pistol in his hand, and toward petitioners, who twice ordered him to halt, but he kept on until quite close, when, seeing him turn toward a large tree, and believing that he intended to shelter himself behind it and open fire on them, they both fired at him and killed him. *Held*, that what they did was done in the lawful discharge of a duty imposed on them by the laws of the United States and was justified; that they were not subject to prosecution therefor by the state; and that on their arrest and imprisonment on a charge of murder they were properly discharged on a writ of habeas corpus by the federal court.

Appeal from the Circuit Court of the United States for the Southern District of West Virginia. Habeas Corpus.

John H. Holt, S. C. Burdett (Romeo H. Freer and T. J. McGinnis, on the brief), for the State.

J. W. St. Clair, W. R. Thompson (C. W. Dillon, W. H. McGinnis on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

GOFF, Circuit Judge. This case is here from the Circuit Court of the United States for the Southern District of West Virginia, the appellant insisting that there is error in the order of that court entered on the 11th day of December, 1903, discharging from arrest and imprisonment the appellees, John D. Laing and Stewart Hurt. From the petitions filed in their behalf, praying for the writs of habeas corpus, the returns thereto, and the exhibits filed therewith, it appears that at the March term, 1903, of the Circuit Court for said district, one John Harless was indicted, charged with a violation of section 5398 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3655], in that he had resisted certain officers of the United States while they were engaged in the discharge of their official duties; that a capias for his arrest had been duly issued from said court and regularly placed in the hands of

Daniel W. Cunningham and Walter C. Summers, deputy United States marshals for that district; that said officers proceeded to the county of Raleigh, in said district, where Harless resided, for the purpose of arresting him, and that to assist them in executing the process mentioned they summoned Quincy George, John D. Laing, and Stewart Hurt, citizens residing in that locality, as a posse comitatus; that on April 21, 1903, the said five mentioned parties, with the capias in the hands of the officers mentioned, proceeded to the house in the county of Raleigh where Harless resided, for the purpose of arresting him; that the appellees were directed by the officers to approach from the rear the house in which Harless was then supposed to be, the said marshals and the remaining member of the posse proceeding so as to reach it at the front thereof; that Harless, observing the coming of the officers, left the house by the rear door, and ran in the direction of the appellees, carrying in his hand a pistol, and that when he was about 90 yards from them, they, seeing him so advancing and so carrying the pistol, called to him to halt, which he did not do, but continued to approach until he was within close pistol range of them, when they again commanded him to stop and surrender, but he, refusing to do so, turned towards a large tree which was a short distance from him, when the appellees, believing that he was seeking shelter of the tree from which to fire on them, near the same moment both of them fired at him, one of the shots passing through his body near the heart, producing death; that the appellees were soon thereafter arrested by a constable of Raleigh county, on a warrant charging them with feloniously shooting and murdering the said Harless, and that they were on the 28th day of April, 1903, indicted by the grand jury of that county for feloniously killing him; that they were committed to the jail in said county to await trial on such charge, and that while so confined writs of habeas corpus were at their instance sued out, requiring the sheriff of that county to produce the appellees before the Circuit Court of the United States for the Southern District of West Virginia, in order that the cause of their imprisonment and detention might be inquired into, they claiming that in the shooting and killing of Harless, under the circumstances mentioned, they had violated no law of the state of West Virginia, but had, on the contrary, lawfully discharged their duties as members of the posse comitatus referred to.

After due return had been made to the writs of habeas corpus, and after the petitioners had been brought before it by said sheriff, the court below, with the consent of the parties, ordered that the questions raised by the two petitions should, as they both related to the same transaction, be heard together. The petitioners then offered the testimony of 12 witnesses in their behalf, and 13 witnesses were examined in behalf of the respondent; certain documentary evidence, including the transcripts of the proceedings in the circuit court of Raleigh county, and in the Circuit Court for the Southern District of West Virginia, relating to said matter, were also offered in evidence, and the argument of counsel fully heard; after which the judge presiding entered an order discharging the

petitioners, when the state of West Virginia prayed a review by this court of the proceedings so had in the court below.

The points involved in the assignments of error may be stated as follows: First, had the Circuit Court of the United States for the Southern District of West Virginia jurisdiction of said petitions? Second, were the petitions so drawn as to authorize the court below to issue the writs of habeas corpus asked for? Third, did the facts alleged and substantiated by the testimony show that the petitioners were justified in killing Harless?

That the court below had jurisdiction and was authorized to issue the writs is shown by section 753 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 592], which expressly permits that court to issue the writ of habeas corpus in such cases, and to discharge the petitioners, if it be found that they are imprisoned, on account of acts which they were empowered to do under the laws of the United States. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; *In re Quarles and Butler*, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080; *Storti v. Massachusetts*, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120.

The motions to quash were properly overruled, for the petitions presented such cases as required the court to make inquiry concerning the detention and imprisonment of the petitioners. On such motions the allegations of the petition will be taken as true, and where they charge, as these petitions do, that the petitioners were duly summoned to aid in the execution of a writ of *capias*, which had been regularly issued by a court of the United States, and that their imprisonment is because of an act done by them in the lawful discharge of such duty, then, in obedience to the requirements of the statute mentioned, the court should at once issue the writ of habeas corpus, and, if on the hearing the proof offered sustains such allegations, should promptly discharge the parties so imprisoned.

The disposition of the remaining point raised by the assignments of error requires the careful analysis of all the testimony offered on the hearing below. The circumstances causing the effort to arrest Harless were unusual, the incidents connected with it unfortunate, and the result greatly to be deplored. From the evidence we are to determine whether or not the appellees were honestly endeavoring to lawfully execute the writ issued by the court below, and whether or not, the circumstances attending such endeavor on their part authorized them to act as they did. The record shows that at the time Harless was killed he was under indictment, charged with resisting the officers of the United States in the discharge of their duties; that he was aware of the pendency of such indictment, and knew that the deputy marshals had in their hands a *capias* for his arrest; that he had publicly stated on several occasions, concerning which the appellees had been informed, that he did not intend to be arrested, and that he would not be taken alive; that he had theretofore resisted arrest, and that he was taking a

prominent part in the strike then prevailing throughout the entire New River coal field; that an injunction had been sued out by certain coal operators in that section against a number of persons participating in the strike, and that the orders of the court in which such suit was pending—the court below—had been openly and persistently disregarded and violated; that because of such violation rules had been issued by that court against the parties charged therewith, and that said Deputy Marshal Cunningham had been sent to that locality to execute them; that he found the parties against whom he had such rules organized and determined to resist him, and that to enable him to serve the process in his hands he summoned assistance, among others the appellees, Laing and Hurt, but that, nevertheless, the attempt to serve the rules mentioned failed, because of the resistance of an armed mob, of which Harless was a member, he being armed and prominent in such resistance, seen and recognized by the appellees; that this mob thus resisting the arrest of a number of its members, and defying the officers of the law, marched through the locality where said strike was prevailing, destroying the property of certain citizens and terrorizing the community; that said marshal so resisted summoned a posse comitatus of about 200 men, with the assistance of which he again attempted to serve the process in his hands, such attempt resulting in a conflict with the mob, in which a number of men were killed and wounded; that in the fight Harless, an armed member of said mob, took an active part in such resistance, and that while so engaged was seen and recognized by the marshal as well as by the appellees; that soon thereafter the appellees were again summoned to assist in arresting Harless, and that they then took the place assigned them, as before described, in the rear of the Harless house.

We do not find it necessary to discuss the distinction existing between felonies and misdemeanors, nor the common-law rules applicable to the justification of officers, when endeavoring to arrest parties charged with such offenses, respectively. Those questions raised by counsel for appellant, important and interesting as they are, are not involved in this case as we see it, nor are the propositions of law relating to them applicable to the facts here found.

The appellees were, as members of said posse, discharging an important duty imposed upon them by the law—a duty they did not seek, but one they were ordered to perform. There was no feeling of animosity on their part towards Harless, and no motive existed because of which either of them would have been induced to do him harm. Did they act unlawfully, or were they justified in what they did? They were on a perilous mission, a fact at the time well known to them. Harless was a dangerous and desperate character, and this also they were well aware of. As the appellees understood the situation, Harless, in his endeavor to escape from the officers who were approaching the house, was coming directly towards them in a threatening manner, with pistol in his hand, refusing to halt, when ordered by them to do so, not only resisting arrest, but evidently intending bodily harm to those endeavoring to arrest him. Commanded the second time to halt and surrender, he

again refused, continuing to approach the appellees with pistol in hand, and when quite near them turned to the shelter of a tree, from which they had every reason to believe it was his intention to open fire on them. They were not only being resisted by the party they were lawfully endeavoring to arrest, but their lives were placed in jeopardy by him. They were compelled to act at once, for there was then no time for delay nor chance for further parleying. They were either to retreat, taking the risk of his shot, or were to continue the effort to arrest him, even if such endeavor cost Harless his life. What they did do was what reasonable men under like circumstances will always do. They acted under the responsibility of great power, which for that occasion was theirs, and they did not abuse it nor did they betray it. They acted under the fearful excitement incident to great danger, and their conduct receives the approval of our judicial judgment.

The appellees were, at the time Harless was killed, representing the government of the United States in enforcing the orders of its court. It was the duty of that government to see that such orders were respected, as it is also its duty, as well as the duty of that court, to see that the appellees, who have properly discharged the obligations that had been imposed upon them by the laws of the United States, are protected from arrest and punishment by any other authority whatsoever. It is because of this that the insistence of counsel for appellant that the appellees should have been remanded for trial by the state court is without merit. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *Wildenhus's Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565; *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. 525, 32 L. Ed. 926; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862; *Ex parte McCardle*, 6 Wall. 318, 18 L. Ed. 816; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Ex parte Jenkins et al.*, 2 Wall, Jr., 521, Fed. Cas. No. 7,259; *Ex parte Robinson*, 6 McLean, 355, Fed. Cas. No. 11,935; *Roberts v. Jailer of Fayette County*, 2 Abb. 265, Fed. Cas. No. 15,463; *In re Neill*, 8 Blatchf. 156, Fed. Cas. No. 10,089; *Electoral College of South Carolina*, 1 Hughes, 571, Fed. Cas. No. 4,336.

If the appellees properly discharged their duties as members of the posse comitatus, as we find that they did, then they were not guilty of any crime against the state of West Virginia, for surely the performance of a duty to the United States cannot be a wrong to the state. A state court has not the right to arrest, convict, and punish an officer of the United States for an act lawfully done by him in the discharge of his official duties. If such court has that right, then the federal government is without the power necessary for its own protection.

Appellant's contention that a jury and not the court below should have passed upon the evidence is not sustained by the law, for the Congress certainly intended, in cases of this character, that the judges of the United States should hear the evidence, and without a jury proceed in a summary way to pass upon the federal question involved; that question being, is the petitioner deprived of his liberty in contravention of the Constitution or laws of the United

States? The statute also directs that if the judge shall find that the allegations of the petition are sustained, he shall forthwith discharge the petitioner and set him at liberty.

We would have in our midst an anomalous condition of affairs if the courts of a state could arrest and punish the officers of the federal government for acts done by them when they were lawfully discharging their duties under the laws of the United States. The right to arrest and punish them would carry with it the power to prevent them from discharging their duties. Such right does not exist, for the government of the United States, under its Constitution, possesses all the power necessary to its existence as an independent nation. As a nation it is absolutely sovereign over every foot of soil, and over every person found within the limits of its territory, and this sovereignty gives it the power to make and execute its own laws, in its own way and in its own tribunals.

There is no error in the judgment complained of. Affirmed.

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**JARNAGIN v. TRAVELERS' PROTECTIVE ASS'N OF AMERICA.**

(Circuit Court of Appeals, Sixth Circuit. December 12, 1904.)

No. 1,335.

**1. ACCIDENT INSURANCE—INTENTIONAL INJURIES.**

Where it was alleged that insured had been placed under arrest by officers of the law and disarmed, and while so in custody such officers negligently and without lawful excuse permitted certain parties to assault and shoot deceased, and thereby cause his death, such death was caused by "intentional injuries inflicted by another person," within a provision of an accident policy held by deceased exempting the company from liability for such injuries.

**2. SAME—PROXIMATE CAUSE.**

Where it was alleged that deceased died from a shot fired by third persons while deceased was in the custody of officers of the law under arrest, and that his death was caused by the negligence of such officers in failing to protect deceased, the proximate cause of his death was the shot, and not the negligence of the officers in failing to protect him.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Pickle & Turner, for appellant.

J. H. Frantz (Cornick, Wright & Frantz, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. Jeremiah Jarnagin held a certificate of membership or policy of accident insurance in the Travelers' Protective Association, which provided that the association should not be liable for "death or disability when caused \* \* \* by intentional injuries inflicted by the member or any other person." Jarnagin was murdered while under arrest and in the custody of officers of the law.

¶ 1. Accident insurance, risks and causes of loss, see note to *National Acc. Soc. of City of New York v. Dolph*, 38 C. C. A. 3.

The declaration averred that the officers "negligently and without lawful excuse permitted certain parties to assault and shoot, and thereby cause the death of, said Jarnagin." The court below sustained a demurrer to the declaration on the ground that the cause of death as stated came within the exception of the policy. This is assigned as error. The following is the provision of the policy involved:

"The member hereby agrees that the following rules shall be observed: That the Travelers' Protective Association of America shall not be liable for injuries incurred by a member in occupations more hazardous than specified in his application for membership; or in case of injuries, fatal or otherwise, wantonly or intentionally inflicted upon himself, while sane or insane, or in case of disappearance, or injuries of which there is no visible mark upon the body (the body itself not being deemed such a mark in case of death), or in case of injury, disability or death happening to the member while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicant, or death or disability when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war or riot, injury resulting from an altercation or quarrel, unnecessary lifting, voluntary overexertion (unless in a humane effort to save human life), voluntary or unnecessary exposure to danger, or to obvious risk of injury, or by intentional injuries inflicted by the member or any other person, injury received either while avoiding or resisting arrest, while violating the law or violating the ordinary rules of safety of transportation companies, or riding on a locomotive, or to cases of injury caused by the diseases of epilepsy, paralysis, apoplexy, sunstroke, freezing, orchitis, hernia, fits, lumbago, vertigo, or by sleep walking, voluntary inhalation of any gas or vapor, injury fatal or otherwise, resulting from any poison, or infection, or from anything accidental or otherwise taken, administered, absorbed or inhaled, disease, death or disability resulting from surgical treatment (operation made necessary by the particular injury for which claim is made and occurring within three calendar months from the date of accident excepted)."

The declaration alleged that Jarnagin was "accidentally killed in the manner hereinafter stated," "the special facts and circumstances relating to his death" being thus set forth:

"The said Jarnagin had been placed under arrest by certain officers of the law, or deputy sheriffs or police officers, and disarmed, whereby it became in law the duty of said officers to afford adequate protection to him against violence, injury, or death at the hands of others; and while so under arrest, disarmed, and in the custody of said officers, they, the said officers, negligently, and without lawful excuse, permitted certain parties to assault and shoot, and thereby cause the death of, said Jarnagin; that the proximate cause of the death of said Jarnagin was the negligence and fault of said officers, without which said death would not and could not have occurred, in failing to afford adequate protection to said Jarnagin, as was their legal duty to do, and that, therefore, the death of said Jarnagin was not the direct result, as the proximate cause of the intentional violence of his assailants, but of the negligence and fault of the said officers."

1. In the case of the Travelers' Insurance Company v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308, the policy of insurance contained a provision that no claim should be made under it where the death of the insured was caused by "intentional injuries inflicted by the insured or any other person." The insurance company claimed that the insured was murdered. The court (Mr. Justice Harlan delivering the opinion) held that, "if he was murdered, then his death was caused by intentional injuries inflicted by another person." In the case of the Travelers' Protective Association v. Langholz, 86 Fed. 60, 29 C. C. A.



628, the declaration averred that the insured was murdered by a person named, "being shot through the head with a Winchester rifle, from which his death resulted immediately." The provision of the policy sued on was identical with that in the case at bar, having been issued by the same company. The court held that the statement of facts agreed on and the finding of the lower court showed the insured "to have been murdered (that is, intentionally injured by another person)," and, following the rule in *Insurance Company v. McConkey*, directed a judgment for the insurance company. In *Brown v. U. S. Casualty Co.* (C. C.) 88 Fed. 38, it was held that, where the accident insurance policy provided that the insurance should not cover "death resulting from intentional injuries inflicted by any person," no recovery could be had in case of the murder of the insured. The case of *Insurance Co. v. McConkey* was followed. To the same effect are the following authorities: 2 May on Ins. § 520a; *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

2. But it is urged that the omission of the officers to protect Jarnagin, the fact that (as alleged) they "negligently, and without lawful excuse, permitted" his murder, takes this case outside the rule in the *McConkey Case*, because it appears from the declaration that the proximate cause of Jarnagin's death was not the injuries inflicted by his assailants, but the negligence of the officers who failed to protect him from them. If Jarnagin had held a policy insuring him against death caused by intentional injuries inflicted by another, a defense based upon the facts relied on here would seem untenable to the point of absurdity. It would be said: "Suppose he was under arrest, suppose the officers did fail to protect him, still what caused his death was the injuries inflicted by his assailants, and that was precisely what the policy insured him against." The case at bar is essentially the same. In each the question is, "What caused the death?" And the answer must be the same. The shots of his assailants were the direct and proximate cause, and the failure of the officers to protect him was only a condition, which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him. Thus a man with heart disease might be killed by a blow which would not affect a sound man, but nevertheless it would be the blow, and not the heart disease, which killed him. The doctrine of proximate and remote causes has been discussed in many cases, but, after all, each case must be decided largely upon the special facts belonging to it. *Ins. Co. v. Tweed*, 74 U. S. 44, 52, 19 L. Ed. 65. The rule where negligence is claimed to be the cause of the injury was stated in the case of *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, where it is said (page 475, 94 U. S., 24 L. Ed. 256):

"But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

We applied this rule in *Butts v. Cleveland, etc., Ry. Co.*, 110 Fed. 329, 49 C. C. A. 69. A passenger, notified that the car he was on was to be cut from the train, started forward, and, as he was crossing to the

next car the separation took place, and as he took hold of the doorknob of this car the brakeman called out, "Look out! Look out!" whereupon, acting on the impulse of the moment, he stepped back, and fell between the cars and was hurt. This court held that it was not the cutting of the cars, nor the lack of time to get to the forward car, nor the warning given by the brakeman, that was the proximate cause of the accident, but the plaintiff's own unexpected and inconsiderate act in stepping back from a position of safety into one of danger.

*Scheffer v. R. R. Co.*, 105 U. S. 249, 252, 26 L. Ed. 1070, grew out of a railroad collision. The passenger injured in the accident ultimately became insane and committed suicide. In a suit against the railroad company for his wrongful death the court held that it was not the collision which was the proximate cause of his death, but his own act. The case of *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, and *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, are discussed, the court reaching the conclusion (page 252, 105 U. S., 26 L. Ed. 1070):

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

In *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, it was held that a policy of accident insurance which excepted death by suicide, without qualifying the word "suicide" by the words "whether sane or insane," covered a death by hanging one's self while insane. Suicide being the intentional killing of one's self, could not be predicated of the act of an insane person, which must be regarded as involuntary, and not really his act. This policy contained a provision excepting death caused wholly or in part by bodily infirmities or disease, and the court said that:

"If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death;" citing cases.

In *Manufacturers' Accident, etc., Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620, the question of proximate cause came before this court. The insured was found submerged, face down, in a brook, dead. It was claimed he had fallen into the brook in consequence of a disease, which thus indirectly caused his death. Respecting this claim, Judge Taft, who delivered the opinion, said (page 954, 58 Fed., page 590, 7 C. C. A., 22 L. R. A. 620):

"We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result even had

there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

The question whether a cause was proximate or remote has frequently been before the courts in cases of marine insurance. The holdings in a number of these cases are stated in Broom's Legal Maxims, p. 216. We quote a few which seem pertinent:

"Where a ship meets with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, the loss is to be ascribed to the capture, not to the sea damage. So the underwriters are liable for a loss arising immediately from a peril of the sea, or from fire, but remotely from the negligence of the master and mariners; and where a ship insured against the perils of the sea was injured by the negligent loading of her cargo by the natives on the coast of Africa, and, being pronounced unseaworthy, was run ashore in order to prevent her from sinking and to save the cargo, the court held that the rule, '*Causa proxima non remota spectatur*,' must be applied, and that the immediate cause of loss, viz., the stranding, was a peril of the sea."

To return to the case at bar. It is not charged in the declaration that the officers willfully exposed Jarnagin to the danger of being murdered. Such averment might amount to a charge of complicity in the murder. The extent of the allegation is that they negligently permitted certain parties to murder him; in other words, failed to protect him where protection was (as alleged) a legal duty. In the absence of specific averments to that effect, it cannot be assumed that the failure of officers to protect a prisoner would naturally and probably result in his murder. It must be presumed that in this country the law, as ordinarily enforced, is adequate to protect life. It cannot be assumed that it is necessary for a man to place or keep himself in custody and under the protection of officers in order to secure his personal safety. Nor can it be assumed that a citizen must carry weapons in order to safeguard his person. From the fact, therefore, that a man is unarmed, and not protected by officers, it cannot reasonably and naturally be anticipated that he will become the victim of murder. If he is murdered while unarmed and unprotected, the act of his murderers, and not the failure of the law to protect him, must be regarded as the proximate cause of his death. The negligence of the officers which exposed Jarnagin to danger was no more the proximate cause of his death than was, in Scheffer's Case, the collision which injured him, whereby he became insane and killed himself; or, in Dorgan's Case, the temporary seizure, which caused him to fall into the brook where he was drowned. In each case "a casual and unexpected cause," not the natural and probable result of the one relied on, intervened to occasion death.

The judgment of the lower court is affirmed.

## BROWN v. McDONALD et al.

(Circuit Court of Appeals, Third Circuit. January 9, 1905.)

No. 38.

**1. DISCOVERY—STOCK—NAMES OF OWNERS.**

Where complainant, as surviving receiver of a corporation, had been instructed to collect from the holders of the preferred stock thereof a certain installment to pay debts, and alleged that defendants, who were stock brokers, purchased 1,100 shares of the preferred stock of the corporation for persons whose names were unknown to complainant, and caused the same to be transferred to a clerk in defendants' employ, and that defendants, on demand, had refused to disclose the names of the real owners of the stock, complainant was entitled to maintain a bill against defendants to discover the names of such persons necessary to the commencement of a suit at law against them to recover such assessment.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 130 Fed. 964.

Reynolds D. Brown, for appellant.

John G. Johnson, for appellees.

Before ACHESON and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The bill as amended was purely and simply a bill of discovery in aid of a proposed action or actions at law. The defendants demurred. The demurrer was sustained, and the bill was dismissed.

The plaintiff in the amended bill is Arthur K. Brown, who has brought the same as surviving receiver of the American Alkali Company, a corporation organized and existing under the laws of the state of New Jersey.

The amended bill shows that on September 9, 1902, the plaintiff and one Henry I. Budd, Jr. (who since died), were appointed receivers of the American Alkali Company by the Circuit Court of the United States for the District of New Jersey, and the bill recites an order by that court on November 14, 1902, whereby the receivers were "authorized and instructed to collect from the holders of the preferred stock of the American Alkali Company, for the purpose of paying the debts of said corporation, the balance of the first installment of \$2.50 per share of the call made by the board of directors on September 16, 1901." The amended bill further sets forth that on September 16, 1901, William J. McDonald, one of the defendants, was the registered holder of 1,100 shares of the preferred stock of the American Alkali Company; that said McDonald then was and is now a clerk in the employ of John W. Sparks and J. Maurice Wynn, copartners trading as J. W. Sparks & Co., the other defendants, who were stock brokers; that the plaintiff is informed and believes, and therefore avers, that said McDonald is not and never was the real owner of said shares of preferred stock or any of them, but that they were purchased by said Sparks and Wynn for the account of persons unknown to the plaintiff, and were placed by them in the name of McDonald for the purpose of

concealing the names of the real owners thereof; that the plaintiff is advised that the persons for whose account the said shares were purchased and placed in the name of McDonald are personally liable for the payment of the call or assessment made on September 16, 1901; that the plaintiff has demanded of the defendants that they disclose to him the names of such persons, but they have refused so to do; and that the plaintiff proposes to bring suit against such persons to recover said first installment of said assessment, amounting to \$2,750, as soon as he can discover the same. And the bill prays that the defendants be compelled to answer the bill, and that they be ordered by the court to disclose and discover to the plaintiff the names and addresses of the persons for whose account the said 1,100 shares of preferred stock were purchased and placed in the name of McDonald.

The question we are called upon to determine upon this appeal is whether the plaintiff's amended bill presented a case entitling him to the discovery sought.

It is urged on behalf of the appellees, first, that a bill of discovery merely in aid of a purely legal right is no longer maintainable in a court of the United States; and, second, that if such a bill can now be maintained in a federal court this is not a case in which such a bill is allowable. In support of the first of these propositions we are referred to what was said against the maintenance as a general rule of a bill solely for the sake of discovery, by Mr. Justice Brewer, when sitting at circuit, in *Preston v. Smith* (C. C.) 26 Fed. 884, 889, and to what was said by the Circuit Court of Appeals for the Fourth Circuit in *Safford v. Ensign Mfg. Co.*, 120 Fed. 480, 56 C. C. A. 630. Now, undoubtedly, section 724 of the Revised Statutes [page 583, U. S. Comp. St. 1901], which empowers the courts of the United States in actions at law to require the parties to produce books and writings, and section 858 [page 659], which makes the parties to a suit at law competent witnesses therein, have removed the necessity of resorting to bills of discovery in ordinary cases, but we are not willing to hold that the statutes have altogether abolished the equitable remedy by bill of discovery. Moreover, this bill is not for the mere discovery of evidence to be used in a trial at law, but it is to ascertain the names of persons against whom intended suits are to be brought to enforce alleged legal claims. There are precedents for such bills of discovery, although the cases are of rare occurrence.

Perhaps the earliest cases sustaining the right to file a bill of discovery to ascertain the proper persons to make defendants in a proposed suit at law are *Heathcote v. Fleete*, 2 Vern. 442, and *Morse v. Buckworth*, 2 Vern. 443. In the former of these cases the bill was to discover who was the owner of a wharf and lighter, to enable the plaintiff to bring an action for damages to his goods by the lighter's being over-set by the negligence of the lighterman; and in the latter case the plaintiff, a freighter whose goods were burned by the negligence of the master or crew of a carrying ship, brought his bill to discover who were part owners of the ship, to enable him to bring an action. In each of these cases the defendant demurred, but the demurrer was overruled. Another early case in which a like bill of discovery was held good on demurrer was *Moodaly v. Moreton*, 2 Dick. 652, in which the purpose

of the bill was to enable the plaintiff to ascertain whom to sue at law for his wrongful ouster from leased premises. In the recent case of *Orr v. Diaper*, 4 Chan. Div. (Law Rep.) 92, it was held that a suit would lie against shipowners who had shipped goods bearing counterfeits of the plaintiffs' trade-mark for discovery of the names of the consignors from whom the goods were received, in aid of contemplated proceedings against the wrongdoers. In overruling a demurrer the Vice Chancellor well said:

"In this case the plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs."

In 2 Story's Equity Jur. § 1483, it is said that while in general it seems necessary in order to maintain a bill of discovery that an action should be commenced in another court to which it should be auxiliary, "there are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought."

The case of *Post & Company v. Toledo, etc., Railroad Co. et al.*, 144 Mass. 341, 346, 11 N. E. 540, 59 Am. Rep. 86, is a pertinent citation in support of the present bill. There a bill in equity was filed to obtain from the defendants discovery of the stockholders of an Ohio corporation in order that the plaintiff might institute a suit in the courts of Ohio against them to collect a judgment which the plaintiff had obtained against the corporation. In overruling a demurrer to the bill the court said:

"The present case must be determined by the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them or to their property, in order to discover who the persons are against whom he may proceed for relief."

We think that the case in hand comes within the principle common to all the foregoing cited decisions. The specific purpose of this bill is to discover who are the real owners of corporate stock alleged to be registered in the name of a nominal holder. Upon the averments of the bill the defendants are not mere witnesses. The bill charges that the defendants Sparks and Wynn purchased the 1,100 shares of preferred stock for account of persons unknown to the plaintiff, and placed the same in the name of McDonald, the other defendant, for the purpose of concealing the names of the real owners. Under this allegation the defendants stand in a confidential relation to the persons for whom the stock was purchased and for whom it is held. The bill also alleges that the plaintiff is advised (presumably by counsel learned in the law) that the persons for whom the said 1,100 shares were purchased and placed in the name of McDonald are personally liable for the payment of the assessment here in question. The plaintiff is proceeding as surviving receiver of the American Alkali Company, and, agreeably to the order of the Circuit Court, directing the receivers to collect from the holders of the preferred stock of the said corporation, for the purpose of paying its debts, the unpaid balance of said assessment.

The bill, we think, sufficiently shows that the plaintiff is justified in his declared purpose to bring suit against the persons for whom it is alleged the 1,100 shares of preferred stock were purchased, and who it is averred are the real owners thereof. Whether or not the persons against whom the plaintiff proposes to bring suit for the unpaid assessment are actually liable therefor is a question not before us for determination, and we intimate no opinion thereon. Undoubtedly the plaintiff has a right to test by suit the alleged liability of the real owners of the stock for the unpaid assessment, and to enable him to do so he is entitled to the discovery prayed for.

The decree dismissing the bill of complaint is reversed, and the cause is remanded to the Circuit Court for further proceedings in accordance with the foregoing opinion.

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WETSTEIN v. FRANCISCUS.

(Circuit Court of Appeals, Second Circuit. November 21, 1904.)

No. 45.

1. BANKRUPTCY—PREFERENCES—RECOVERY—INSOLVENCY—QUESTION FOR JURY.

In an action by a trustee in bankruptcy to recover an alleged preference, the fact of preference having been proved, evidence *held* sufficient to require submission to the jury of the question whether the preferred creditor had reasonable cause to believe that it was intended thereby to give him a preference.

In Error to the Circuit Court of the United States for the Southern District of New York.

The following is the charge of COXE, Circuit Judge, at the trial in the court below:

This action is brought by George C. Franciscus, as trustee in bankruptcy of the estate of Samuel Baernkopf, to recover of William Wetstein the sum of \$5,800, with interest, being the aggregate amount of three alleged fraudulent preferences, made respectively on December 15, December 22 and December 26, 1900.

This court, as has been stated, acquires jurisdiction because of the diverse citizenship of the parties, the plaintiff, trustee, and the bankrupt, both being citizens of the state of Pennsylvania, and the defendant Wetstein, being a citizen of the state of New York. The complainant alleges, after stating the citizenship of the parties, that upon the second day of January, 1901, a petition was filed by the creditors of Baernkopf against him in bankruptcy, and thereafter, on June 3, 1901, Baernkopf was duly adjudicated a bankrupt. The plaintiff, Franciscus, was duly elected and appointed trustee in bankruptcy, and thereafter he qualified and is now acting in such capacity.

The complainant also alleges that Baernkopf was, in December, 1900, indebted to Wetstein, the defendant, in the sum of \$5,800. It also alleges that on the 15th, the 22d and the 26th days of December, Baernkopf was insolvent, and so continued during the entire month. The complainant also charges that, on the 15th day of December, Baernkopf, being then insolvent, paid to the defendant Wetstein, with intent to prefer him over the other creditors, the sum of \$200, and at the time that payment was made, Wetstein, the defendant, had reasonable cause to believe that Baernkopf was insolvent and intended to give him a preference over the other creditors of Baernkopf. It also charges that a demand for this sum of \$200 was made and refused. There are similar allegations regarding the payment on the 22d day of December, of \$500, and the payment of \$5,100, upon the 26th day of December,

the allegation in each case being that Baerncopf was insolvent; that he intended to give a preference to Wetstein; that Wetstein, or his agent, knew, or had reasonable cause to believe, at the time the money was accepted by them, that Baerncopf was insolvent, and that a preference was intended.

The answer of the defendant, Wetstein, admits all of the allegations of the complaint, except that it is denied that Baerncopf was insolvent, and he also denies that the payment was preferential, or made with intent to give a preference, and he denies that he knew or had any reasonable cause to believe, that the payments were made with intent to give him a preference over the other creditors.

So, gentlemen, as to the facts disputed by the answer, there is an issue joined between these parties, and the burden of proof is upon the plaintiff, the trustee in this action, to satisfy you by a fair preponderance of evidence, that the truth of the allegations of the complaint has been established. This plaintiff must satisfy you that Baerncopf was insolvent in December, 1900; that the payment by Baerncopf was preferential, and that Wetstein knew, or had reasonable cause to believe, at the time he accepted the money, that there was an intent to give him a preference. Upon these propositions the trustee must offer evidence which in your judgment outweighs the evidence offered by the defendant, that the allegations to which I have just referred are true and have been established.

This cause of action arises under the bankruptcy act of 1898 [U. S. Comp. St. 1901, p. 3418], prior to the amendments thereto of 1903 [U. S. Comp. St. Supp. 1903, p. 409]. That act, like all bankruptcy acts, had two principal objects in view. The one was to enable an honest debtor, who had been unfortunate in business, to wipe out his indebtedness and start again; the other was to divide the estate of the bankrupt ratably, and without preference, share and share alike, among his creditors. The section under which this action is brought is section 60 [U. S. Comp. St. 1901, p. 3445], and so far as it relates to the questions we are considering here, it is as follows: "A person shall be deemed to have given a preference \* \* \* if, being insolvent, \* \* \* he has made a transfer of any of his property, and the effect of the enforcement of such \* \* \* transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Subdivision "b," of section 60, provides: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he (the trustee) may recover the property, or its value, from such person."

You will see, therefore, that in order to recover under this section 60, it is necessary for the trustee to establish two propositions: First, there must have been a transfer made while the bankrupt was insolvent, the effect of which was to enable one creditor to obtain a greater percentage of his debts than other creditors of the same class; and, second, the creditor—transferee—must have had at the time of the transfer reasonable cause to believe that the bankrupt intended thereby to give a preference.

The statute does not make preferences voidable, unless the creditor, the person receiving the preference, had reasonable cause, at the time of the transfer, to believe that a preference was intended. It is rather difficult, gentlemen, to define just what the words, "reasonable cause to believe," mean, but each case must be considered and determined upon its own facts. Reasonable cause to believe does not require proof, either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended. Reasonable cause must exist at the time of the transfer, and there must be proof, something more than a mere guess or suspicion, of the insolvent condition of the transferor at the time the transfer is made. Applying the law to the facts in this case, it is necessary for the trustee to show, first, that at the time of these payments, to wit, on the 15th, 22d and 26th days of December, 1900, Baerncopf was insolvent, and, second, that Wetstein, the defendant, or his attorney, knew, or had reasonable cause to believe, that a preference was intended.



As to the first proposition, was Baernkopf insolvent? I think you will have little difficulty in reaching a conclusion. Insolvency is denied in the answer, but it has been, practically, admitted on the trial. However, the facts show, that prior to the 26th of December, in addition to the creditors then paid, Baernkopf was indebted in the sum of about \$21,000. I am only speaking now in round numbers; that, adding to this sum the amount paid to creditors on the 26th, he was indebted in the sum of about \$30,000, and that upon the 26th, assuming that the appraisal of his stock was a fair one, he had only about \$8,000 or \$9,000 worth of property with which to pay these debts aggregating \$30,000. Under this act of 1898, the test of insolvency is simply this: A person shall be deemed to be insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. So it would seem, unless the appraisal of the stock was grossly inadequate, that under no theory did Baernkopf have property sufficient to pay the amount which he then owed.

Assuming that he was insolvent during all of these transactions, you then come to what I think is the crucial question, the one which I stated yesterday, at the close of the argument on the law, to be in my judgment the question upon which this controversy must be determined, and that is, did Wetstein, or his attorney, Mr. Vause, have reasonable cause to believe that Baernkopf was insolvent, and that the payments were made with intent to give Wetstein a preference? As before stated, the law provides that the person receiving the preference, or his agent acting for him, must have reasonable cause to believe that a preference was intended, and the cases construing the law make it applicable to attorneys at law who have charge of the collection of the debt. So I think it will not be disputed that the knowledge of his attorney must be imputed to the defendant in this case.

It is always difficult in these cases to prove actual knowledge, or the intent of the defendant by direct evidence, and yet, the law presumes that a person intends the legitimate and ordinary consequences of his act. An intent may often be inferred from circumstances, and, generally, in these cases, it has been held that if the jury believe that sufficient facts appear to warrant them in the conclusion that the creditor must have known or had reasonable cause to know the true condition of the bankrupt's financial affairs at the time the alleged preference was given, they are warranted in finding a verdict for the trustee. But, gentlemen, these must be facts proven, not mere conjecture, not mere guesswork, but actual facts must be established from which the jury may fairly draw the presumption that knowledge existed. There must be such a condition proved as would put a reasonable man upon inquiry and induce him to conclude that a preference was intended. Facts which merely raise a suspicion or a conjecture of insolvency, or a conjecture that he was to be preferred over other creditors, are not sufficient. If the facts proved are such that the jury can safely draw the inference of knowledge, or of a reasonable cause to believe, upon the part of an intelligent business man that his debtor was insolvent and intended to give a preference, it will warrant a verdict to that effect. Mere suspicion, mere guesswork, is insufficient.

I do not know, gentlemen, that it is necessary to say anything further upon the law. It has been stated over and over again, and I think you fully understand it. The principal question relates to the knowledge of the defendant or of his agent, which is imputed to him, as to the actual condition of Baernkopf at the time that the payments were made.

Upon the facts, therefore, you have to determine between two theories. The defendant insists that these payments were made in the ordinary course of business; that the parties were friends, Baernkopf and Wetstein; that they had come from the same country in Europe; that they had known each other for many years; that they had had long business dealings; that during all the time, although Wetstein had sold Baernkopf bills of goods and loaned him money, there had never been any difficulty about payment; that the money was to be paid in December; that the necessities of Wetstein, in order to meet his own obligations, made him unusually desirous and anxious about this money, and that the pressure, if there was any, was due to that

fact, and not from any fear of the insolvency of Baerncopf. They say that all of the inquiries which were made tended to prove Baerncopf's solvency. Wetstein himself did not go to Philadelphia, as I recall the evidence, until December 26th, and the only knowledge which he had of Baerncopf's financial condition was from the two letters, which have not been produced before you, and such information as he got from his attorney upon his return to New York on the two previous occasions. Mr. Vause says he made inquiries in Philadelphia, and that all the information which he received led him to believe that Baerncopf was entirely responsible.

In short, gentlemen, the defendant's theory is that this was an ordinary payment made in the ordinary course of business, and that there was nothing which was brought to the attention of either of the parties, the defendant or his attorney, which caused them to have the least doubt as to Baerncopf's condition. On the other hand, the trustee insists that the affair was entirely out of the ordinary course of business; that it was so extraordinary that it must have put both the attorney and Wetstein upon inquiry, and that the slightest inquiry would have disclosed the actual situation. The counsel for plaintiff has called your attention to numerous facts and circumstances of which he seeks to predicate this conclusion. He insists that the small payment upon the 15th of December, the difficulty in getting the second payment upon the 22d, the payment of the entire sum upon the 26th, there being but one business day intervening, the fact that the defendant and his attorney went to Philadelphia upon the 26th and arrived there at the time the sale to Simpson was concluded; the fact that Wetstein did not himself go into the place of business of the bankrupt; the fact that it was insisted that cash should be paid, and all the other circumstances connected with the transaction, point to the conclusion that the appointment at Philadelphia on the 26th was prearranged, and that it was the intention of Baerncopf, with the knowledge of the defendant, to prefer his favorite creditors at that time. I think, as I have said, that this is the crucial question in the case. You are to determine it as business men, without any prejudice one way or the other, solely upon the facts.

There are three causes of action, three separate claims of preference: One relating to the \$200 payment, another to the \$500 payment, and the third to the large payment of \$5,100. The facts shown as to the defendant's knowledge differ somewhat with reference to these three payments. It may be that you may think that there is not sufficient proof of knowledge upon December 15th to warrant you in saying that the payment of the \$200 was a preference. It may be you may think that there is not sufficient proof as to the payment on the 22d, and it may be, of course, that you may think that there is not sufficient proof to warrant you in saying that there was a preference at any time. I merely call your attention now to the subject, because the evidence differs somewhat, as you will see, upon these various dates. I have here a statement of the amounts paid. The amount paid December 15, 1900, was \$200. The amount paid December 22, 1900, was \$500. The amount paid December 26, 1900, was \$5,100, making a total of \$5,800. If you find that the entire amount constituted a fraudulent preference under the law, of course your verdict would be for the entire sum. If you find that the payment upon the 26th was fraudulent, but not upon the other two dates, then you will deduct \$700 from the amount. If you find that the payments upon the 26th and 22d were fraudulent, and not on the 15th, then you will deduct \$200. If, on the other hand, you find there were no fraudulent preferences whatever, your verdict will be simply a general one in favor of the defendant.

John A. Vause, for plaintiff in error.

A. J. Gleason, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. This is a writ of error from a judgment rendered by the United States Circuit Court for the Southern District of New York on a verdict of a jury in favor of the plaintiff below for the sum

of \$6,642.29. Plaintiff sued as trustee in bankruptcy of Samuel Baernkopf to recover various sums paid to defendant below under circumstances claimed to constitute a preference under the provisions of the bankruptcy law.

It appeared from the evidence that Baernkopf and Wetstein, the defendant, were old friends; that Baernkopf resided and did business in Philadelphia and Wetstein resided in New York; that in June, 1900, Baernkopf owed Wetstein some \$1,150, for which Wetstein held Baernkopf's note, payable June 8, 1900; that on said date said note was extended to December 8, 1900; that between the latter part of November and December 4, 1900, Wetstein advanced to Baernkopf some \$4,000, and that when said note fell due Wetstein forthwith put his entire claim in the hands of his attorney for collection; that the attorney went on to Philadelphia, and collected \$200 thereon; that on December 22d the attorney again went to Philadelphia, and collected \$500, which was all that Baernkopf could then spare; that, with only one business day intervening, the attorney, on December 26th, went back to Philadelphia, taking Wetstein with him, to collect the balance of the account; that they arrived there just at the time when Baernkopf had effected a sale of his two stores to a pawnbroker for \$8,444 in cash; that immediately thereafter Baernkopf met the attorney and Wetstein at Baernkopf's bank by appointment; that Baernkopf offered Wetstein a certified check in full settlement of his claim, but that Wetstein refused it, and insisted on having the money, and that Baernkopf thereupon paid defendant or his attorney some \$5,000 in cash, being the full amount of the balance due on said claim.

It was admitted that Baernkopf was insolvent, and that the payment of said claim left the rest of the unsecured claims, amounting to \$20,000, wholly unpaid.

The fact of a preference having been proved, we think there was a sufficient question to go to the jury whether the defendant, by reason of the surrounding circumstances stated above, had "reasonable cause to believe that it was intended thereby to give a preference," within the prohibition of the act. Inasmuch as no exception was taken to the charge, which seems to have been quite as fair to defendant as he was entitled to, the exception on the ground that there was not sufficient evidence to go to the jury should be overruled.

The judgment is affirmed, with costs.

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### RILEY v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1904.)

No. 1,289.

#### 1. FEDERAL COURTS—TRIAL—DIRECTION OF VERDICT.

Where, in an action for injuries to a switchman, the evidence, though conflicting, was so conclusive in support of defendant's claim that it would have been the duty of the trial judge to have set aside a verdict to the contrary, it was his duty to direct a verdict for defendant.

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¶ 1. See Trial, vol. 46, Cent. Dig. § 383.

**2. SAME—RAILROADS—UNFILLED SPACES—NEGLIGENCE—EVIDENCE.**

In an action for injuries to a switchman by his catching his foot in an excavation under a spring rail frog, evidence *held* insufficient to establish defendant's negligence in maintaining such excavation.

**3. SAME—ASSUMED RISK.**

Where defendant railroad company maintained from 25 to 30 spring rail frogs, with necessary excavations under the spring rails, in the yards in which plaintiff had been working as a switchman for some six months prior to his injury by having his foot caught in one of such excavations, it was his duty to take notice thereof, and he therefore assumed the risk of the danger incident thereto.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

W. H. Washington, for plaintiff in error.

Percy D. Maddin and John W. Judd (Charles N. Burch and J. B. Keetle, of counsel), for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought by W. C. Riley, plaintiff in error, against the Louisville & Nashville Railroad Company, to recover damages for injuries sustained by him while at work, on the night of September 25, 1898, in the yards of the company in East Nashville, Tenn., as an extra switchman. The accident occurred while Riley, carrying a lantern, was walking ahead of a moving car for the purpose of changing a link. At the point where there was a frog, while so engaged, Riley's foot was caught and held in a hole or excavation existing under the rail of the frog, so that the moving car ran upon him and crushed his foot.

Riley's claims, set out in his two causes of action, were, first, that the hole was a defect in the roadbed, of which he had no knowledge, and for the results of which the company, having failed to provide him a reasonably safe place in which to work, was responsible; and, second, that he was a green hand, unfamiliar with the locality, unaware of the hole, which was dangerous to one engaged in switching cars there, and that the company, having failed to warn him of its existence, was liable. The defense of the company was that the hole complained of was not a defect in the roadbed, negligently permitted to exist, but an excavation purposely made and maintained under the movable rail of the spring frog, and that the plaintiff, who was not a green hand, knew or should have known of its existence, for it was plainly observable, and his duties required him to work over it, so that, if the excavation was dangerous, the risk incident to working over it was one he assumed.

At the conclusion of the testimony, the court directed a verdict for the defendant. This action is assigned as error.

There are no disputed questions of law. The questions are those of fact—of the probative force of the evidence. The court below took the view that the testimony in support of the company's claim was so conclusive that if the case had gone to the jury, and a verdict been returned for the plaintiff, it would have been his duty, in the exercise

¶ 3. Assumption of risks incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

of a sound judicial discretion, to set it aside. Holding this opinion, he could not do otherwise than direct a verdict for the defendant. *Patton v. Texas, etc., Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The question for us to determine is whether the court was correct in the view taken. The plaintiff in error insists there was such a conflict in the testimony that the case should have been submitted to the jury.

The testimony of the company tended to show that the excavation into which Riley stepped was one under the rails of a spring rail frog. A spring rail frog is one with a movable rail, which is forced out by the flange of the running wheel, and, when it has passed, is pushed back in place by the spring of the frog. If the spring rail fails to return to its proper place, the next car passing over it is liable to be derailed. For this reason, it is necessary to guard against obstructions to the free movement of the spring rail. Accordingly an excavation is made between the ties under the frog, where the spring rail is movable, so that coal, sand, or other possible obstructions falling between the rails of the frog may not lodge there, but pass through. Such excavation is trough-like in shape, running back from the point of the frog 8 or 10 feet, and extending outside the rail 8 or 10 inches, and is plainly observable. A trackman keeps this excavation cleaned out. There were 25 or 30 of these spring rail frogs in the Nashville yards, where Riley worked. Riley was 24 years old when hurt. He had been working in the Nashville yards for 5 or 6 months as extra switchman. He was intelligent and skillful. Although he worked at night, his employment covered the summer, and there were several hours of daylight each day in which to observe the condition of the track and frogs where he worked. The defendant's witnesses who testified to the above facts were 10 in number—the roadmaster, the yardmaster, the trackman who kept the excavation cleaned out, the members of the crew who worked with Riley, and other switchmen, who were acquainted with the frogs and their mode of operation. They all testified that the excavation was proper, necessary, and obvious. On the other hand, the plaintiff introduced five witnesses. Two of these were acquainted with spring rail frogs, and admitted they had to be cleaned out underneath to keep them in working order. Another had had no experience with spring rail frogs. This left one witness (aside from the plaintiff) who insisted that the track should have been ballasted to the top of the ties where there were spring rail frogs, as well as elsewhere. This evidence of the plaintiff and his one witness was too slight, in the face of the overwhelming evidence to the contrary, to sustain a verdict if the case had gone to the jury.

In *Randall v. B. & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, the plaintiff sought to establish that a certain ground switch was an improper and dangerous structure, and one witness so testified. The lower court directed a verdict for the defendant. Referring to the action of the court below, in view of the evidence offered, Mr. Justice Gray, speaking for the Supreme Court, said (page 482, 109 U. S., page 324, 3 Sup. Ct., 27 L. Ed. 1003):

"It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is in-

sufficient to support a verdict for the plaintiff, so that such a verdict if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. Tried by this test, there was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

See, also, *Southern Ry. Co. v. Rhodes*, 86 Fed. 422, 426, 30 C. C. A. 157.

We are satisfied from an examination of the evidence that the facts as to the excavation were as claimed by the defendant. The spring rail frog where Riley was hurt was a reasonable appliance. The excavation under it was necessary for its proper operation. Such excavation was obvious. Any one giving heed could observe it. Riley's work was in the yards. There were 25 or 30 of these frogs there. It was his duty to know their location, construction, and mode of operation. He had been at work there some six months. It must be assumed he knew of these excavations. If there was danger in working about them, he assumed the risk. The testimony conclusively negatives any right to recover on his part against the railroad company. *Randall v. B. & O. R. Co.*, 109 U. S. 483, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Tuttle v. Detroit Ry. Co.*, 122 U. S. 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *Southern Pacific Ry. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *Texas & Pacific R. Co. v. Archibald*, 170 U. S. 665, 673, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma, etc., Ry. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Narramore v. C., C. & St. L. R. Co.*, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68; *Lindsay v. N. Y., etc., R. Co.*, 50 C. C. A. 299, 112 Fed. 384; *Kenney v. Meddaugh*, 55 C. C. A. 115, 118 Fed. 209.

The judgment of the court below is affirmed.

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PENNSYLVANIA CASUALTY CO. v. BACON.

(Circuit Court of Appeals, Second Circuit, November 25, 1904.)

No. 53.

1. ACCIDENT INSURANCE—PREMIUMS—PAYMENT—WAIVER.

Deceased accepted an accident policy, providing that it should not take effect unless the premium was actually paid prior to any accident on which claim was made, and that no waiver of the contract should be binding on the insurer unless indorsed on or attached to the policy, and signed by the president or secretary of the company. *Held*, that where the insurer did not charge premiums on policies to its agents until they

were actually received, a subagent had no authority to accept a note from deceased in lieu of cash for the first premium, and to thereby waive the provisions of the policy.

In Error to the Circuit Court of the United States for the District of Vermont.

James L. Martin, for plaintiff in error.

James F. Hooker, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The defendant in the court below brings this writ of error to review a judgment for the plaintiff entered upon the verdict of a jury. The principal assignment of error is based upon the ruling of the trial judge in refusing to direct the jury to find a verdict for the defendant upon the ground that the insurance policy upon which the suit was brought had never become operative because no premium had been paid thereon.

The policy, which was one of accident insurance, was based upon the application of one Randall, and provided, among other things, for the payment by the defendant, in the event of Randall's death resulting from sunstroke, of \$5,000 to his wife or legal representatives. It contained also the following conditions:

"This policy shall not take effect unless the premium is actually paid previous to any accident upon which claim is made. \* \* \* This contract is made and accepted by the assured subject to the foregoing stipulations and conditions, and no waiver, alteration or modification of this contract shall be binding upon the company unless the same is endorsed hereon or attached hereto and signed by the president or secretary of the company."

It appeared upon the trial that the policy was issued by the defendant and delivered to Randall for his examination and approval after negotiations between him and one Shelley, who was a subagent of the state agent of the defendant; that shortly thereafter, and on May 5, 1901, Shelley accepted from Randall, in lieu of the first premium payable by the policy, Randall's promissory note payable to Shelley one month from date; that no part of the note was paid in Randall's lifetime; that on July 11, 1901, Randall died, his death resulting from sunstroke (according to some of the evidence), and immediately thereafter the plaintiff, who was afterwards appointed administrator of Randall's estate, sent his check to Shelley for the amount of the note; and that Shelley, in ignorance of the death of Randall, collected the check, but immediately upon learning the facts offered to return the amount thereof to the plaintiff, and the latter refused to receive it. No evidence was offered upon the trial tending to show that the defendant had ever expressly or impliedly authorized Shelley to accept anything but money in the payment of premiums, or ratified his act in doing so in the present instance. The trial judge instructed the jury that if by the agreement between Shelley and Randall the note was accepted as payment of the premium, and Shelley undertook to pay the premium to the defendant, the defendant became liable upon the policy.

The adjudged cases decide that general agents of insurance companies have authority to waive conditions in the policies declaring, in

substance, that the policy shall not take effect until the payment of the premium, and hold that the delivery of the policy to the assured, with an agreement to give credit for the premium, is such a waiver; and many of them hold this to be so notwithstanding the policy provides that its terms shall not be waived or modified by an agent without the approval of some officer of the company. The cases in the federal courts which have sanctioned this ruling were those in which it appeared that the instructions of the company to its general agents were, in substance, that it would hold them personally responsible for such premiums (*Miller v. Life Ins. Co.*, 12 Wall. 282, 20 L. Ed. 398; *Smith v. Provident Saving Society*, 31 U. S. App. 163, 65 Fed. 765, 13 C. C. A. 284), or where it appeared that it was the practice of the company to charge the premium to the agent at the time of delivering to him the premium receipt (*Fidelity Company v. Getty's Administrators*, 39 U. S. App. 599, 80 Fed. 497, 25 C. C. A. 593).

These adjudications are not controlling in the present case, because the powers of subagents of the general agents of insurance companies are not commensurate with those of the general agents, and because it appears here that it was the practice of the company not to charge its agents with premiums until they were actually remitted. The present policy not only provided that it should not take effect unless the payment should actually have been made, but it also provided that no waiver or modification of its provisions should be effectual unless evidenced in writing over the signature of the president or secretary of the company. Thus in plain terms it informed the assured of the limitation of the agent's powers, and that any modification by him alone of the requirement in respect to payment would not be recognized by the company. Undoubtedly the company itself could waive or disregard either or both of these provisions, but evidence that the agent had promised to do so was not alone sufficient. *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. In the recent case of *Northern Assur. Co. v. Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, the general subject of the power of agents to waive conditions inserted in insurance policies was exhaustively considered, and it was decided that it is reasonable and competent for insurance companies to make it a matter of condition in their policies that any consent by an agent to waive or modify any of the express terms of the policy shall be manifested in writing by one of its officers, and that when such a condition is inserted in the policy such a limited grant of authority is the measure of the agent's power, and any modification or waiver by him not thus manifested is ineffectual, and does not bind the company unless it is shown that he had express authority to dispense with the condition, or that the company subsequently, with knowledge of the facts, ratified his action. Giving effect to this decision as the latest expression of the law which should control the federal courts applicable to the question now presented, we conclude that the trial judge erred in refusing to instruct the jury as requested by the defendant.

The judgment is accordingly reversed.



## UNITED STATES v. TWENTY BOXES OF CORN WHISKY et al.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 502.

## 1. INTOXICATING LIQUORS—SHIPMENT—DESIGNATION OF PARTIES.

The words, "Glass; this side up, with care," written on a box containing bottles of whisky, are a mere caution to the carrier, and not a false designation of the contents of the box, within the meaning of Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277], subjecting to a penalty any person who ships liquors under any other than the proper name or brand.

## 2. SAME.

Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277], subjecting to a penalty any person shipping liquors under any other than the proper name or brand, merely applies to their shipment under a false brand or designation, and not to their shipment without any name or brand being placed thereon.

## 3. SAME—STATUTES—CONSTRUCTION.

Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277], providing that any person shipping liquors under any other than the proper name or brand shall forfeit the liquors, and be subject to pay a fine of \$500, is highly penal in character, and should be strictly construed.

## 4. SAME.

Rev. St. § 3449 [U. S. Comp. St. 1901, p. 2277], subjecting to a penalty any person shipping liquors under any other than the proper name or brand, applies only to shipments by distillers, brewers, manufacturers of wine, rectifiers, and wholesale dealers in spirits or fermented liquors or wines, and not to all persons generally.

In Error to the District Court of the United States for the Western District of Virginia, at Danville.

For opinion below, see 123 Fed. 135.

John C. Blair, Asst. U. S. Atty.

R. B. Glenn, for defendants in error.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. An information was filed in the court below against 60 gallons of corn whisky, packed in 20 boxes, each box containing 12 quart bottles thereof. N. Glenn Williams intervened as the owner. Each box was 12½ inches wide by 16½ inches long. There were no marks on any of the boxes except that on the top of each one was written: "Glass; this side up, with care." To each box there was a tag attached, on which was written, "O," "Savannah, Georgia."

There was an agreed statement of facts, and the case was submitted on demurrer. The demurrer was sustained and the information dismissed. The United States sued out this writ of error; the substance of the assignments of error being that, under the provisions of section 3449 of the Revised Statutes [U. S. Comp. St. 1901, p. 2277], it was necessary to have had printed upon said boxes the correct name of the contents thereof, and that, this not having been done, the same were forfeited to the United States, and that therefore the court below erred in not so deciding.

Section 3449, under which the information was drawn, reads as follows:

"Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

The contention of the United States is, in substance, that said section 3449 requires, under penalty of forfeiture, the shipper of spirituous or fermented liquors or wines to place upon the casks or packages in which they are shipped the true and correct name of the contents, stating its kind and quality, and that, as there were no such marks or brands upon the packages described in the information, the same were liable to be forfeited to the United States, and further that said section prohibits placing upon such boxes and casks any false or improper name or brand; and that the words "Glass; this side up, with care," was a false and improper name or brand, in violation of said section.

In order to sustain this contention, it will be necessary for us to construe the statute as applying not only to distillers, brewers, manufacturers of wine, rectifiers, and wholesale dealers, but also to all other persons, whether they be employed in the various avocations above mentioned or not, and, in addition thereto, to further find that said marks upon the boxes were intended to be a designation of the contents of the same, and that as such, they were false and misleading.

We do not think the words, "Glass; this side up, with care," were intended as a designation of the contents of the packages, or that they had any relation to the quality or quantity of the same, but were, as the court below held, intended as a caution to the carrier, in order that he might have notice of the necessity existing for their careful handling. That being so, it follows that said packages were shipped without any name or brand being placed thereon.

Is it required, under the provisions of the statute mentioned, that the name and brand should be placed upon packages shipped under the circumstances of those mentioned in the information? The section quoted does not in words say so, and we are of opinion that it should not be implied. We think said section was intended to apply to the shipping of such wines and liquors under some name other than the proper name or brand—in other words, that it was intended to prevent the removal of such liquors under a false brand or designation. If it had been the intention of the lawmaking power to forbid the shipment of wines and spirits so packed unless the boxes were marked so as to show the true kind and the correct name of their contents, the statute would, we think, have been so written. We do not find it proper to read into it other words greatly enlarging its meaning. It is highly penal in character, and should be construed strictly. For opinion of court below, see 123 Fed. 135. Also see *U. S. v. Stege et al.* (D. C.) 87 Fed. 553.

Reaching the conclusion which we do—that the packages were shipped without any name or brand thereon, and that they were not shipped under a false designation—it becomes unnecessary for us to

further consider the assignments of error. The information is drawn upon the theory that the statute applies to all persons, and not simply to distillers, brewers, manufacturers of wine, rectifiers, and wholesale dealers in spirits or fermented liquors or wines. It contains no allegation as to the occupation of the person who shipped the liquor; that being immaterial, under the construction given the statute by the plaintiff in error. In that construction we are unable to concur.

We find no error in the judgment complained of, and the same will be affirmed.

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In re JANES et al.

(Circuit Court of Appeals, Second Circuit. December 6, 1904.)

No. 52.

**1. BANKRUPTCY—PARTNERSHIP—INDIVIDUAL ASSETS—APPLICATION.**

Where a partnership and the individual members, being insolvent, were adjudged bankrupts, and the firm had no assets, firm creditors were not entitled to share in the individual assets of one of the partners, which assets were wholly distributable to his individual creditors, under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that the net proceeds of the individual estate of each partner shall be applied to the payment of his individual debts, and that the surplus only shall be applied to pay partnership debts.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York, in Bankruptcy.

For opinion below, see 128 Fed. 527.

This cause comes here upon petition to review an order of the District Court, Western District of New York, affirming a ruling of the referee to the effect that the creditors of the bankrupt partnership shall share with the creditors of the individual partners in the estates of such individual partners. The relevant provisions of the bankrupt act are (section 5):

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after the paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424].

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¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 559.

V. H. Riordan, for petitioner.

Frank M. Loomis, for trustee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The bankrupts were adjudicated such on February 13, 1904, and a trustee appointed, who proceeded to sell all the assets of the copartnership and individual estates. The individual estate of H. S. Janes produced \$15.50, the individual estate of Ezra S. Janes produced \$6,155.06, and the firm assets sold for \$10. Whether the last-named sum was ever collected is not clear, but the referee finds that the firm assets are "none." Both partners are insolvent. Creditors of the partnership and creditors of Ezra S. Janes proved their claims, and it has been held that all shall share alike in the estate of Ezra—a decision which the petitioner here, a creditor of Ezra, seeks to review.

It will be noted that such a marshaling of the assets is not as provided in the sections above quoted, but it is insisted that when there are no firm assets and no solvent partner an "exception" is created, to which the rule of the statute does not apply. It seems unnecessary to add anything to the extended discussion of this question already published in the Reports. Reference may be had to the careful and exhaustive historical review of the authorities which is contained in Judge Lowell's opinion in *Re Wilcox* (D. C.) 94 Fed. 84, and to the later decisions which sustain the construction adopted by the district court in case at bar. In *re Conrader* (D. C.) 118 Fed. 676, affirmed 121 Fed. 801, 58 C. C. A. 249; In *re Green* (D. C.) 116 Fed. 118.

We are of the opinion that the rule to be applied is the rule laid down in the sections above quoted from the bankrupt act. It was within the discretion of Congress to leave this subject of the marshaling of assets to the courts, to be disposed of in accordance with equity principles and practice, or to provide that the general rule should be modified in particular cases. It has done neither. On the contrary, it has itself directed how the assets shall be marshaled, and it has done so in language broadly covering this case as well as all the others. The language is plain, explicit, and unambiguous; it names no "exception"; its phraseology conveys no intimation that any "exception" is contemplated. To inject into the act an excepting clause where none has been enacted would seem to be judicial legislation. For this reason, we have reached the conclusion above expressed.

The order under review is reversed, and the cause remanded, with instructions to marshal the assets in accordance with the directions of the bankrupt act.

## NICOLA BROS. CO. v. SPEER BOX &amp; LUMBER CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1905.)

No. 62.

## 1. SALES—BREACH OF CONTRACT—DAMAGES—EVIDENCE—RELEVANCY.

In an action for breach of a contract for the sale and delivery of lumber, to have been delivered on March 21, 1903, it was not an abuse of the trial court's discretion to permit evidence of the value of such lumber at the place of delivery on March 7, 1903, and in the May following, as too remote in point of time; the court having properly instructed the jury that defendant was liable only for the difference between the contract price and the market value of the lumber not delivered on the day and at the place specified for delivery.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Watson B. Adair, for plaintiff in error.

R. B. Ivory, for defendant in error.

Before DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The defendant in error was plaintiff in the court below, and the plaintiff in error was defendant. The action was brought to recover damages for the breach of a contract for the delivery of cottonwood lumber during the winter of 1902-03; that is to say, as was agreed upon the trial, on or before March 21, 1903. The only specifications insisted upon go to the admission, against objection, of certain evidence upon the subject of damages.

"The whole case for the plaintiff in error" is stated in his brief to be that, inasmuch as the inquiry was "as to the value of the lumber on the 21st of March, 1903, \* \* \* proof as to what the value was in the month of May, 1903, and, still further, what it was on the 7th of March, 1903, introduced irrelevant and incompetent evidence." This position is untenable. It is true, of course, that no fact is relevant which does not tend either to prove or to disprove the matter in issue, and it is likewise true that the evidence with which we are now concerned was directed to the ascertainment of the value of cottonwood lumber, in the vicinity of Pittsburg, on the 21st of March, 1903. But it does not follow that the testimony should have been strictly confined to that day, and the question before us is whether the learned judge, in admitting the evidence of value as of two weeks before and about two months after March 21, 1903, committed reversible error. It would be difficult to supply any precise test for determining, in all cases, whether any fact proposed to be proved is or is not too remote to be material, and we believe that no attempt to do so has ever been made. The circumstances of each case are necessarily controlling, and the action of the trial judge will not be disturbed by an appellate court, unless an abuse of discretion quite clearly appears. If the evidence be so remote as to be wholly immaterial, it is, no doubt, his duty to reject it; but, if it be sufficiently near to have a tendency to lead a reasonable man to a belief respecting the matter in dispute, it ought not to be excluded, but should be submitted to the jury, which, in determining the weight to be given to it, may

and should take into consideration its separation in point of time from the subject under investigation. Fort Pitt Gas Co. v. Evansville Contract Co., 123 Fed. 64, 59 C. C. A. 251. The learned judge did not fail to make this plain to the jury in the present case, for in his charge he said:

"It is the general rule of law that in the sale of goods and chattels, whether the subject-matter of the sale is wheat, or lumber, or cattle, or whatever it may be, where a contract is broken by a failure of the vendor or seller to deliver, the measure of damage is the difference between the contract price and the market value of the articles at the time and place of delivery under the contract. \* \* \* No special circumstance has been disclosed here that takes this case out of the general rule of damages established by the courts everywhere, and which I have laid down to you—the difference between the contract price and the market value at the time and place when and where this lumber was to be delivered. \* \* \* They could have delivered it on the 21st of March, and they were not bound to deliver it before; \* \* \* and in so far as there was a failure to deliver the lumber due under this contract the plaintiff is entitled to recover for the undelivered lumber the difference between the contract price and the market value at McKees Rocks, or in Pittsburg, which is the same thing, on that date. And what that was is to be determined by you from a consideration of all the evidence in this case. What was, under the evidence, the fair market value of cottonwood lumber of the kind described in this contract at McKees Rocks, or in Pittsburg, on or about—we will say on—the last day when this lumber was to be delivered? And that you ought to determine from a calm and fair consideration of all the evidence in the case. The object of the law is, so far as it is humanly possible, to compensate a person who justly complains of the breach of a contract. It is not intended to punish the man who is in default. That is not the purpose of the law; but it is to compensate the party to the contract, who has been disappointed, who has lost the article for which he contracted. And, in determining that question, I repeat that the jury ought to give a fair consideration to all the testimony in the case bearing upon that point, and to be governed by the preponderance of the evidence, the weight of the testimony."

These instructions not only accurately stated the applicable rule of law, but distinctly impressed upon the jury that it should consider all the testimony with reference to the latest day upon which the defendant might have made delivery under the contract. More than this could not properly have been done. Cottonwood lumber was not always in the Pittsburg market, and the restriction of the evidence of its value to any narrowly limited period would probably have defeated what the learned judge rightly regarded as the fundamental object of the law—"to compensate persons who justly complain of the breach of a contract." His discretion, we think, was correctly, as well as rightfully, exercised; for, in our opinion, the evidence which it has been supposed he should have excluded was neither wholly irrelevant, nor so remote as practically to be immaterial.

The judgment is affirmed.

**A. R. MILNER SEATING CO. v. YESBERA.**

(Circuit Court of Appeals, Sixth Circuit, November 10, 1904.)

No. 1,306.

**1. PATENTS—INVENTION—COUNTER SEATS.**

The Milner patent, No. 597,686, for improvements in counter stools, used in stores, consisting chiefly of the use of a spring, which automatically throws the seat over toward and under the counter when not in use, and a rest for the stool arm when in use, although combining old elements, produces a new and improved result, and discloses invention and novelty. Also *held* infringed.

**2. SAME—ANTICIPATION—EVIDENCE.**

The fact that a defendant has appropriated the device of a patent, and has been very successful in its sale, is persuasive evidence against him on the defense of anticipation.

**3. SAME—INFRINGEMENT—CHANGE OF FORM.**

That a defendant has changed the form of parts of a patented device so that they are more clumsy in appearance and less useful, but are functionally the same, does not avoid infringement.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Thos. B. Hall, for appellant.

Almon Hall, for appellee.

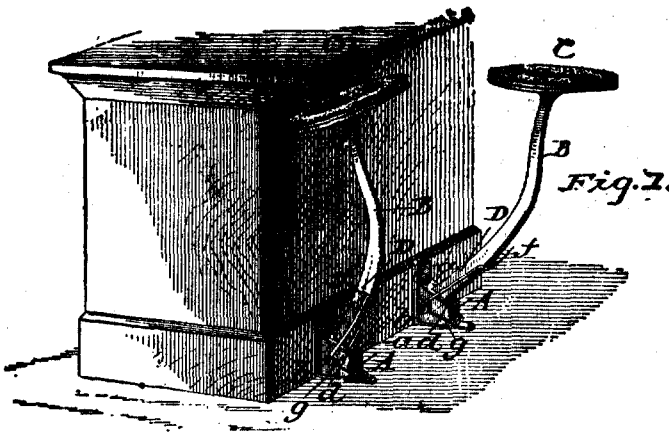
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case was before us on a former occasion, when we reversed the decree of the lower court which had been rendered against the complainant upon a demurrer to the bill. 111 Fed. 386, 49 C. C. A. 397. The suit is one for the infringement of a patent granted to Milner January 18, 1898, and numbered 597,686, for improvements in counter stools, used chiefly in stores. The improvements consisted, in part, of a spring, which, coiled on the pinion of a bracket resting upon the floor, extended upward and backward behind the arm of a seat; the lower end of the arm being pivoted in the floor bracket containing the spring. The office of the spring was to throw the seat over toward and under the counter when not occupied, thereby leaving the floor space less obstructed than if the seat remained in a fixed position. The details and supposed advantages of the patent are stated in the former opinion. The bill had then been dismissed for the reason, as held by the lower court, that the patent showed no invention. In reversing the decree we said:

"It may be admitted that the invention is one of narrow limitations, but we are not prepared to hold that in the circumstances, which may be susceptible of proof, the patent should be held void, in the absence of any anticipation, and supported, as it is possible it may be, by evidence that it fulfills a useful purpose, and has been extensively adopted by the public in practical use, and further supported by the presumption of validity arising from the allowance of the patent by the Patent Office, the force of which presumption is augmented by the fact that there was a serious contest in the

office, which must have developed the characteristics of the patent, and brought them pointedly into view."

After the mandate was sent down, the defendant answered, denying that Milner invented the improvements for which his patent was granted, alleging that Milner's supposed invention had been anticipated by several patents, which are enumerated, and denying infringement. The case was heard in the Circuit Court upon the pleadings and proof. The bill was dismissed upon the ground, as stated in the decree, that the patent to Milner "is invalid and void for want of patentable invention in the device described in said patent, and for lack of novelty in said patented device." The spring is exhibited in our former opinion. But it seems desirable to reproduce the stool, in order that the relation of all the parts of the stool may be the better understood



A is a recessed bracket fastened to the floor and to the base of the counter. "b" is a pivot extending through both sides of the bracket and the lower end of the arm, B. D is the spring, which is coiled around the pivot, and has an extension, "g," which rests on the base of the bracket, and another extension, "f," reaching some distance up the arm and engaging the back side thereof. The arm of the stool, when that is opened, rests upon the rear part of the bracket at "d." The claims are as follows:

"(1) In a counter stool, a recessed floor bracket, a curved stool arm pivoted in the bracket and engaging one of the walls of the bracket to form a stop to limit the outward movement of the arm, a spring encircling the pivot of the arm having extensions engaging, respectively, the stool arm and bracket, a seat plate formed on the upper end of the stool arm and disposed in a plane substantially at right angles to the upper end of said stool arm when the latter is in a folded position, whereby the seat of the stool will fold close against the counter, the said angle of the seat plate with the stool arm being such as to cause the seat to lie in a horizontal plane when the latter is in position for use and a seat secured to the seat plate.

"(2) In a store or counter stool, a recessed floor bracket, an arm pivoted to the bracket and engaging one of the walls of the bracket to form a stop to limit the outward movement of the arm, a spring engaging the stool



arm and bracket, respectively, a seat plate formed on the upper end of said arm and so disposed in a plane at an angle to the upper end of said stool arm that when the latter is in a folded position the seat of the stool will fold close against the counter, the said angle of the seat plate with arm being such as to cause the seat to lie in a horizontal plane when the latter is in a position for use, and a seat secured to the seat plate, substantially as described."

Several patents were introduced by the defendant to prove that Milner had been anticipated. Most of the features of his stool are shown to have been developed in former patented devices, and the controversy in respect of the validity of the patent seems to be narrowed to the provision, and particularly to the location, of the spring D and the rest "d." It is to those features that we mainly give attention. In a British patent to Rettie, granted in 1881, for a folding seat, two seat arms were used, which were hinged at different places on the bottom of the seat, one behind the other. Between the seat and the floor these arms crossed each other. The front arm, which was straight, passed down to, and was pivoted in, a floor bracket. The rear arm, after crossing the other, was turned to, and pivoted in, a bracket fixed to the counter. This arm extended beyond the pivot, and near the end of this extension one end of a coiled spring was attached. The other end of the spring was attached to a pin on the floor bracket, or standing in the floor, it is not clear which. There is no such rest for the seat arm on the brackets, or either of them, as that in Milner's patent. At a certain stage of the turning of the seat arms on each other, a shoulder on one rests on a stop fixed on the other. There is much dissimilarity between this construction and Milner's. The spring is exposed to injury, and it, as well as the arm to which it is attached, is in the way of the feet of one using the seat, and it is attached to the arm which folds up the back of the seat. The mechanism is complicated, while Milner's is simple and compact, and offers as little obstruction to the user as seems possible. A patent to Mealia, issued in 1872, shows a coiled spring to close the seat, one end of which is set in the floor and the other presses against the front of the seat arms. It is not located on the bracket, and the rest consists of a hook hinged to the seat and let into a staple in the wall by hand. The seat is not adapted to face the counter, but to the use of one having his back to the wall. Another patent to Corwin, issued in 1881, shows a seat which, when not in use, is wholly behind the wall of the counter. The arm of the seat is horizontal, and the seat is pulled out through an opening in the wall until a notch in the lower side of the arm reaches the wall and drops into a catch there. The rear end of the arm is pivoted to an upright arm, which, at its bottom, is pivoted in a bracket having a spring thereon coiled about its pivot, designed to throw the arms and the seat back under the counter when the arm first mentioned is lifted off the catch in its notch. It did not close automatically. The elements of this combination are wholly unlike those of Milner's, except the spring, which is substantially the same. If the claim in the latter's patent were for the spring alone, this of Corwin would anticipate it. But Milner puts the spring in another place in combination with other parts of a counter seat, and we nowhere find any

combination of the elements he employs much resembling his. He has undoubtedly sifted out of the older art the elements which he reorganizes. But he has reorganized in such a way as to effect a new mode of operation with a distinctly better result. None of the other prior patents make so near an approach as those we have analyzed, and it is evident that these do not any of them combine the same elements as in the same way co-operate in Milner's invention. The convenience to users of his method of combining the operative parts, the automatic operation made possible thereby, and the security of that element most exposed to injury are the beneficial results of his production. The proof also shows that the Milner counter seat has met with considerable public favor, and, what is persuasive evidence of its advantages over those of the constructions the defendant advances as anticipations, the latter appropriates Milner's production as the foundation of his own business, and has therewith been very successful. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 26 L. Ed. 939; *Gandy v. Belting Co.*, 143 U. S. 587, 595, 12 Sup. Ct. 598, 36 L. Ed. 272; *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Fed. 267, 56 C. C. A. 547. The defendant has not succeeded in effacing the reasons which were given in our former opinion for upholding the patent, and upon more mature reflection upon the whole case we are convinced that it should be held valid.

Upon the question of infringement there can be no doubt whatever. The only difference between defendant's counter seat and Milner's, worth mentioning, is that, whereas in Milner's the arm of the seat as it rises is slightly curved outwardly from the counter, and then is curved inwardly and upwardly to the seat, in the defendant's the arm first curves inwardly and then outwardly and upwardly to the seat. The former would seem to be the better, as it gives more room to the feet and dress of the user, but it is not of the essence of the invention; there is no such limitation in the claims; and the variation is only a mere change of form, seemingly adopted to evade the Milner patent. The making the arm in more bungling shape and less useful does not avoid infringement. *Penfield v. Chambers Bros. Co.*, 92 Fed. 630, 34 C. C. A. 579; *Chicago Fruit House Co. v. Busch*, 2 Biss. 472, Fed. Cas. No. 2,669; *Roberts v. Harnden*, 2 Cliff. 506, Fed. Cas. No. 11,903.

The decree of the court below should be reversed, and the cause remanded, with directions to enter a decree for the complainant for an injunction and for profits and damages to be ascertained.

**RICH v. BALDWIN, TUTHILL & BOLTON.**

(Circuit Court of Appeals, Sixth Circuit. December 3, 1904.)

No. 1,300.

**1. PATENTS—INVENTION—COMBINATION OF OLD ELEMENTS.**

There is no invention in selecting and putting together the most desirable parts of different machines in the same art, making a new machine in which each part operates in the same way as it did in the old, and effects the same result.

**2. SAME—INFRINGEMENT—SAW-STRETCHING MACHINES.**

The Rich patent, No. 548,394, for a saw-stretching machine, discloses invention in combining with elements of different prior machines an improved mechanism for moving the rolls to change their place of bearing upon the saw, which has given the machine popularity and a wide sale; but, its validity being dependent alone on such single feature, the patent must be narrowly construed, and is not infringed by a machine in which a different mechanism is used for moving the rolls, although it accomplishes the same result.

**3. SAME—IMPROVER.**

If validity is given to a patent only by an improvement of a narrow character, just sufficient to cross the line which divides mechanical improvement from patentable invention, the inventor will be protected only as to such improvement as is specifically described, and is but little aided by the doctrine of "equivalents," which term has a variable meaning and is measured by the character of the invention.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Charles C. Bulkley, for appellant.

E. A. Maher, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

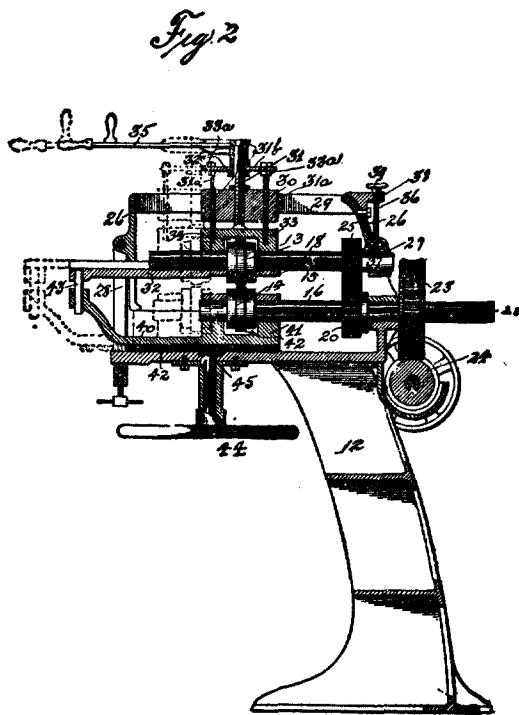
SEVERENS, Circuit Judge. This suit was brought by the patentee, and after his death revived by the appellant, upon a bill which alleges the infringement by the appellees of letters patent No. 548,394, granted to the said Elisha B. Rich, October 26, 1895, for improvements in saw-stretching machines, and prays for an injunction and an accounting. The answer denies that the patentee was the original inventor of the so-called improvements; alleges that they had already been patented to one Milo Covell; that the invention had been abandoned by Rich; had been in public use for more than two years; and, further, denies infringement. At the hearing in the court below, upon the pleadings and proofs, the bill was dismissed upon the ground that there was no invention in Rich's alleged improvements.

The "invention relates," says the patentee, "to that class of machines which are employed to roll, stretch, and re-form saws which by stress and strain during use have become distorted." He states that theretofore the rolls in such machines had been mounted vertically, and in operation were lifted by power and dropped by gravity, relatively to the saw, which remained stationary, but which, as we suppose, must

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 27-29.

have been moved from time to time as its different sections were operated upon; that his object was to obviate the necessity of moving the saw about, and "to provide a horizontally positioned machine adapted to positively and directly move the rolls back and forth in both directions, the saw itself remaining in a stationary position"; and that his invention "consists, in conjunction with a plurality of stretching rolls revolved by suitable mechanism and adapted to act upon the flat surface of a saw, of mechanism by which the shafts of said rolls are geared together and rotated in unison, and said rolls or roll and shaft moved back and forth relative to the saw-surface, in addition to their movement of rotation, by means of a positive connection between said rolls and the member manually operated to effect this movement." He further states that his invention includes certain details of construction, which he proposes to point out and claim.

Fig. 2 of the drawings is here reproduced:



Nos. 13 and 14 represent the rolls. The frame, 40, in which the shafts are journaled, is movable to right and left by means of the cogged pinion, 45, having a handle, 44, and operating in corresponding cogs, 42, along the base of the frame. By this movement of the frame the rolls are themselves simultaneously and correspondingly carried along on the shafts by which they are revolved, and the shafts are

simultaneously revolved by means of the gearing, 20 and 25. The upper part of the frame, with the upper roll, can be opened at the pin, 43, and turned upward on a hinge at the right to permit the saw to be put in and taken out. When closed the pin holds the upper and lower parts of the frame in proper relation at that end. The distance between the faces of the rolls is graduated by the mechanism shown in the upper part of the figure. For the purposes of this case we do not need to pursue the details of construction further. The claims involved are the first and second. They are as follows:

"(1) The combination in a saw-stretching machine, of a plurality of stretching rolls mounted upon rotated shafts, and adapted to be moved laterally relatively to a saw to be operated upon and frames within which said shafts and rolls are mounted, one of which frames is hinged to the other and adapted to be moved away from the other, together with positively and directly operating devices by which said rolls are moved positively back and forth to adjust the rolls relatively to the saw surface.

"(2) The combination in a saw-stretching machine, of a plurality of stretching rolls mounted upon rotated shafts and adapted to be moved laterally from side to side relative to a saw to be operated upon and longitudinally movable frames acting upon, or carrying, the rolls to impart to the same the movement aforesaid and a manually operated rack and pinion device between the movable frame and the point of application of the power."

The patent specially relied on in the answer as anticipating the improvements of Rich is No. 380,865, to Milo Covell, dated April 10, 1888. In taking the evidence the appellees also introduced another patent relating to the same subject, No. 259,068, granted to T. S. Wilkin, June 6, 1882. The patent to Covell shows the rolls mounted on vertical parallel shafts, and the patentee states that he adopts this position instead of the horizontal position, "as is usually the case," in order to obtain certain advantages, which he specifies. It is interesting to note that Rich, as we have said, distinguishes his invention from the earlier art by putting these parts in a horizontal position, and explains the advantages thereof; whereas Covell states that he puts his in vertical position instead of the horizontal, for the purpose of showing the advantages of that position. Turning to the Wilkin patent, we find that his saw stretcher has the shafts and rollers in a horizontal position—a prototype, in this respect, of the patent in suit. An analysis of the Covell patent shows that it has the parallel shafts and rolls, with gearing to operate them, as in the Rich patent. One of the shafts and its bearings turn on a pivot at one end, and open at the other end to receive the saw and to let it out. The rolls and shafts and the frame in which they are set are capable of being moved relatively to the saw. Means are provided for graduating the distance apart of the rolls and their pressure against the same. The means employed are the equivalents of those in the Rich patent, unless it be that in the one the apparatus is vertical, and in the other horizontal, and a certain difference in the means for moving the rolls, presently to be noticed more particularly. But if there were any special advantage in the horizontal position over the vertical, it had already been disclosed in the Wilkin patent. Besides, if the Wilkin and the Covell patents collectively contained all the features of the Rich patent,

there would be no invention in changing one of the elements of the Covell patent by bringing into it a feature of the Wilkin patent. *Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co.*, 102 Fed. 957, 961, 43 C. C. A. 80, and the cases there cited.

With respect, however, to the means for shifting the movement of the rolls from place to place, there is an advance of some consequence beyond the prior art, which we will now point out. In Covell's patent this movement was effected by suspending an inner frame, containing the shafts and rolls, by a strip of some flexible material, for instance leather, attached to the frame by one end, and having the other wound over a shaft or drum in the outer frame, turned by a handle. The shaft had fixed upon it a ratchet wheel, into the cogs of which a pawl would fall to prevent the drum from running back, and thereby letting down the rolls. Winding this up would lift the rolls relatively to the saw, and by lifting the pawl out of its place the rolls would be let down and secured again by the pawl to the changed position. We have seen that the device of Rich was to effect such movement by a cogwheel pinion operating in corresponding openings in the bottom of the frame carrying the rolls, and having a handle to turn it. Ordinarily this provision of a common method for such a purpose would hardly amount to invention, but here the proof indicates, and we think it probable, that the means employed by Rich for changing the position of the rolls in operating upon the saw has a special adaptability, in this: that while the method of Covell permits changes of only a definite and uniform distance by moving the pawl from one cog in the ratchet wheel to another, a somewhat hindering manipulation, and results in rolling the saw at fixed places, the method of Rich enables the operator to change the bearing of the rolls upon the saw to any desirable distance and to the identical place where the operation is required, and this is readily done by turning the handle of the cogged pinion one way or the other and to the extent necessary to suit the requirements. We are inclined to think that the combination of this improvement in the organization of such a machine would have the quality of invention, under the rule stated in *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 901, 53 C. C. A. 36; *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 400, 49 C. C. A. 409. We understand that the language in the first claim, "with positively and directly operating devices by which said rolls are moved positively back and forth to adjust the rolls relatively to the saw surface," refers to the means described in the specification, for a claim for all means of doing the thing mentioned would be too broad to be valid. The second claim more clearly makes those specific means a part of the combination.

But the patent stands upon this narrow ground, and the question remains whether the defendants infringe it. In order to establish the infringement of a mere improvement in a machine of former devices already in use for accomplishing a similar purpose, the means must be substantially the same, operating in the same way, and accomplishing the same result.

"If," said Mr. Justice Day, then a member of this court, in *Ross-Moyer Mfg. Co. v. Randall*, 104 Fed. 355, 43 C. C. A. 578, "the field

of invention is limited, and an improvement of a narrow character has been made, just sufficient to cross the line which divides mechanical improvement from patentable invention, the inventor will be allowed the specific description shown, and no more." To the same effect is *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. It is not enough that the same result is accomplished. The need existing, it is the privilege of any other man to effect the result if he does it by different means. The defendants do not use the cogged pinion device to move the rolls, but use a bolt fixed in the frame, and having a screw and extending through a fixed bearing and having a nut thereon controllable by a handle. By turning the nut one way or the other, movement is given to the rolls. The same result is accomplished as by Rich's device, and it is urged that the means are equivalent. This is true only in a broad sense, and might, perhaps, be well said if the Rich patent was for a primary invention, or one having broad limits, as in the well-known case of *Morley S. M. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715. But, as we have said, it was not. As we have several times had occasion to say, and what is indeed well established in patent law, the term "equivalent" has a variable meaning, and is measured by the character of the invention to which it is applied. *McCormick Harvesting Mach. Co. v. Aultman, Miller & Co.*, 69 Fed. 371, 16 C. C. A. 259; *Penfield v. Chambers Bros. Co.*, 92 Fed. 630, 34 C. C. A. 579; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 41 C. C. A. 627. Different means for moving the rolls by power directly applied existed. Rich saw one of them. The defendants found another. We could not give such breadth to the Rich patent as is claimed for it without giving him a monopoly of all means capable of effecting the result which was the object of his invention. His patent does not confer so extensive a right.

The decree dismissing the bill will be affirmed, with costs.

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CHISHOLM et al. v. FLEMING et al.

(Circuit Court, D. Delaware. January 16, 1905.)

No. 248.

1. PATENTS—INFRINGEMENT.

The claims of letters patent No. 421,244, dated February 11, 1890, granted to Charles P. Chisholm and John A. Chisholm for "improvements in the method of hulling peas," sustained, and *held* to have been infringed.

(Syllabus by the Court.)

In Equity.

Gustav Bissing, for complainants.

Robert S. Taylor, for defendants.

BRADFORD, District Judge. The bill in this case charges infringement of letters patent of the United States No. 421,244, dated February 11, 1890, granted to Charles P. Chisholm and John A. Chisholm

for "Improvements in the Method of Hulling Peas." This patent was carefully considered by this court in *Chisholm v. Johnson*, 106 Fed. 191, and was sustained. The circuit court of appeals, through a majority of its members, reversed this decision, holding that the patent had been anticipated. 115 Fed. 625, 53 C. C. A. 123. The parties in this suit are not the same as those in *Chisholm v. Johnson*. But this circumstance alone would not, in view of the decision of the appellate court upon the same patent, justify this court, if the proofs were the same in both cases, whatever might be its convictions upon the subject, in entering into the question of the validity or invalidity of the patent. The proofs, however, are not the same in both cases. In this suit are presented not only the proofs adduced in the former case, but evidence of a vital character directly bearing upon the points on which the decree in *Chisholm v. Johnson* was reversed. The question of the validity of the patent is, therefore, open for determination in this case. The great utility and success of the impacting process of the patent in suit were neither denied nor questioned by the appellate court in *Chisholm v. Johnson*. It also appears from the opinion that such a "viner" process as is used by the defendants in this suit would infringe the present patent. It is admitted that the "viner" machine complained of in this case was used by the defendants prior to the filing of the bill and was "identical in construction and mode of operation" with that used by the defendant in *Chisholm v. Johnson*. The court in that case said:

"The machine described in this patent for hulling the peas on the vines is the machine of the podder-process patent (No. 421,244), with such slight modifications as are necessary for the treatment of the larger mass of material. The method pursued in the two instances is the same, the only difference being that in the former case the blows by the beaters are applied to the pods after being stripped from the vines, while in the latter case the blows are given to the pods when still attached to the vines. The two processes, although slightly differing in respect to the form of the material treated, are strictly analogous. The work is done substantially by the same means and with the like result."

The substantial question in the former case so far as it related to the patent now in suit was one of anticipation. Judge Acheson delivering the opinion of the court said:

"In view of the French patent to Madame Faure and first certificate of addition thereto, we are of opinion that the claims of the *Chisholm* patent, No. 421,244, are invalid for want of novelty."

Judge Gray in his dissenting opinion said:

"I dissent from so much of the foregoing opinion of the majority of the court as relates to patent No. 421,244, granted to Chisholms, for an improvement in the method of hulling peas, and commonly called the 'podder process.' I am of opinion that this patent should be sustained as a true invention of a patentable process. Its usefulness cannot be disputed, nor do I think its validity is open to attack. A careful examination of the Faure machine convinces me that it cannot be sustained as an anticipation of the invention of the patent here in suit. I do not find, either in the original patent to Madame Faure nor in the specification and claims of the first addition thereto, any hint of the method of hulling peas by impact."

In the majority opinion, after reference to certain features in Madame Faure's French patent and the certificates of addition thereto, and to certain phraseology contained therein and in the article in *La Nature*;



and to the Scientific American of June 6, 1885, supposed to justify an inference that the operation and process of the French patent and its first certificate of addition thereto were distinctively by way of impact and not abrasion, the following statement is made: .

"But, after all, it is a matter of no moment that Madame Faure may not have understood the true theory of the operation. Her opinion is not material. The great fact is that she devised and described a machine for hulling green peas capable of operating by impact and incapable of operating (at least to any considerable extent) in any other way. The organization of the Faure machine and the speed of its beaters are such as to render hulling by abrasion practically impossible. In the nature of the case, the operation of the Faure machine is by impact. This is the principle of the apparatus."

The counsel for the defendants says in his brief of argument in this case:

"It is admitted that in her original patent, and in her second addition, Madame Faure described her machine as operating by abrasion; and she does not distinctly state in her first certificate of addition whether it operates by abrasion or impact. But she describes the machine with the utmost nicety. If when built and operated according to her directions, it will of necessity hull peas by impact and not otherwise, then it anticipated the patent in suit; if not, not."

After the decision by the court of appeals of *Chisholm v. Johnson* certain experiments were made in hulling green peas by the "podder" process as tending to throw light upon the disputed point of "abrasion" or "impact" in the operation of the machine of the first certificate of addition to the patent of Madame Faure; it being admitted that the patent now in suit operates solely by impact. The counsel for the defendants refers to these experiments as follows:

"The complainants claim that their experiments prove that the Faure machine operates mainly by abrasion, and only slightly by impact. The defendants claim that their experiments confirm the theory that the Faure machine operates wholly by impact or with only such small per cent of abrasion as may be neglected."

The experiments above referred to and other proofs in this case, not presented in *Chisholm v. Johnson*, show, in my judgment, to a moral, if not mathematical, certainty, that, while the machine of the patent in suit operates solely by way of impact, the Faure machine was incapable of hulling green peas by impact except to a comparatively limited extent, and was essentially and distinctively abrasive in its character and operation. There is a general similarity in point of appearance between the Faure machine and the machine of the patent in suit; but with respect to the adjustment and characteristics of the working parts of the two machines, determinative of the nature of the process carried on by them, there are marked and important differences, producing different results. It may be well here briefly to refer to some of these differences. In the machine of the patent in suit, or *Chisholm podder*, there is a clearance of an inch or more between the tips of the beaters and the faces of the counter-beaters or lifting ribs. In the Faure machine the clearance is only three eighths of an inch. By reason of this difference, while green peas can be hulled only by impact in the *Chisholm* machine, the pods can and necessarily must be abraided in the Faure machine to the extent to which they are caught be-

tween the tips of the beaters and the faces of the counter-beaters. As to the extent of such abrasion more will be said later. In the Faure machine the sides of the counter-beaters are so slanted that the pods taken by any of them from the bottom of the drum cannot be raised to any considerable distance in the drum before sliding to and over the inner face or surface of the counter-beater. In the Chisholm machine the sides of the counter-beaters are not slanted, but parallel. In the Faure machine the inner face of each counter-beater is approximately two inches wide and corrugated. In the Chisholm machine the inner faces of the counter-beaters are much narrower and are not corrugated. In the Faure machine the radial depth of the counter-beaters is three inches. In the Chisholm machine it is from five and a half to six inches. In the Faure machine there are four beaters, each six feet long measured parallel to the axis. In the Chisholm machine there are a large number of beaters, each about twenty inches long. There are six counter-beaters in each of the two machines. In view of the above distinctive features of the Faure machine, what is naturally to be expected if its beaters move at an impacting speed? If the beaters make 200 revolutions a minute, any one of them would pass a fixed point in the drum or cylinder three and one third times in each second; or, in other words, the interval between the passing and repassing of that point by that beater would be considerably less than one third of a second. As there are four beaters in the machine the fixed point would be passed by a beater at intervals of less than one thirteenth of a second. So, if the beaters make 175 revolutions a minute, the fixed point would be passed by a beater at intervals of less than one eleventh of a second. If, however, the inner face of a counter-beater or lifting rib be substituted in lieu of the supposed fixed point, it is evident that, if the beaters and counter-beaters revolve in opposite directions, any given counter-beater will be passed by a beater at even less intervals of time; and, further, that if the beaters and counter-beaters revolve in the same direction any given counter-beater will be passed by a beater at somewhat greater intervals of time. In the translated description of the first certificate of addition it is said that "the counter-beater has only a speed of about ten to forty revolutions in a minute." Assuming that the drum in the Faure machine makes twenty revolutions a minute, while the beaters are revolving at the rate of 200 a minute, the interval of about one thirteenth of a second must be increased to about one twelfth of a second; or, if the beaters revolve at the rate of 175 a minute, the interval of about one eleventh of a second must be increased to about one tenth of a second. These minute fractions of a second may be slightly varied by increasing or diminishing the rate of revolution of the cylinder, within the prescribed limits. If, for instance, the cylinder makes 30 revolutions a minute and the beaters revolve at the rate of 200 a minute, the intervals would be about one eleventh of a second each, or, if the beaters revolve at the rate of 175 a minute, about one ninth of a second each. It is a matter of simple mathematical demonstration, that under the law of gravitation a body falling from a state of rest, without any resistance, atmospheric or of any other kind, will fall in the first one tenth of a second a little less than two inches, or, to be more exact, one and ninety-three one hundredths of an inch.

It thus requires a trifle more than one tenth of a second for a body so to fall a distance of two inches—approximately the width of the corrugated face of the Faure counter-beater. If there be resistance by way of friction, such as would result from sliding across the corrugated face of such a counter-beater, it would require a somewhat longer time to cover the same distance. It is safe to assume that it would take a pea pod at least, and probably more than, the tenth or the ninth of a second to drop or slide fully across the face of the counter-beater. But the tips of the Faure beaters moving at an impacting speed constantly pass each counter-beater at intervals somewhat less than that required for the dropping or sliding of the pod fully across the face of the counter-beater. Under these circumstances it is difficult, if not impossible, to escape the conclusion that in the Faure machine, when run at an impacting speed, there is a practically continuous abrasion of the pods dropping from the edge and face of each counter-beater until it rises slightly above the "nine o'clock position," when such pods as are left will fall away from the face of the counter-beater and may be operated upon by impact. Owing to the slant in the sides of the Faure counter-beaters and their radial narrowness it is apparent that the great mass of the pods lifted by each of them were intended to and will, if the machine be used as designed, slide to and over its inner edge before the ten o'clock position is reached. The comparatively small proportion which may escape abrasion may be impacted in the upper half of the cylinder if sufficient speed be imparted to the beaters. The witness Lyons referring to the machine of the patent in suit says:

"I find that owing to the fact that this machine, in accordance with the Chisholm patent, is fed only lightly, and owing to the fact that the Chisholm lifting ribs are radially longer than the counter beaters of the Faure machine, no pods will drop down from these lifting ribs between the six o'clock and nine o'clock positions; so that, while the drum is moving during this quadrant, no work is done upon the pods in the quadrant between six o'clock and nine o'clock. In this respect the Chisholm machine and its mode of operation is radically different from the Faure machine. The latter does the bulk of its work in the quadrant between the six and nine o'clock positions, by abrasion, while the former does no work at all within this quadrant."

The experiments upon which the complainants rely as showing that the Faure machine operates mainly by way of abrasion in the hulling of green peas were made at Hart, Michigan, in July and August, 1902, and extended over a period of more than a month. The Faure machine of the first certificate of addition was reproduced in exact accordance with its drawings and scale, except in one or more minor particulars immaterial to the present discussion. The drum and all the parts inside of it, including beaters and counter-beaters, were identical in size and shape with those of the Faure drawings. The machine was operated at various speeds, sometimes with the beaters and counter-beaters moving in the same direction, and at other times moving in opposite directions; sometimes with the normal clearness of three eighths of an inch between the tips of the beaters and the counter-beaters, and sometimes with an enlargement of the clearance to one inch, so as to correspond with the clearance of the machine of the patent in suit. Among many others, there were ten sets of experiments.

In each experiment included in the ten sets the machine was run for thirty seconds while the beaters were making 175 revolutions a minute. During the thirty seconds, with the abrading clearance of three eighths of an inch, and with the beaters and counter-beaters moving in the same direction, an average of twenty five per cent of the peas were hulled. On the other hand, during the thirty seconds, with the one inch clearance—representing that of the Chisholm machine in which abrasion is impossible—and with the beaters and counter-beaters moving as before in the same direction, an average of nine and three tenths per cent of the peas were hulled. The difference between the two results represents fifteen and seven tenths per cent of the peas hulled, showing conclusively that while nine and three tenths per cent of the peas were hulled by impact, the remaining fifteen and seven tenths per cent were hulled by abrasion. It is unnecessary to discuss other details of the experiments at Hart. It is enough to say that they all show the essentially and distinctively abrasive character of the Faure machine. To neutralize the effect of the above showing the defendants rely upon certain experiments in hulling green peas made at or near Canastota, New York, January 13, 1903, with the machine of the patent in suit, or "Chisholm podder." There were but two tests made, during each of which the beaters made 180 revolutions a minute. In the first test the machine was used with its normal clearance of an inch or more between the tips of the beaters and the counter-beaters; but in the second the clearance was reduced to three eighths of an inch. The result of the first test was that three per cent of the hulled peas were broken, and seven and one half per cent of the pods passed through the machine without the hulling of their peas. The result of the second was that two per cent of the hulled peas were broken, and five per cent of the pods passed through the machine without hulling. The defendants contend that the Canastota experiments negative the idea that the Faure machine operated mainly or to any considerable extent by abrasion. But such is not the case. They are misleading and merely show that a Chisholm machine with a Faure clearance will operate differently from a Faure machine with a Faure clearance. The narrow clearance is only one of the elements in the Faure machine contributing to abrasion. With it are necessarily associated others, including narrow counter-beaters with slanting sides and comparatively broad and corrugated faces, and beaters about six feet long. These other elements were wholly lacking in the machine used in the Canastota experiments. As there used, the counter-beaters were radially deep, with parallel or non-slanting sides and comparatively narrow and smooth inner faces; and instead of four long beaters there were a large number of small beaters about twenty inches long. The parts of the machine calculated and adapted to raise the pods into the upper half of the drum to a point from which they would, in escaping from the counter-beaters, fall away from their face and down upon the upcoming beaters, thus preventing abrasion to any considerable extent, notwithstanding the presence of the narrow clearance, were identically those and operated as those of the Chisholm machine. If there had been a real intention to show how the Faure machine would operate, a Faure machine would have been used, and resort would not have been

had to the unnatural expedient of a Chisholm machine with a Faure clearance. The fact that the defendants have wholly failed to produce evidence of experiments with a Faure machine, but have resorted to something else, is, under the circumstances, a virtual admission by them of the contention of the complainants as to the abrasive character of that machine. To sustain the defense of anticipation as against the patent in suit would require strong and convincing evidence. Such evidence does not exist. On the contrary, I am satisfied on the proofs that Madame Faure had no conception of the Chisholm impact; that her machine was designed and understood by her to be and was abrasive in its character; and that its operation in hulling green peas was principally by way of abrasion, whatever may have been the speed of its beaters. That machine did not suggest the process of the patent in suit; nor does the evidence disclose that prior to such patent was there any disclosure of its process by or in any machine, patent or publication. The defense of anticipation must, therefore, fail. *Tilghman v. Proctor*, 102 U. S. 707, 711, 26 L. Ed. 279; *Clough v. Barker*, 106 U. S. 166, 175, 176, 1 Sup. Ct. 188, 27 L. Ed. 134; *German-American Filter Co. v. Erdrich* (C. C.) 98 Fed. 300, 307; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 424, 22 Sup. Ct. 698, 46 L. Ed. 968. Judge Seaman, in *Chisholm v. Randolph Canning Co.* (C. C.) 135 Fed. 815, has recently sustained the patent in suit, having before him the decision of the court of appeals in *Chisholm v. Johnson* and also the proofs of the experiments at Hart and Canastota. Among other things he said:

"Proofs are furnished, however, in the present record—which were entirely wanting in the *Johnson* case—of repeated experiments with a Faure machine, wherein it was practically demonstrated that it was not adapted to perform the patent operation of hulling by impact. While it is true that the resemblance in the general form of the machines is striking, it is obvious from the descriptions given by Madame Faure that she had no conception of the impact method which was discovered by the Chisholms. As it now appears that her device is incapable of its practical performance, I am of opinion that it constitutes no bar to the claims of invention in the Chisholm patent."

For the foregoing reasons I am satisfied that the claims of the patent in suit are valid and have been infringed by the defendants. A decree for the complainants may be prepared in accordance with this opinion.

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UNITED SHOE MACHINERY CO. v. DUPLESSIS INDEPENDENT SHOE  
MACHINERY CO., Limited, et al.

(Circuit Court, D. Massachusetts. December 13, 1904.)

No. 1,970.

1. PATENTS—SUITS FOR INFRINGEMENT—JURISDICTION OF SUIT AGAINST ALIEN. Act March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589], providing that suits in Circuit Courts for the infringement of patents shall be brought only in "the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a

regular and established place of business," applies only to defendants who are inhabitants of some district within the United States, and does not affect patent suits against aliens, which may be brought in any district where the defendant may be found.

In Equity. On plea to the jurisdiction.

Elmer P. Howe, Benjamin Phillips, and Alfred H. Hildreth, for complainant.

T. Hart Anderson, for defendants.

HALE, District Judge. This suit in equity is brought by the United Shoe Machinery Company, a citizen of the state of New Jersey, for infringement of a patent, against the Duplessis Independent Shoe Machinery Company (Limited), the Duplessis Shoe Machinery Company, Joseph Cyprien Desautels, and Charles Arthur Hamel. The two defendant corporations are alleged to be alien corporations incorporated under the laws of Quebec, in the Dominion of Canada, having their chief place of business in the Province of Quebec, and a regular and established place of business within the district of Massachusetts. Charles Arthur Hamel is alleged to be a citizen of the United States of America, and a resident of Haverhill, in the district of Massachusetts. Joseph Cyprien Desautels is alleged to be an alien, a subject of his majesty Edward VII, and a resident of the city and district of St. Hyacinthe, in the province of Quebec.

The case comes before the court upon the plea of Desautels to the jurisdiction of this court, in which plea he moves the court to set aside any service, or pretended service, of process on him, alleging that he is a subject of the King of Great Britain and Ireland, and a resident of the city and district of St. Hyacinthe, in the Province of Quebec; that he is not now, and never has been, a resident of the district of Massachusetts; and that he has not now, and never has had, a regular and established place of business in the district of Massachusetts.

The question, then, before the court is whether an alien, who is an inhabitant of no district within the United States, but who is alleged to have committed acts of infringement within the United States, and who has been served with process within this district, is within the jurisdiction of this court.

Section 629 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 503] provides that "the circuit courts shall have original jurisdiction as follows: \* \* \* Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States." Section 711 [U. S. Comp. St. 1901, p. 577] provides that "the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states: \* \* \* Fifth. Of all cases arising under the patent-right or copyright laws of the United States."

Under these general provisions, the Circuit Courts of the United States have original and exclusive jurisdiction of all patent suits, without regard to the citizenship of the parties or of the amount in controversy. Has this ample jurisdiction of the Circuit Courts been restricted by subsequent legislation? If it has not, an alien may be sued

for the infringement of a patent wherever he may be found. It is necessary to examine the history of legislation touching this matter. The act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 508], provided, among other things, as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

This statute was before the Supreme Court for construction in the case of *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211. In commenting upon the words which we have quoted from the statute, Mr. Justice Gray, speaking for the court, said:

"These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole."

That case further decided that the law of 1887 did not apply to suits for the infringement of patents. The Supreme Court in *Re Keasbey and Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, confirmed the decision of the *Hohorst* Case in reference to suits for the infringement of patents, and settled the law on that subject. So that under the statute of 1887 patent suits against citizens of the United States were brought wherever the defendant could be found. This was the situation when the act of March 3, 1897, was passed. That act is found in chapter 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589]. The statute is as follows:

"That in suits brought for the infringement of letters patent the Circuit Courts of the United States shall have jurisdiction in law or in equity, in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which said defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

By that act Circuit Courts have jurisdiction "in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business." In *Bowers v. Atlantic Co.* (C. C.) 104 Fed. 887, Judge Coxe, in discussing this statute, says: "Infringement alone will not give jurisdiction; a regular place of business alone will not give jurisdiction; both must concur." The decision in that case is to the effect that the act of 1897 restricted the jurisdiction of the court. At page 890, Judge Coxe says:

"The jurisdiction did not need to be broadened; it was as broad as it had ever been since the creation of the government. It was limited only by the national sovereignty. There was not a foot of ground within the limits of the United States where an infringer was safe from process. \* \* \* There was no demand for a more extended jurisdiction; on the contrary, the demand was that the jurisdiction should be limited so that all suits should stand upon an equal footing."

That case distinctly holds that the act of 1897 was in the nature of a compromise between the former broad legislation of Congress and the narrowness of the act of 1887; that whereas the former legislation was too broad, the law of 1887 was too narrow. The act of 1897 was passed after the decision of the Supreme Court in the *Keasbey and Mattison Case*; so that in making the law Congress must be presumed to have had in mind the former statutes and the construction that those statutes had received in the *Hohorst Case* and in the *Keasbey and Mattison Case*. It may fairly be said that, while the former of these cases may be held to be dictum upon the point in question, the latter case confirmed the former. The law of 1897 did undoubtedly restrict the jurisdiction of the Circuit Courts. But was it the intention of Congress in that act to restrict such jurisdiction to the extent that an alien could not be sued in the Circuit Courts of the United States, although he could sue in those courts? The act of 1887 was held, as we have shown, not to apply to aliens and not to apply to patent suits. The act of 1897 changes the law with regard to patent suits by specifically defining the district in which patent suits shall be brought; but in that act no reference was made to aliens, the class of persons within its provisions being described by the word "defendant," while the act of 1887 used the words "any person." For example, the statute of 1887 says that "no suit shall be brought against any person \* \* \* in any other district than that whereof he is an inhabitant." The law of 1897 says that the Circuit Courts shall have jurisdiction "in the district of which the defendant is an inhabitant." It is a well-known rule of construction that no statute alters the settled law further than its words import. *Shaw v. R. R. Co.*, 101 U. S. 557, 25 L. Ed. 892; *U. S. v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308. In *U. S. v. Kirby*, 7 Wall. 486, 19 L. Ed. 278, Mr. Justice Field, speaking for the Supreme Court, says:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

See, also, *Sedgwick on Construction of Statutes* (2d Ed.) p. 201, and cases cited. Under the well-recognized rules of construction, we must decide that there does not appear to have been any intention on the part of Congress to change the settled law, or to make the law apply to suits brought against an alien for the infringement of a patent. We must hold, in reference to the statute of 1897, as the Supreme Court held in reference to another statute, in the *Hohorst Case*, *supra*, that the language of the statute applies only to those persons who are



inhabitants of some district within the United States. We think that this decision is the only one consistent with the general intention of the statute as a whole.

The decree, therefore, must be: The plea of the defendant Desautels is overruled, with costs for the complainant.

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VOIGHTMAN et al. v. PERKINSON et al.

(Circuit Court, N. D. Illinois. August 11, 1904.)

No. 26,968.

1. PATENTS—INVENTION—COMBINATION OF OLD ELEMENTS.

To render a combination of old elements patentable, all must co-operate to produce a new result.

2. SAME—FIREPROOF WINDOW.

The Voightman patent, No. 600,186, for a fireproof window, is void for lack of invention, being for an aggregation of old parts, each acting separately to produce the old result.

In Equity. Suit for infringement of letters patent No. 600,186 for a fireproof window, granted to Voightman March 3, 1898. On final hearing.

Offield, Towle & Linthicum, for complainants.

J. H. Perkinson and John W. Hill, for respondents.

KOHLSAAT, J. Complainants seek in this proceeding to restrain defendants from infringing claims 5, 6, and 7 of patent No. 600,186, granted to complainant Voightman on March 3, 1898, for an improvement in fireproof windows. The claims in suit read as follows, viz.:

"(5) In a fireproof window, the herein-described automatic closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein, the destructible retaining device, M, N, by which said sash is held open; all substantially as shown and described.

"(6) In a fireproof window the herein-described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein, the retaining chain, M, having the fusible link, N, therein; all substantially shown and described.

"(7) In a fireproof window, the herein-described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein at a pivot, P, above its middle, the retaining chain, M, having the fusible link, N, therein at a point opposite the opening; all substantially as shown and described."

Briefly stated the claims involve: (1) A fireproof casing; (2) a fireproof sash, pivoted in the frame, adapted to automatically close itself when released; (3) a destructible retaining device, sometimes described as a "fusible link." It is claimed for the alleged combination that the result is a fireproof window set in a fireproof casing, which will close automatically when subjected to external heat. None of the elements of the alleged combination is new in itself, nor is a self-closing window new. It is old in the skylight and shutter arts, while automatic releas-

¶ 1. See Patents, vol. 38, Cent. Dig. §§ 29, 48.

ing devices are very old. But it is claimed that the device of the patent is broadly new, making it practically a substitute for iron and other shutters. In a shutter or skylight the window would not be new. Up to the time of the invention and perfection of wire glass, about 1892, there was no window glass, or substitute therefor, which could have been used for the purpose of a fireproof window. When wire glass was invented and put into merchantable and usable form, it seems to have, for the first time, made it possible to combine a window and a fireproof shutter. At the time complainant Voightman applied for his patent, viz., October 20, 1897, wire glass had been in use five or six years. It had been used in windows and for similar purposes, so that a fireproof window was not new. What Voightman did was to construct a pivoted fireproof sash in fireproof setting, and add thereto a device for automatically releasing the sash if subjected to heat while in an open position. Thus it follows that his advance in the art, if any, consists in the application of the destructible retaining device set out in his patent. That the result was very important cannot be denied, and is shown in the rating, with regard thereto, fixed by the insurance companies. It cannot be said that the claims in suit apply to any other portion of the window than the sash operated by the methods of the patent. The claims must be treated as though they pertained to a window of that one sash. Now, granted a one-sash fireproof window set in fireproof frame and sash, would it be invention to so adjust it as to make it operate in the manner of the patent in suit; that is, to hang it in such manner as that it would automatically drop to a closed position when released from some restraining force, the release being also automatically effected? Would there be any invention in treating this new substitute for shutters in the same manner as shutters were theretofore treated? I do not think so. Every step in so doing had been clearly worked out long before. To hold otherwise would be to hold that the mere use of wire glass by complainant was invention, and to do this would be equivalent to giving him the benefit of the invention of wire glass. True, about two years elapsed between the commercial success of wire glass and the date of the application for the patent in suit, but that alone would not be sufficient to justify the court in finding patentable novelty.

There seems to me to be another difficulty in sustaining this patent. If, as above stated, Voightman simply added the automatic releasing device, how can the whole be termed a combination? In *Specialty Mfg. Co. v. Fenton Mfg. Co.*, 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058, Mr. Justice Brown, speaking for the Supreme Court, says:

"Where a combination of devices produces a new result, such combination is doubtless patentable; but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the ruling of this court in *Hailes v. Van Wormer*, 20 Wall. 353, and other cases cited."

In *Pickering v. McCullough*, 104 U. S. 318, 26 L. Ed. 749, the Supreme Court, speaking by Justice Matthews, said:

"In a patentable combination of old elements all the constituent elements must so enter into it as that each qualifies every other."

Some of the lower courts have deduced from the whole of Justice Matthews' opinion the following rule; i. e.:

"That a combination, to be patentable, must produce a new and useful result as the product of the combination, and not a mere aggregate of several results, each the complete result of one of the combined elements." *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 371, 3 C. C. A. 559.

There has been considerable objection to the enforcement of Justice Matthews' statement of the law in the letter of it, but in substance there must be co-operation of all the elements of a combination patent. How does the frame co-operate with the releasing device? What is the product of the wire glass and the destructible retaining device? I confess it appeals to me as an aggregation, rather than a combination.

For the foregoing reasons the bill must be dismissed for want of equity.

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**WESTINGHOUSE et al. v. NEW YORK AIR BRAKE CO. et al.**

(Circuit Court, S. D. New York. October 18, 1904.)

No. 4,977.

**1. PATENTS—DAMAGES FOR INFRINGEMENT—INTEREST.**

Interest on damages awarded for infringement by final decree allowed, under the circumstances of the case, from the date of the master's report, by which the damages as finally awarded were practically liquidated.

In Equity. Suit for infringement of patent.

Betts, Betts, Sheffield & Betts, for complainants.  
Chas. Neave, for defendants.

PLATT, District Judge. One matter alone remains unsettled. Complainants argue that interest ought to run from date of the interlocutory decree, to wit, December 1, 1893. I cannot agree with them. The matter strikes me in this way: It seems clear that the profits which complainants might have enjoyed, except for the infringing sales, were in condition for judicial ascertainment upon the filing of the first report. It is true that the master, after stating certain facts upon which that computation could be made, stated further facts, and, upon the entire statement, adopted a theory from which the larger sum resulted. For all practical purposes, however, the damages flowing from a narrower construction of the law were fully liquidated at that time. The greater includes the less, and the whole is the sum of all its parts. If the master's theory had been accepted by the court, the larger sum found due under that theory would have borne interest from the date of the report. As the case now stands, the final decree is an endeavor to execute Judge Wheeler's view of the law, as the present judge now in control understands it. It is believed that Judge Wheeler was impressed by counsel's urgent claim that the amount now found to be due was the limit of the court's authority, under

Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250. It was really an indorsement of the present judgment, which, the master had advised him, was easily ascertainable.

It seems eminently fair to me that interest should begin to run from the date of the filing of the first report.

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WILLITT v. BAKER.

(Circuit Court, W. D. Arkansas, Harrison Division. December 10, 1904.)

1. FEDERAL COURTS—EQUITY JURISDICTION—SUIT TO QUIET TITLE.

Where a state statute authorizes a suit to quiet title regardless of possession, a federal court of equity in such state is a court of competent jurisdiction, in which a suit in support of an adverse claim to mining ground may be maintained under Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], when it appears that neither of the parties is in possession.

2. SAME—JURISDICTION—SUIT FOR POSSESSION OF MINING CLAIM.

A suit brought under Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430]. in support of an adverse claim to mining ground, is not necessarily one of federal cognizance, but the jurisdiction of a federal court is dependent on diversity of citizenship.

3. SAME—DIVERSITY OF CITIZENSHIP.

Where a sale and conveyance of a mining claim are real, and not merely simulated, the motive of the sale is immaterial, so far as affecting the right of the grantee to maintain a suit for its possession in a federal court on the ground of diversity of citizenship.

4. MINING CLAIMS—SUIT IN SUPPORT OF ADVERSE CLAIM—PARTIES.

A part owner of a mining claim, who joins with the other owners in filing an adverse claim under Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], but afterwards becomes vested by conveyances with title to the interests of the others, may maintain the suit required by said section in support of the adverse claim in his own name.

5. SAME—RIGHT OF RELOCATION—FAILURE TO COMPLETE ASSESSMENT WORK.

Under Rev. St. § 2324, as amended in 1880 (Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61 [U. S. Comp. St. 1901, p. 1426]), which makes a mining claim subject to relocation on the failure of the original locators to do the required assessment work in any year, "provided the original locators \* \* \* have not resumed work upon the claim after failure and before such location," where the locators of a claim were at work thereon on the 31st of December, and that night left their tools in the cut, intending to resume work the next morning at the usual time, which they did, their possession and work were, in law, continuous; and one who made a relocation in the night, during their absence, was a trespasser, and acquired no rights by the relocation.

6. SAME—SUIT ON ADVERSE CLAIM—RIGHT OF DEFENDANT TO JUDGMENT.

In a suit brought under Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], by an adverse claimant to determine the right to the possession of a mining claim, the title of each party is brought in question; and, to entitle the defendant to a judgment or decree establishing his title, even where the plaintiff's case fails, he must prove that he did the assessment work for each year as required by the statute.

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† 3. Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.

In Equity. Suit in support of adverse claim to mining ground.

S. W. Woods, for plaintiff.

J. C. Floyd, for defendant.

ROGERS, District Judge. The bill of complaint in this case was filed in this court November 26, 1902, and process issued on that day. Service was had January 1, 1903, and the answer was filed two days later. Thereafter the rules of practice obtaining in this court were ignored, and all that has been done was done by consent of counsel for the parties. At the trial all questions of irregularity were expressly waived in open court, and the whole case, as prepared, was argued and submitted on the merits. I shall treat the case in that way.

The plaintiff alleges that on the 1st day of January, 1901, the west half of the northwest quarter of section 29, township 17 north, range 14 west, situate in the Marion county mining district, county of Marion and state of Arkansas, was a part of the vacant, unappropriated public domain, subject to location and appropriation as a placer mining claim, and on said day William H. Bradley, C. C. Clendenin, Fred B. Sanders, H. Shelden, F. P. Clendenin, Geo. L. Cornell, C. W. Darling, and the plaintiff, R. W. Willitt, all being citizens of the United States, and having made a discovery of mineral on said land, entered thereupon in compliance with the mining laws of the United States, the laws of the state of Arkansas, and the rules and regulations of the Marion county mining district, and located said land as a placer mining claim, by posting a placer mining location thereon, and by filing a true copy of the same for record in the recorder's office of Marion county, Ark., where the same now appears of record, and makes a copy of said notice a part of the complaint, marked "Exhibit A." By proper allegations in the bill it is made to appear that before it was filed all such rights as were acquired by all of said locators, as hereinbefore stated, became vested in the plaintiff, R. W. Willitt, and copies of the mesne conveyances executed by them to said Willitt are made exhibits to the bill. It is then alleged that, by virtue of said location and mesne conveyances, the plaintiff is the owner and entitled to the possessory right to said land, and that he and those under whom he holds have had the quiet, open, and peaceable possession of said land since the date of said location. It is then alleged that the defendant, E. C. Baker, made mineral application No. 559 for a United States patent for said land at the land office in Harrison, Ark., and published his notice thereof on the 28th day of August, 1902, and during the 60 days of publication of said notice that R. W. Willitt and his grantors above named filed their adverse claim No. 61 against said mineral application No. 559, and paid the legal fee therefor, and that said application No. 559 was on the 27th day of October, 1902, suspended, and a receiver's receipt issued thereon, a copy of which receipt is attached to, and made a part of, the complaint.

In a second paragraph of the bill the plaintiff alleges that on the 1st day of January, 1901, the west half of the northwest quarter and the east half of the northwest quarter of section 29, township 17 north, range 14 west, was a part of the vacant and unappropriated public

domain, and subject to location and appropriation as a placer mining claim, and on said date William M. Willitt, C. C. Clendenin, Grant C. Stebbins, William H. Bradley, Fred B. Sanders, William Towers, C. W. Darling, and the plaintiff, R. W. Willitt, all being citizens of the United States, having made a discovery of mineral thereon, entered upon said land in compliance with the mining laws of the United States, the laws of the state of Arkansas, and the local rules and regulations of the Marion county mining district, and located said land as a placer mining claim by posting a placer mining location notice thereon, and by filing a true copy of the same in the recorder's office of said Marion county, where it now appears of record, and attaches a copy thereof to the complaint as an exhibit. By appropriate allegation it is made to appear in the bill that, before it was filed, all such rights as the above-named locators acquired in said lands by virtue of the location herein-before stated became vested in the complainant in this suit. It is then alleged that, by virtue of said location and mesne conveyances, the plaintiff is the owner of, and entitled to the possessory right to, said land, and that he, and those under whom he holds, have held the quiet, open, and peaceable possession of said land since the date of said location, and that said last-described lands were also included in a part of said mineral application No. 559 of said defendant, E. C. Baker, and that said plaintiff, R. W. Willitt, and his above-named grantors, at the same time they filed adverse claim No. 61, also filed adverse claim No. 62, also against said mineral application No. 559, and paid the legal fee therefor, and said adverse claim prevailed, and said application was on the said 27th of October, 1902, suspended, and a receiver's receipt issued for said filing fee, a copy of which is attached to the complaint. The bill then alleges that the defendant, Baker, does not hold or own any right, title, or interest in said lands, and that he is not entitled to the United States patent therefor, and states that the location under which the defendant claims title is null and void, and that his application based thereon is fraudulent and constitutes a cloud on plaintiff's title. Plaintiff further states that said lands are wild and unimproved, and are worth the sum of \$3,000; that the plaintiff is a citizen of the state of Illinois, and Baker is a citizen of the state of Arkansas—and prays for a decree declaring that he is the owner of said mining claim, and the possessory right thereto; that said location under which defendant claims is null and void; and that said mineral application No. 559 be canceled, and that he have his costs and all further proper relief.

On the 10th of October, 1904, plaintiff, by consent, filed a supplemental complaint, in which he alleges that for the purpose of perfecting his possessory title to the first-described tract of land under his first location, as stated in his original complaint, on the 11th of May, 1904, he caused a location notice, in amendment of the said original location notice, describing his first-named tract of land by blazed boundary lines, and by stakes set for the corners thereof, and further described the land by measurement of the boundary lines, and caused the names of the said original locators to be posted in a conspicuous place on the said land, in the presence of two witnesses, who signed the same as such, and caused a copy of said amended notice to be filed

in the office of the recorder of Marion county on the 7th of May, 1904, where the same is now recorded, all of which is made to appear by reference to a copy of the location notice filed with the amended petition. He further alleges that, for the purpose of perfecting his possessory title to the second tracts of land described in his complaint under his said mining location made on the 1st of January, 1901, on the 12th of May, 1904, he caused a location notice in amendment of the said original location notice, describing the said land by blazed boundary lines, and by stakes set for the corners thereof, and further described the land by measurement of the said boundary lines, and caused the names of the said original locators to be posted in a conspicuous place on the said land in the presence of two witnesses, who signed the same as such, and also caused a copy of the said amended location notice to be filed for record in the office of the recorder of said Marion county on the 17th of May, 1904, where the same now appears of record, all of which will appear more fully by reference to a copy attached to the complaint, and made a part thereof.

On the 5th of January, 1903, the defendant filed his answer, paragraph 1 of which is a special plea to the jurisdiction of the court. It may be remarked, in passing, that the plea is not sworn to, nor does it contain the certificate of counsel, as required by equity rule 31 of the Supreme Court of the United States. In his special plea the defendant alleges that he made mineral application 559 for all of the land described in the complaint, and that on the 27th of October, 1902, R. W. Willitt, William M. Willitt, Grant C. Stebbins, William H. Bradley, Fred B. Sanders, William Towers, C. W. Darling, and C. C. Clendenin filed their adverse claim No. 62 against his said mineral application, and that the said Fred B. Sanders and C. C. Clendenin were at the time of filing said adverse claim, and now are, residents of the state of Arkansas, and that the transfers of said interests in said land under the mining location relied on by the said plaintiff in this controversy, to the plaintiff, were not made for the purpose of parting with their interests in said land under said location, but, as defendant believes and avers, for the purpose of giving the federal court jurisdiction in this case; and the defendant further avers that the said R. W. Willitt now holds the interest transferred by C. C. Clendenin to Fred B. Sanders in trust for them, for their use and benefit, and they are interested in this controversy, and, being residents of this state, for this reason this court is without jurisdiction to try this case, wherefore he prays that the same be tried, and that the cause be dismissed.

In the second paragraph defendant denies that on the 1st of January, 1901, the land described in paragraph 1 of the complaint was a part of the vacant, unappropriated public domain, and subject to location and appropriation as a placer mining claim. He denies that the location of plaintiff and his co-locators, as alleged in the complaint, was filed or that it was made in compliance with the mining laws of the United States, the state of Arkansas, or the rules and regulations of the Marion county mining district, and avers the fact to be that said lands were not at said date a part of the vacant, unappropriated public domain, subject to location and appropriation as a placer mining claim, and that said pretended location, under and by virtue of which plaintiff

claims, was null and void, and that the subsequent conveyances made to plaintiff by his co-locators are likewise null and void. He denies that plaintiff, by virtue of said location and said mesne conveyances, became the owner of said land, or that he has now or ever has had the quiet and peaceable possession of said land, or any right or title to the same. He also denies that on the 1st of January, 1901, the lands described in the second paragraph of plaintiff's complaint were a part of the vacant, unappropriated public domain, subject to location and appropriation as a placer mining claim, and denies that the pretended location made by the plaintiff and his co-locators was filed or that it was made in compliance with the mining laws of the United States, the laws of the state of Arkansas, or the local rules and regulations of the Marion county mining district, but avers the fact to be that said land was not at said time a part of the vacant, unappropriated public domain, subject to location or appropriation as a placer mining claim, and that the said pretended location by plaintiff and his co-locators was null and void, and that the subsequent conveyances were likewise null and void. He denies that plaintiff is, by virtue of said location and mesne conveyances, the owner of said land, and denies that he now has or ever has had the quiet, peaceable possession of said land, or any right or title to the same. By way of further answer, he alleges that on the 2d day of January, 1899, all of said lands were part of the vacant, unappropriated public domain, and subject to location and appropriation as a placer mining claim, and that on that day S. G. Wilson, John Bearden, W. C. Bearden, W. S. Teegarden, N. J. Bearden, M. E. Bearden, O. L. Cox, and D. C. Campbell, all being citizens of the United States, having made a discovery of mineral thereon, entered upon said lands in compliance with the mining laws of the United States, the laws of the state of Arkansas, and the local rules and regulations of the Marion county mining district, and located said land as a placer mining claim by posting a mining location notice thereon, and by filing a true copy of the same for record in the recorder's office of Marion county, Ark., where the same now appears of record, a copy of which is attached to, and made a part of, this answer; that said locators entered upon the actual possession of said lands for mining purposes, and they and their grantee, E. C. Baker, have ever since been in possession of said land, and have performed the amount of labor and work necessary thereon for patent. He further alleges that on and prior to the filing of the complaint, by proper conveyances, the interests of all his co-locators had become vested in him, and filed copies of the deeds with his answer. He also alleges that by virtue of said location and conveyances the defendant is the owner of the possessory right to said lands, and that he and those under whom he holds have performed the assessment work on said land required by law, and have done and performed the amount of work thereon sufficient in law to entitle him to a United States patent upon payment of the purchase price of the land to the government, and he had made application No. 559 so to do, and is entitled to the possession of said land, and is now in the actual possession of the same.

On the 10th of October the defendant filed a supplemental answer to the plaintiff's amended complaint, and therein denies that the allegations



and averments made in said supplemental complaint, in paragraph 1 thereof, are true, as alleged, and further denies that plaintiff is entitled to any relief thereunder. Further answering, he denies that the allegations made in paragraph 2 of said supplemental complaint are true, as alleged, and further denies that plaintiff is entitled to any relief thereunder. On the same day defendant filed another supplemental answer, in which he alleges that, for the purpose of perfecting his possessory title to all of said lands under the mining location made thereon January 1, 1899, by the persons in his original answer named, he on the 12th day of May, 1904, caused the location notice in amendment of said original notice describing said lands or mining claims to be made by blazing the boundary lines, and putting up stakes in the corners thereof, and further described the lands by measurement of the boundary lines, and in the names of the original locators, and caused the same to be posted in a conspicuous place on said land, in the presence of two witnesses, who signed the same as such, and also caused a copy of the same amended notice to be filed in the office of the recorder of Marion county, Ark., on the 12th of May, 1904, where the same appears of record, a copy of which notice is attached to said amended answer. On the same day (October 10th) plaintiff filed his replication to the special plea designated in the first paragraph of defendant's answer, and also a replication to the second paragraph of defendant's answer. On the 11th of October, 1904, a stipulation was filed as follows:

"It is agreed and stipulated in this case that the rules and regulations of the Marion county mining district provide for the recording of mining location notices, and that after the 23d day of October, 1899, said local laws require that the locators, or some one of them, must go upon the ground, in person or by agent, when the notice is posted, and the posting of said notice must be witnessed by two disinterested witnesses upon the ground, who must sign their names as witnesses; that this rule was not in force at the date of January 1, 1899, when the location made by N. J. Bearden et al., under which defendant, E. C. Baker, claims title, was made, but that said rule was first adopted October 23, 1899, but there was a rule in Marion county at that time requiring notices to be recorded."

The first question that arises in this case is one of jurisdiction. Both parties allege that they were in possession of the property at the institution of the suit. In point of fact, neither was in actual possession. The property was wild, unimproved, and unoccupied. If the defendant had been in actual possession at the institution of the suit, the plaintiff had a complete remedy at law by the institution of a suit in ejectment. Where neither party is in actual possession, is a court of equity a court of "competent jurisdiction," within the meaning of section 2326, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1430]? In *Wehrman v. Conklin*, 155 U. S. 321, 15 Sup. Ct. 131, 39 L. Ed. 167, the court said:

"The general principles of equity jurisprudence, as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and, as a prerequisite to such bill, it was necessary that the title of the plaintiff should have been established by at least one successful trial at law."

As said further on in that case:

"The jurisdiction was in fact only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace."

See *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, in which it is said:

"To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."

Section 6120, Sand. & H. Dig., provides:

"An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, whether in actual possession or not, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."

It has been repeatedly held by the Supreme Court of the United States that state statutes enlarging the power of courts of equity in the states will be enforced in the federal courts, unless they infringe upon section 723 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 583], inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law; and a statute of the state of Iowa very similar to this was upheld in that case. I think it, therefore, clear that, in view of the statute of Arkansas and the decision above quoted, a court of equity is a court of "Competent Jurisdiction," within the meaning of section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430], and it has been so treated generally by the inferior courts and the United States Circuit Court of Appeals. See *Preston v. Hunter et al.*, 67 Fed. 996, 15 C. C. A. 148; *Shoshone Mining Company v. Rutter et al.*, 87 Fed. 801, 31 C. C. A. 223; *U. S. Mining Company v. Lawson* (C. C.) 115 Fed. 1006. It is needless to inquire, therefore, whether, in the absence of such a statute as that cited, a court of equity would have jurisdiction in such a case as that under consideration, where neither party was in possession of the property. The question, however, was elaborately discussed in *Shoshone Mining Company v. Rutter et al.*, 87 Fed. 801, 31 C. C. A. 223, by the Circuit Court of Appeals for the Ninth Circuit. It is not necessary for me, however, to decide that question here, and I abstain therefrom. But the plea in this case raises another question of jurisdiction. In this plea it is alleged that C. C. Clendenin and Fred B. Sanders still own their interest in the mine in controversy, and that the same is held by the plaintiff, R. W. Willitt, in trust for them, and that the said Clendenin and Sanders are citizens of Arkansas, and therefore the court has no jurisdiction. It was held in *Larned v. Jenkins*, 109 Fed. 100, 48 C. C. A. 252, that:

"The fact that an action is brought, pursuant to the requirements of Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], to determine the right to the pos-

session of a mining claim, does not confer jurisdiction of such action on a federal court."

In other words, that a suit over a mining claim does not, in and of itself, establish that it is a case of federal cognizance. *Mining Company v. Rutter*, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864; *Blackburn v. Mining Company*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276. This question, however, is of no importance in this case, because the testimony fails to show the truth of the plea. It follows, therefore, that jurisdiction in this class of cases must depend upon the citizenship of the parties. They must be citizens of different states. The case could only be dismissed on the ground mentioned when it is shown that the transfer by Clendenin and Sanders to Willitt, the plaintiff, is simulated and collusive. This is not shown. The rule in such cases is found stated and illustrated by a variety of cases found in volume 2 of the *Federal Reporter Digest*, at page 2991, par. 86. It may be added that when the sale is real, and not simulated, the motive with which the sale was made is not the subject of inquiry, and is quite immaterial.

It is insisted that the contest in the land office was not instituted by the plaintiff, but by him and his grantors, who are named in the complaint; and it appears from the record that the receiver's receipt was, in point of fact, issued to the plaintiff and the original grantors. The receiver's receipt was dated October 27, 1902; the suit was instituted on November 26, 1902; the conveyances to plaintiff are all dated between the two last-named dates; so that it clearly appears that the contest in the land office was begun by the original locators, and before the institution of the suit the title became vested in the plaintiff, and the suit was instituted by him. Section 2326, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1430], provides:

"Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

By the terms of the statute, it is seen that the suit must be instituted by the "adverse claimant." But I think that the construction is altogether too narrow, to hold that the construction of the statute shall be absolutely literal. The general rule of law is that all suits shall be brought by the party in interest, and, if the plaintiff became vested, between the institution of the adverse claim and the institution of the suit, of the rights of his co-locators, he is in fact the real party in interest; and, if he could not institute the suit, no suit could be instituted at all. At all events, he was one of the original locators, as well as one of those who instituted the adverse claim, and has the right to institute the suit in his own name for his own interest; but I think, having become vested of all the property before bringing the suit, he had the right to bring it in his own name.

This brings us to the merits. It is not disputed that the locators under whom the defendant holds by conveyances made their locations in due form on the 2d of January, 1900. It may be conceded that the \$100 worth of work required by the statute to be done annually was not done, either by the defendant or his grantors, for the year 1900, although there is some testimony that it was done. It is beyond question, under the proof, that the assessment work for 1900 was begun in the fall or winter of that year. The plaintiff himself testifies that he was on the ground in the month of December, and work had begun on the claim; and he testifies also that about 4 o'clock of December 31, 1900, he was on the claim, and found tools (shown to have been the tools of the defendant) in the cut on the claim where defendant had been at work, and that they were there also on the following day, to wit, January 1, 1901, about 2 o'clock in the afternoon, and that, so far as he could tell, they had not been disturbed since the previous afternoon, when he had seen them in the cut, and that no work had been done in the meantime, that he could discover, on the premises. He also testifies that he could not find anywhere on the ground (and he was at some pains to ascertain) whether or not work had been resumed. He also stated that he had made his location and posted his notice about 2 o'clock a. m. of the night of the 31st of December, 1900, and that he could not state that defendant did no work on the place on the 31st of December, 1900, or that he did not resume work on January 1, 1901. There is some testimony, more or less remote and incidental, which tends to corroborate the testimony of plaintiff as to whether the work was resumed on the 1st of January, 1901. On the other hand, there is the positive testimony of the defendant and H. E. Baker that they worked on the land on December 31, 1900, and left the tools in the cut where they quit work, intending to resume work at the usual time next day, and did so, and worked on the claim all next day, and for several days thereafter; and H. E. Baker testifies that he did not see the plaintiff and others posting notices on the claim on January 1, 1901, and never saw any notices, but heard of one, and that he thought that Mr. Sanders (one of the witnesses for plaintiff) knew that he and E. C. Baker were there at work on that day. He also testified that he worked on the 31st of December, 1900, in what was described by T. L. Baker as cut No. 3, on the south side of the claim; and that he does not remember precisely how long they worked, but they usually worked nine hours a day; that their tools were left in cut No. 3, and that on the 1st of January, a part of the day, they worked in cut No. 3, and went up farther, to what is known as cut No. 4; that part of the time he worked in cut No. 3 on January 1, 1901, he was alone, and part of the time E. C. Baker was with him, and when E. C. Baker was not with him he was prospecting upon the claim. There is some testimony, rather remote, tending to corroborate the testimony of these two witnesses. It is not denied by any witness that E. C. Baker and T. L. Baker worked on the claim in controversy on the 31st of December, 1900, and left their tools in the cut where they quit work, nor is it denied that they resumed work on the following day; but, as stated, there is some evidence tending to show that their testimony is not true. There is an apparent, but not an actual, irreconcilable conflict on this

point. It is easy to see how a man or men might go on a 160-acre tract of rough, broken, mountainous land, walk over it in a very general way, and not see a man or men at work on the mountain, or prospecting in some gulch or on some ledge, and then truthfully swear what the plaintiff has sworn in this case; and yet a man or men might be there all the time, and at work, and not be seen. Much depends upon the circumstances, the character and topography of the land, and character of work that was being done, or good faith of the parties in going upon the land to examine and look for persons at work. The court, in order to sustain plaintiff's contention on this point, would be compelled to find that the positive testimony of the defendant and T. L. Baker was deliberately false. It may be conceded that their testimony is not satisfactory, and, to a considerable degree, indefinite; indicating a want of candor. I cannot say, on the evidence, that they did not work on the claim on December 31, 1900; that they did not leave their tools that evening in the cut, intending to return the next day and resume work at the usual time, nor can I find that they did not so do, in the absence of evidence to that effect, either positive, or, if circumstantial, then so positive as to exclude the probability of its truth. On this point the burden was on the plaintiff to show that the work for the year 1900 was not done, and that it was not resumed on the 1st of January, 1901. In *Buffalo, Zinc & Copper Company v. Crump*, 70 Ark. 540, 69 S. W. 572, 91 Am. St. Rep. 87, the Supreme Court of this state held that a forfeiture of a mining claim by the failure of the former owner to perform the annual labor required by law cannot be established except by clear and convincing evidence, the burden of proving which rests upon him who sets it up—in this case, upon the appellee. *Hammer v. Garfield Mining Company*, 130 U. S. 291-301, 5 Sup. Ct. 548, 32 L. Ed. 964. It is settled law that equity favors neither forfeitures nor penalties. It would seem to the court that the plaintiff knew at the time he located his claim that the defendants had been doing work upon the claim in the latter part of December, 1900; that their tools were upon the ground, and their camp close to or upon the edge of the claim itself; that it would have been easy for him to have established by other evidence whether or not on the 1st of January, 1901, work was resumed upon the mine. This was the crucial question in his case, for, if work had not been abandoned upon the mine, then he himself was a trespasser. He is not corroborated upon this point by any positive proof, although upon that very day he and others, according to his own testimony, were upon the place and located his claim. In *Fee v. Durham*, 121 Fed. 469, 57 C. C. A. 584, the Circuit Court of Appeals of the Eighth Circuit, by Judge Caldwell, said:

"The defendant's grantors were in the actual possession of the claim, actively engaged in doing the annual assessment work thereon, when the plaintiffs entered upon the claim and made their location. The entry and location, under these circumstances, was a trespass, and no rights were acquired thereby. The *Lebanon Mining Company of New York v. The Consolidated Republican Mining Company*, 6 Colo. 371; *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735. Inchoate rights to the public lands cannot in any case be acquired by trespass or by violence. An entry upon the prior possession of another is a trespass, and tends to provoke violence, homicides, and other crimes, and one making such

an entry gains nothing by it. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732. The original locators must be held to have been in the actual possession of the claim at the time the plaintiffs made their location. The suspension of work Saturday night, intending to resume it Monday morning, and leaving their tools on the ground for that purpose, was not in any sense an abandonment of their possession for the time between Saturday night and Monday morning. In contemplation of law, their possession was as complete and actual during that time as if they had remained at work during the night and on the Lord's Day. They were not required to work during the night or on the Lord's Day in order to maintain their possession and make their assessment work continuous. Their possession was attested and protected by their work and the presence of their tools. They could not lawfully work on the Lord's Day, if they had desired to do so, for the law of the state forbids labor on that day, under a penalty. *Sand. & H. Dig.* § 1887. Resting from their work from Saturday night until Monday morning was no more an abandonment of their work or possession than the cessation of work to eat their midday meal would be. Under the act of Congress, the failure to do the required assessment work within the year does not absolutely and irrevocably render the claim subject to relocation. It has this qualification: 'Provided that the original locators \* \* \* have not resumed work after failure and before such location.' *Rev. St.* § 2324, as amended in 1880 (*Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61* [*U. S. Comp. St. 1901, p. 1426*]). Referring to this statute, the Supreme Court of the United States, in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, said: 'Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. \* \* \* Mining claims are not open to relocation until the rights of the former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another had discovered. This he cannot do until the discoverer has, in law, abandoned his claim, and left the property open for another to take up.' The original locators in this case had not abandoned their claim, but were actually and continuously at work from the 26th of December until an early day in January, when they had done \$500 worth of work. There was no suspension of the work during this time, and there was no period of time during which the plaintiffs could enter and make a valid location. The continuity of the work and possession was not broken by the cessation of labor at night and on the Lord's Day. It must be conceded that if the original locators had resumed work after the clock struck 12 on Saturday night, December 31st, that the plaintiffs' location would have been invalid. We think, upon the facts in this case, for all legal purposes, the original locators must be held to have been prosecuting the work for the whole of that night, and that plaintiffs could not rightfully enter upon the claim and make a valid location between midnight and the usual hour of resuming work on Monday morning. *Pharis v. Muldoon* (Cal.) 17 Pac. 70; *Belcher Consolidated Mining Company v. Deferrari*, 62 Cal. 160."

When the plaintiff located his claim at 2 a. m. on the 31st of December, 1901, he was, in law, a trespasser. The claim was not abandoned. The defendants were as much at work upon the claim at that time as if they had been actually in the cut, using the tools, at the time he made his location. In *Gwillam v. Donnellan*, 115 U. S. 49, 5 Sup. Ct. 1110, 29 L. Ed. 348, the court said:

"If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second. *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735."

But it is held in numerous cases that in a suit brought under *Rev. St.* § 2326 [*U. S. Comp. St. 1901, p. 1430*], to determine the right of possession of an adverse mining claim, the title of each party is brought

in question, and each party must make proof of his title thereto before he can ask a judgment in his favor. In *Bay State Silver Mining Company v. Brown* (C. C.) 21 Fed. 167, Judge Sabin held:

"Where neither party establishes title to the ground in controversy, judgment cannot be for either party, and the suit must be dismissed." Citing *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990.

He also states:

"In suits of this nature no presumptions of fact as to title arise. Title, right of possession, or forfeiture are facts to be established by the evidence."

In *Whalen Consol. Copper Mining Company v. Whalen et al.* (C. C.) 127 Fed. 611, it was held that the evidence of the amount of money paid for work done, though not conclusive, was admissible, as bearing on the claimant's good faith. In that case the court said:

"The laborers received but \$3.50 per day, which was a reasonable sum. They were paid for one day and a half in going from Eureka to the mines, which, under the facts of this case, was proper. The foreman received \$5.00 per day, which was not unreasonable. The expenses paid for tools, freight, and hauling to the mines must also be allowed."

The question rises, therefore, as to whether or not the defendant has shown that he was entitled at the commencement of this suit to the possession of this property. Did he do the required assessment work for the year 1900? Upon this point there is a direct conflict in the evidence. But as said by District Judge Hawley in *McCulloch v. Murphy* (C. C.) 125 Fed. 149, 150:

"The testimony concerning the amount of labor performed furnished a wide field of controversy, and an opportunity for a broad difference of opinion as to the value of the work. There is always a conflict as to the actual or reasonable value of the labor. It has been said—and a wide experience in such cases has convinced the court of its truth—that every relocater is interested in depreciating the value of the work performed by the original locator, and the latter, in saving his claim from forfeiture, is interested in extolling his work. The case in hand certainly forms no exception to this general rule. In cases of a conflict upon this point, it is always proper to consider whether there has been a bona fide attempt to comply with the law."

This language is quite as applicable to the case at bar as it was to the case in which it was used. The value of the work done for the year 1900 is variously estimated by interested witnesses at from \$25 to \$150. It is profitless to analyze the evidence. It is well, however, to notice the rules which have been observed by other courts in determining questions of this sort. In *Book et al. v. Justice Mining Company* (C. C.) 58 Fed. 107, District Judge Hawley used this language:

"Labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location. Work done outside of the limits of a mining claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the location of the claim."

I refer to these matters in order that it may be seen that the courts have been liberal in passing upon the question of whether or not the assessment work for any given year has been done. In view of the de-

cisions upon this subject as announced by courts of large experience in mining cases, I should, in this case, if necessary, reach the conclusion that the defendant did the necessary amount of work for the year 1900 during the months of December, 1900, and early in January, 1901. But defendant's case must fail for another reason. The bill in this case was not filed until the 26th of November, 1902, and there is an entire absence of any proof whatever that after the month of January, 1901, the defendant ever did any assessment work upon the claim in controversy. The express condition of the statute requires that "not less than \$100.00 worth of labor shall be performed or improvements made during each year." There is no proof that any labor was ever performed for the year 1901. Whether this is attributable to a misconception of the law by counsel in the preparation of his case, or whether it is due to the fact that no work was ever done, the court is not advised, and could only speculate. A reading of the testimony would indicate, though not definitely, that no work has been done since January, 1901, on this claim by the defendant. This being true, he has wholly failed to establish that he has any right to the possession of the claim. He has specifically alleged in his answer "that he and those under whom he holds have performed the assessment work on said land required by law, and have done and performed an amount of work thereon sufficient, in law, to entitle him to a United States patent upon paying the purchase price to the government, and he has made application number 559 so to do, and he is entitled to the possession of the land, and is now in the actual possession of the same," but there is no proof whatever to establish it. The statute requires that "the claimant, at the time of filing this application, or at any time thereafter, within sixty days of publication, shall file with the Surveyor General of the United States a certificate showing that \$500.00 worth of labor has been expended or improvements made upon the claim by himself or grantors." It is true that after the adverse claim was filed it was not necessary for him to file that certificate until the case had been determined in this court, but it is not true that he can be permitted now, after the determination of the case at bar, to perform the assessment work for the years 1901, or any subsequent year, or to perform \$500 worth of work, which is essential to enable him to procure a patent. *Benson Mining & Smelting Company v. Alta Mining & Smelting Company*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *McCulloch v. Murphy et al.* (C. C.) 125 Fed. 147; *Book et al. v. Justice Mining Company* (C. C.) 58 Fed. 106; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Bay State Silver Mining Company v. Brown* (C. C.) 21 Fed. 167; *Whalen Consolidated Copper Mining Company v. Whalen et al.* (C. C.) 127 Fed. 611.

The finding of the court will be that neither party is entitled to the possession of the property in controversy, and the bill will be dismissed at the costs of the plaintiff.



## UNITED STATES v. HOOVER.

(District Court, D. Nebraska. December 27, 1904.)

No. 503.

## 1. ANIMALS—TRANSPORTATION—INFECTIOUS DISEASES—DEPARTMENT OF AGRICULTURE—RULES.

Act Cong. May 29, 1884, c. 60 (23 Stat. 31 [U. S. Comp. St. 1901, p. 299]), providing for the regulation of the animal industry, and prohibiting the exportation of diseased animals out of quarantined districts, etc., being limited to cases where the animal in question was affected with an infectious or contagious disease, the Secretary of Agriculture had no authority to extend the same by a rule prohibiting the taking of any horse outside of a quarantine district without first having it inspected by the bureau of animal industry, etc., regardless of whether it was diseased or had been exposed thereto.

## 2. SAME.

Act Cong. June 3, 1902, c. 985 (32 Stat. 289), authorizing the Secretary of Agriculture to apply any part of an appropriation to the general expenses of the bureau of animal industry in the purchase and destruction of diseased and exposed animals, and to the quarantine thereof, whenever in his judgment it is essential to prevent the spread of pleuropneumonia, tuberculosis, or other diseases of animals from one state to another, limited the power of the Secretary in these regards to diseased or exposed animals, and gave him no jurisdiction over animals not affected with or exposed to an infectious or contagious disease.

## 3. SAME.

Act Cong. Feb. 2, 1903, c. 349 (32 Stat. 791, pt. 1 [U. S. Comp. St. Supp. 1903, p. 372]), transferred certain powers vested in the Secretary of the Treasury by Act Cong. May 29, 1884, c. 60, §§ 4, 5 (23 Stat. 32), relating to the importation of animals from foreign countries, to the Secretary of Agriculture. It also provided that animals inspected by the bureau of animal industry and certified to be free from disease might be shipped from one state to another without further inspection, and authorized the Secretary of Agriculture from time to time to establish rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe certain diseases exist, and that such rules and regulations shall have the force of law. *Held*, that such act does not prohibit the shipment of animals free from disease, and that the Secretary of Agriculture had no power thereunder to make rules and regulations with reference to such animals, the violation of which alone would constitute a crime.

## 4. SAME—PROSPECTIVE OPERATION.

Act Feb. 2, 1903, c. 349 (32 Stat. 791, pt. 1 [U. S. Comp. St. Supp. 1903, p. 372]), providing for the inspection of diseased animals, etc., declares that any person knowingly violating its provisions or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, etc. *Held*, that such provision affected only rules and regulations made thereafter, and did not have the retroactive effect of giving validity to a prior void order.

Irving F. Baxter, U. S. Atty., and S. R. Rush, Asst. U. S. Atty. (Geo. P. McCabe, of counsel), for the United States.

A. W. Jefferis and F. S. Howell, for defendant.

MUNGER, District Judge (orally). The government having closed its offer of testimony and rested its case, the defendant now moves the court to direct a verdict of not guilty, for the reason that no offense is alleged or proven.

The information in this case was filed by the United States district attorney, by leave of court, and charges the defendant with having, on October 15, 1903, driven a mare and colt from the Pine Ridge Indian reservation, a quarantined district within the state of South Dakota, into Holt county, in the state of Nebraska, without the quarantined district, in violation of a rule or regulation issued by the Secretary of Agriculture, under date of January 20, 1903, known as "Order No. 102," which prohibited the taking of any horse without the quarantined district without first having such horse inspected by an inspector of the bureau of animal industry and be accompanied by a certificate of inspection issued by said inspector.

The order of the Secretary recites that it is issued in accordance with the act of Congress approved May 29, 1884, c. 60 (23 Stat. 31 [U. S. Comp. St. 1901, p. 299]), entitled "An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," and with the act of Congress approved June 3, 1902, c. 985 (32 Stat. 289), making appropriations for the fiscal year ending June 30, 1903.

It is not charged in the information that the mare and colt in question were infected with any disease, or had been exposed to an infectious disease, nor is there any evidence that either of them were infected with or had been exposed to any disease. The prosecution is based solely upon the proposition that it is a criminal offense to transport any animal out of the quarantined district, without reference to whether such animal is diseased or has been exposed to an infectious disease, without first obtaining the certificate required by said order of the Secretary of Agriculture.

The act of May 29, 1884, was analyzed and construed by the Supreme Court in *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, wherein it was said by the court, speaking with reference to interstate commerce:

"Congress went no farther than to make it an offense against the United States for any one knowingly to take or send from one state or territory to another state or territory, or into the District of Columbia, or from the District of Columbia into any state, live stock affected with infectious or communicable disease. The animal industry act did not make it an offense against the United States to send from one state to another live stock which the shipper did not know were diseased."

The act of Congress, then, being limited to cases where the animal was affected with an infectious or communicable disease, it was not within the power or authority of the Secretary of Agriculture to extend the act, and by an order or regulation bring within its penal provisions matters which were not criminal by the terms of the act. *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; *U. S. v. Maid* (D. C.) 116 Fed. 650; *U. S. v. Blasingame* (D. C.) 116 Fed. 654; *Dent v. United States* (Ariz.) 71 Pac. 920.

The Act of June 3, 1902, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1903, authorized the Secretary to expend any part of the sum appropriated for the general expenses of the bureau of animal industry "in the purchase and destruc-

tion of diseased or exposed animals and the quarantine of the same, whenever in his judgment it is essential to prevent the spread of pleuropneumonia, tuberculosis, or other diseases of animals, from one state to another." This act limited the Secretary in these regards to diseased or exposed animals. It contained no prohibitory provisions and provided no penalty. It seems to me clear that at the time order No. 102 was issued there was no law making it an offense to take an animal free from disease, and which had not been exposed to an infectious or communicable disease, from one state into another, and that the prosecution cannot be maintained for a violation of the order of the Secretary only.

It is, however, urged that the prosecution may be sustained under the act of February 2, 1903, c. 349, 32 Stat. 791, pt. 1 [U. S. Comp. St. Supp. 1903, p. 372]. This act transferred certain powers vested in the Secretary of the Treasury by sections 4 and 5 of the act of May 29, 1884, c. 60, 23 Stat. 32, relating to the importation of animals from foreign countries, to the Secretary of Agriculture. It also provided that animals which had been inspected by an inspector or assistant inspector of the bureau of animal industry, and his certificate given that such animals were free from disease, might be shipped from one state to another without any other or further inspection. This latter provision was intended to permit the transportation of animals so inspected from one state to another without being subject to another inspection pursuant to state laws. The act further authorized and empowered the Secretary of Agriculture "from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any state or territory, including the Indian Territory, and into and through the District of Columbia, and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law." The act nowhere attempts to prohibit the shipment of animals which are free from disease, and if Congress intended to empower the Secretary of Agriculture to make rules and regulations the violation of which alone should constitute a crime it was an unconstitutional delegation of legislative authority. While Congress may authorize the executive head of any department of government to make binding rules and regulations which are administrative in character, it cannot delegate the authority to make laws. That power is by the Constitution vested in Congress alone.

In *United States v. Eaton* the court say:

"It is well settled that there are no common-law offenses against the United States. \* \* \* It was said by this court in *Morrill v. Jones*, 106 U. S. 466, 467, 1 Sup. Ct. 423, 27 L. Ed. 267, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. \* \* \* Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of common law that an offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it. \* \* \* It is necessary that a sufficient statutory authority should exist for declaring an act or omission a criminal offense. \* \* \* Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may

be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The penal provision of this act of February 2, 1903, reads:

"That any person, company or corporation knowingly violating the provisions of this act, or the orders or regulations made in pursuance thereof, shall be guilty of a misdemeanor, and on conviction shall be punished," etc.

It limits prosecutions to a violation of its provisions or rules and regulations made pursuant to its provisions. The order the violation of which is the foundation of this prosecution was made and issued before this act was passed, and, the order being void at that time, the act did not have the retroactive effect of giving validity to a prior void order.

The motion to direct a verdict is sustained, so, gentlemen of the jury, the court assumes the responsibility in this case, and you are directed to return a verdict of not guilty.

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#### UNITED STATES v. OREGON & C. R. CO.

(Circuit Court, D. Oregon. December 12, 1904.)

No. 2,657.

##### 1. PUBLIC LANDS—RAILROAD GRANT—CANCELLATION OF PATENT.

Where the United States relies upon a private entry of a tract of land, which was of record and uncanceled at the time of the attaching of a railroad grant under which the land was patented, to except such tract from the grant, and as ground for cancellation of the patent, it must be shown either that the entryman was then residing on the land or that he had made final proof and payment, when without one or the other his right had been lost by abandonment.

##### 2. SAME—LANDS EXCEPTED FROM GRANT—PRE-EMPTIONS.

Under a grant of lands to a railroad company which excepted from its operation such lands within the place limits as should be found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of," such exception includes lands upon which pre-emption filings had been made and accepted by the land office in compliance with the law relating to pre-emptions, although such lands had not been paid for at the time of the attaching of the grant.

##### 3. SAME—HOMESTEAD CLAIMS—LANDS OCCUPIED BY HOMESTEAD SETTLERS.

An exception from a railroad grant of lands which should be found to be "occupied by homestead settlers \* \* \* or otherwise disposed of" includes lands so occupied with an intention to obtain title thereto under the homestead law, although no application for entry thereof had been made; and also lands for which such application had been made and accepted, whether occupied by the claimant at the time or not, such lands being within the term "otherwise disposed of."

##### 4. SAME—ATTACHING OF GRANT—APPROVAL OF MAP OF DEFINITE LOCATION.

The grant of lands to the Oregon & California Railroad Company (Act July 25, 1866, 14 Stat. 239, c. 242), which excepts lands disposed of, reserved, etc., with reference to the time when the company "shall file in the office of the Secretary of the Interior a map of the survey of said railroad," at which time it is provided that "the Secretary of the Interior shall withdraw from sale public lands herein granted," etc., does

not attach to lands upon which homestead applications were made between the filing of the map of definite location and its approval by the Secretary of the Interior.

**5. SAME—CANCELLATION OF PATENTS ERRONEOUSLY ISSUED—CONSTRUCTION AND VALIDITY OF STATUTE.**

Act March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], and March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], which give the United States the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of lands so patented and sold to bona fide purchasers, are valid, and a suit to enforce such rights may be maintained in a court of equity.

In Equity.

John H. Hall, U. S. Atty.

Wm. D. Fenton and Wm. Singer, Jr., for defendant.

BELLINGER, District Judge. This is a suit to cancel patents alleged to have been erroneously issued for lands within the place limits of the grant of lands to the defendant company made by Congress on July 25, 1866 (14 Stat. 239, c. 242), and to recover the price of such of the lands so patented as may have been sold by the defendant to bona fide purchasers. The grant was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 such sections on each side of the line of road; and it provided that when any of said alternate sections should be found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of," other lands in lieu thereof, designated by odd numbers, and within 10 miles of the limits of the first-named sections, should be selected. The particular lands in dispute are alleged to have been excepted from the grant by reason of homestead and pre-emption claims subsisting at the time it became effective. There is one cash entry claimed, but it is alleged in the answer, and the fact seems to be conceded, that this entry was canceled, and there is no contention in the case respecting it. There is also a claim—that of J. W. Dougherty—arising under the donation law. Dougherty's donation notification was filed on February 14, 1855. This claim was of record and uncanceled when the map of definite location was filed, but neither final proof nor payment had been made. The stipulation of facts is silent as to whether Dougherty was residing upon this donation at the time the map of definite location of defendant's road was filed, and without such residence the claim was abandoned. Final proof or continued residence was necessary to the life of this donation. The former is negatived by the stipulation of facts, and there is no presumption in favor of the latter. *Oregon & C. R. Co. v. United States*, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012. The facts relied upon to except the particular land from the grant must be shown, and in this case they are not shown. Upon one of the parcels of land in question there were filed two pre-emption declaratory statements—one by John Morin, on October 20, 1867; and one by Wm. A. Mills, on September 15, 1868. The amended stipulation of facts as to the Morin filing is that final proof or payment was never made or tendered under the filing made. The first stipulation of facts as to this pre-emption claim was

that the declaratory statement was on file and of record, uncanceled, at the time the map of definite location was filed. From the amended stipulation of facts it must be presumed that the declaratory statement in question was canceled prior to the filing of the map—a fact which explains the later filing by Mills, so that further reference to Morin's filing is unnecessary. There are seven pre-emption and four homestead claims relied upon by the government to take the lands claimed out of the railroad grant. From the stipulation of facts it appears that in all these cases the lands claimed have been sold by the company to bona fide purchasers, and there is no claim of interest in any of the original claimants, the contention being that because of these claims the grant did not attach to the particular parcels, and that upon the subsequent abandonment of these pre-emption and homestead claims the lands covered by them reverted to the government.

It is argued for the railroad company that the lands upon which mere pre-emption filings have been made are not pre-empted lands and within the exception in the grant, and the cases of *Hutchings v. Low*, 15 Wall. 77, 21 L. Ed. 82, *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, are cited to the effect that "until payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others." The first of these cases was one where there was a settlement on unsurveyed lands in the state of California, with the intention on the part of the settler to acquire the same under the pre-emption laws of the United States. Thereafter Congress passed an act granting to the state of California a tract of land for public use, resort, and recreation, which included the land so settled upon. It was held, following the earlier case of *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, that mere occupation and improvement of any portion of the public lands, with a view to pre-emption, do not confer upon the settler any right in the land occupied as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that this power in Congress only ceases when all the preliminary acts prescribed by those acts for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. These cases are commented upon and approved in the later case of *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, where it is decided, in effect, that if a settler upon unsurveyed lands, within a specified time after the surveys are made, makes application to purchase (that is, files a declaratory statement such as is required when the surveys have preceded settlement), and performs certain other acts prescribed by law, including the payment of its price, he acquires for the first time a right of pre-emption to the land (that is, a right to purchase it in preference to others). It does not follow from what is decided in these cases that the word "pre-empted," as used in excepting lands from railroad or other grants, is necessarily restricted to such lands as have been paid for. The cases cited did not involve the definition to be given the word "pre-empted." The question decided was that mere occupation and improvement of unsurveyed lands with a view to pre-

emption conferred upon the settler no right as against the United States, and did not impair the power of Congress to dispose of the land settled upon in any way it might deem proper. The question to be decided in this case is whether the exception out of the grant in question of "pre-empted" lands includes lands upon which pre-emption filings have been made and accepted by the land office in compliance with the laws relating to pre-emptions.

The defendant refers to the several acts granting lands to the Union and Central Pacific Railroad Companies, the Texas Pacific, Northern Pacific, Atlantic and Southern Pacific, and the Oregon Central Railroad Company, as to which it has been uniformly held that lands covered by pre-emption filings were within the exceptions from the grants of "pre-emption or other claims," "pre-emption or homestead rights," and lands "to which a pre-emption or homestead claim is found attached." The difference between these exceptions and that under consideration is urged to show that lands covered by pre-emption filings were subject to the defendant's grant, and properly patented to the company. But it is a rule of statutory construction that statutes having similar objects are to be construed alike, and so the construction which has been put upon acts on similar subjects, even though the language should be different, should be referred to. *Endlich on Interpretation of Statutes*, § 52. These statutes, taken together, disclose the policy of the government in making exceptions of lands from railroad grants. It is against sound policy that the settlement and consequent development of the country should be retarded by withholding large portions of the public lands from settlement under the pre-emption and homestead laws until such time as it can be known by the location of the lines of the aided railroads whether the grants will attach to them. The public inconvenience that would result from the withdrawal of all the alternate odd-numbered sections of public land to await the location of a land grant railroad is illustrated in the present case. This grant was made in 1866. The first, second, and third sections of the road were located in the years 1870-1871. The maps of location of the remaining seven sections were filed in 1882, 1883, and 1884. Prior to the location of the line of road the limits of the grant could not, of course, be known, and upon the construction of the statute contended for by the defendant, an intended pre-emptor, who had settled upon and improved his pre-emption claim, as he is required to do before he can file his declaratory statement, would run the risk of being cut off in his right notwithstanding the utmost diligence on his part. Such a result would be contrary to the established policy of the government, and would result in a sacrifice of public interests. The considerations for this particular grant and the conditions relating to it were the same as in the other grants, and I am of the opinion that Congress intended at least the same exception in respect to pre-emption and homestead rights and claims in this case that it did in the others. I therefore interpret the word "pre-empted," used to designate land excepted from the grant in the act of July 25, 1866, c. 242, 14 Stat. 239, to mean lands upon which pre-emption filings were made and accepted in conformity with law. The stipulation of facts does not state that these pre-emption claimants had settled upon and improved the lands covered by the pre-emption claims;

but this must be presumed, inasmuch as the law does not permit the filing of declaratory notices without proof of such settlements and improvements.

The grant excepts lands occupied by "homestead settlers." It does not appear that the homestead claims relied upon were those of settlers, and there is no exception in terms in favor of homestead claimants not settlers. I assume that this exception was intended to provide for persons who had settled upon the public lands intending to enter the same as homesteads, but had not made the showing and application before the local land office and the payment necessary to give them a right under the homestead laws. The later act of June 10, 1872, c. 424, § 3, 17 Stat. 381, Rev. St. § 2315 [U. S. Comp. St. 1901, p. 1421], provides for settlers of this class. It does not follow that Congress intended to grant the lands of homesteaders, not settlers, who had fully complied with the law. Settlement is not a prerequisite to a homestead filing. A person qualified to become a homesteader is permitted to make his homestead application to the register of the local land office upon making the prescribed affidavit, and upon payment of a fee of \$5 when the entry is of not more than 80 acres, and on payment of \$10 when the entry is for more than 80 acres. When the offer thus made has been accepted by the filing of the required affidavit and the homestead application and by the payment of the fee provided for, the applicant has acquired a vested right. The lands covered by the homestead application are "disposed of" within the exception in the grant. But, whether within that exception or not, such lands are not subject to disposition by Congress in violation of the obligation which the government has assumed to issue the patent to which the homesteader is "entitled" upon proof of the subsequent residence and cultivation required by law.

Two of the homestead applications in the case were made after the map of definite location was filed in the office of the Secretary of the Interior, and before approval by that office. The exception in the grant to the Northern Pacific Railroad Company was of lands not reserved, etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office." In the grant to the defendant company the exception is with reference to the time when the company "shall file in the office of the Secretary of the Interior a map of the survey of said railroad," at which time it is provided that "the Secretary of the Interior shall withdraw from sale public lands herein granted," etc. The Supreme Court, construing the former of these grants, held that no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. *N. P. R. R. Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139; *U. S. v. O. & C. Railroad Co.*, 176 U. S. 44, 20 Sup. Ct. 261, 44 L. Ed. 358. There is nothing to distinguish the two grants so far as the effect that is to be given to the filing of the map of location is concerned. The construction that requires acceptance of the location as filed applies with equal force in each case. The grant therefore did not attach to the lands upon which homestead applications were made between the filing of the map of definite location and its approval by the Secretary of the Interior.



The act of March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], provided for the cancellation of patents wrongfully issued to railroad companies, for the issue of new patents to innocent purchasers, and for the recovery from such companies of the government price for the lands so patented and sold. I conclude, contrary to the contention of the defendant, that the United States, under this act, could, after cancellation of the erroneous patent, also recover from the companies the value of the land in question, since the cancellation provided for was not to remedy the wrong done to the United States, but was a step in a proceeding adopted to protect innocent purchasers from the consequences of the companies' wrongful acts. To the same effect is the act of 1896. Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]. The confirmation of title in the good-faith purchasers is intended to right the wrongs done such purchasers at the cost of the companies responsible therefor to the extent of the government price of the lands surrendered by the United States for that purpose. It does not ratify the wrong done to the United States, but provides relief for the innocent purchaser against its consequences at the cost of the wrongdoer. These companies will not be heard in a court of equity to say: "We did not agree to pay for these lands. We took them and sold them without right. Your remedy is against our innocent grantees to get back what we had no right to convey. You cannot ratify their title without condoning our wrong." This construction put upon the act of 1896 does not give it a retroactive effect. The act does not create a liability, but provides a means of enforcing one already existing.

As to the contention that the case is not one of equitable cognizance, it is enough to say that suits for cancellation are of equitable cognizance, and equity, having taken jurisdiction for such purpose, may go on, and grant the relief of pecuniary compensation, if the facts disclosed in the trial should require it. But, without this, the suit is expressly authorized by the act of 1887, as amended by implication of the act of 1896.

The United States is entitled to recover the minimum government price for the lands covered by the pre-emption and homestead applications named in the bill of complaint, and such will be the decree.

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### IN re BOURLIER CORNICE & ROOFING CO.

(District Court, W. D. Kentucky. January 3, 1905.)

#### 1. BANKRUPTCY—EXPENDITURES—COSTS OF ADMINISTRATION.

Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable, are not "costs of administration," within Bankr. Act July 1, 1898, c. 541, §§ 62, 64 (30 Stat. 562, 563 [U. S. Comp. St. 1901, pp. 3446, 3447]), requiring such costs to be paid out of the estate in which they are incurred as preferred claims.

#### 2. SAME—LANDLORD'S LIEN—PRESERVATION.

Where property belonging to a bankrupt more than sufficient to pay a landlord's lien for unpaid rent thereon was sold under an agreement with the trustee that the lien should be transferred to the fund arising from

the sale, the lien was preserved, and attached to such fund for the benefit of the landlord.

**3. SAME—BANKRUPT'S BUSINESS—CONTINUANCE—EXPENDITURES—LIEN CLAIMS—PRIORITY.**

A bankrupt's receiver and trustee were empowered to continue the bankrupt's business for the benefit of general creditors, as authorized by Bankr. Act July 1, 1898, c. 541, § 2, cl. 5 (30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]), by a referee's order providing that the trustee should have a first lien on all the bankrupt's property for what he might advance for expenditures in so doing. The trustee continued the business, and in so doing made expenditures in addition to using a fund derived from other assets subject to a landlord's lien, and on completion of the contract received a fund therefrom which was subject to a mechanic's lien. *Held* that, neither of the lien creditors having consented to such expenditures or to the continuance of the business, their claims were payable from the fund derived from the contract prior to the claim of the trustee for additional expenditures.

**In Bankruptcy.**

A. G. Ronald, for G. W. Ronald.

John Marshall and A. S. Brandeis, for W. R. Root, administrator.

W. W. Watts and J. G. Sachs, for trustee.

EVANS, District Judge. Certain creditors of the Bourlier Cornice & Roofing Company, on the 27th day of May, 1902, filed their petition praying, upon grounds stated therein, that the debtor might be adjudicated a bankrupt. On May 28, 1902, the following order was made by the court in that proceeding:

"Came the Columbus Slate Company, Robert Douglass, and Francis L. Minton, trustees of the estate of R. G. Dun, and carrying on the business of R. G. Dun & Co., and the Louisville Tin & Stove Company, petitioning creditors, and file their petition herein, seeking the appointment of a receiver to take charge of the assets of this estate and preserve the same, and to provide for the fulfillment of certain contracts involved in this estate, and filed the affidavits of Al. Bourlier, E. C. Hamsley, Charles Hamsley, and Emile B. Bourlier in support thereof; and thereupon the said petition was set for hearing for Thursday, May 29, 1902, at 10 o'clock a. m."

On the next day, May 29th, in view of the well-known reluctance of this court to appoint receivers, unless, in the language of the bankrupt act, it should be "absolutely" necessary, a very strong representation was made to it by the applying creditors as to numerous uncompleted contracts which the debtor was endeavoring to execute, and the strong and confident expectation of those interested that those contracts would certainly yield a large profit, and in this way be very beneficial to the general creditors. The court was so far convinced that, in its order that day made after filing the consent of the debtor to be adjudicated a bankrupt as prayed for, and after making the adjudication accordingly, it also adjudged as follows:

"This cause coming on to be heard upon the petition of the Columbus Slate Company, Robert D. Douglass, and Francis L. Minton, trustees of the estate of R. G. Dun, and carrying on the business as R. G. Dun & Co., and the Louisville Tin & Stove Company, petitioning creditors herein for the appointment of a receiver herein, and the bankrupt having filed in court a consent in writing to an immediate adjudication and order of reference herein, and divers creditors having joined in said application for such appointment of such receiver, and the court being fully advised thereof, it is

now ordered that said motion to appoint a receiver herein be, and the same is hereby, sustained. It is therefore ordered that George L. Martin, of Louisville, Kentucky, be, and he is hereby, appointed receiver of the estate herein, to take charge of, preserve, and hold the property of the bankrupt, the Bourlier Cornice & Roofing Company, to insure the same in a reasonable sum, and in so far as he can to continue the work under the contracts involved in this estate, and to use such material and property herein as may be proper to use therein, and such receiver shall continue in office until the election of a trustee herein. Said receiver is further authorized and empowered to collect, receive, and receipt for any and all moneys that may be due or owing to the said bankrupt, and he shall make a report of his acts and doings herein, and report to the court from time to time as said work progresses. Before entering upon his duties as receiver herein he shall execute bond to the United States of America in the sum of \$5,000 for the faithful performance of his duties herein. And thereupon came the said George L. Martin, as such receiver, with the Bankers' Surety Company of Cleveland, Ohio, as surety, and executed such bond, and said bond is now hereby approved, and the clerk of this court is ordered and directed to file the same in the record of this cause."

This phase of the case in none of its bearings was ever again brought to the attention of the court, nor did the judge make any order upon it until the pending petitions for review were argued. Although not so stated by the referee in his certificate, it will be observed that in the order of May 29, 1902, there was inserted, in accordance with the positive directions of the court, the express provision that "such receiver shall continue in office until the election of a trustee herein." As certified by the referee, a trustee was appointed by the creditors on the 25th day of June, 1902. The receivership expired on that day eo instanti the appointment of the trustee, and while some hundreds of dollars were paid out by the receiver as indicated by his reports, it appears that very little was done by the receiver, as such, in the way of carrying out any of the running contracts. So that so far as the receivership was concerned it seems to cut little figure in the questions raised on the pending petitions for review. It appears from the original certificate and from the amended certificate of the referee filed herein pursuant to the order entered, pending the consideration of the petitions for review, on the 15th day of December, 1904, that the next day after the appointment of the trustee (who happened to be the same person as the receiver) the trustee applied to the referee for orders to be allowed to continue the execution of the contracts, it being hoped, expected, and represented by him that profits could be earned for the benefit of the general creditors. The referee, at a meeting duly called, yielded to the views of the trustee, and, no creditor objecting, made orders accordingly, and in the course of the order on the subject appears to have provided that the trustee should have a "first lien" on all the bankrupt's property for what he might advance for expenditures in executing those orders. Instead of profits, however, large losses resulted from the effort.

There was nearly \$3,000 worth of property on the premises leased by the bankrupt from Dr. G. W. Ronald. This was sold, and by consent and agreement of parties the landlord's lien for about \$350, balance due for rent, was transferred to the fund arising from the sale. Other assets added to this, when all were sold, yielded a fund of about \$3,350, which long ago came in cash into the hands of the trustee. Without paying the rent, the entire fund appears to have been exhausted by the

trustee in his operations. The claim of Dr. Ronald had been proved as a secured debt, and under those circumstances he had no right to vote at the general creditors' meeting, and in fact he took no part therein nor in those proceedings by which the trustee was authorized to execute the contracts of the bankrupt.

G. R. Root had a contract to furnish the slate needed under one of the contracts of the bankrupt with the Louisville Water Company, and had done so, and, he having died, his administrator claimed, as against the water company as well as the bankrupt, a mechanic's lien for about \$1,400, which I may here say could properly work itself out through the indebtedness of the water company to the bankrupt of about \$1,700. I agree with the referee that Root had and has a valid mechanic's lien. He is therefore entitled to be paid out of the avails of that indebtedness, unless he has done, or the referee and the trustee have done, something to deprive him of that right in favor of the trustee. Upon one occasion a question was brought up to the judge upon a petition for a review as to whether Root should be made a party defendant to this proceeding. It was a simple question, and as he claimed an interest in a fund also claimed by the trustee in right of the bankrupt, I found no difficulty in holding under section 2, cl. 6, of the bankruptcy act of July 1, 1898, c. 541 (30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]), that he was a proper party, and should be made a defendant; but that was the extent of the ruling. Root, however, brought suit against the Louisville Water Company in the state court for the enforcement of his lien on the property of that company, and preferred not to file any proof of debt, either secured or unsecured, in this proceeding. But after being made a party he came in by petition, setting forth his claim to a lien upon the money due from the water company, that company having also answered admitting its indebtedness, and expressing its willingness to pay the money in any way that would be safe and give it proper protection. On hearing the contest between these parties, the referee adjudged that the trustee should be repaid the advances he had made in executing the bankrupt's contracts before either Ronald or Root could be paid at all, and they have filed the pending petitions for reviewing that ruling.

I have no doubt that Dr. Ronald had and was entitled to a lien as landlord for the balance due him for the rent of the premises occupied by the bankrupt, nor any doubt that his lien was transferred to the money derived from the sale of the personalty on the premises pursuant to the agreement referred to, and of which agreement the trustee had full knowledge, inasmuch as he was a party to it. It must be apparent that Dr. Ronald's claim was secured many times over by the personalty sold, and it is matter of some surprise that he was not paid out of the proceeds. It is palpable that he was entitled to have his money paid promptly, and equally palpable that the trustee should not have spent it for the sole benefit of the general creditors, and in efforts to make a profit for them. In this latter question Dr. Ronald could not have had any interest, and his rights should not have been put in jeopardy.

I am entirely satisfied that Root did not consent to any of the orders made by the referee regarding the carrying out of the contracts referred to, nor in any way participate in procuring them. When those orders

were made he was not before the court, and was at last made a party over his protest. Root is therefore not estopped from asserting his superior right to the fund not yet in the hands of the trustee, but upon which fund Root's lien rests. So that the real contest is between Root and Ronald, claiming under their respective liens on one side, and the trustee, claiming the first lien upon the water company fund under the referee's orders on the other. Hardship must come upon one or the other of these defendants, and I am to decide which of them shall bear it. I find it a most unpleasant duty. Root has a lien beyond question, and so had Ronald. Each of those liens was based upon a clear legal right, which was perfect before any claim of the trustee could possibly have arisen. Neither Root nor Ronald had any interest in the effort of the trustee to make profits for the general creditors. On the other hand, Martin, the trustee, under the directions of the referee, and under the referee's order of June 26, 1904, which purported to give him a "first lien," expended the money he seeks to have repaid out of the fund yet to come from the water company. Such repayment, however, is sought not to the prejudice of those in whose interest the trustee was working, viz., the general creditors, but of those whose interests he was in fact destroying, viz., the lien creditors. Whenever the money is paid in by the water company, it will come charged with Root's mechanic's lien, and the water company when paying it should be cleared from all liability respecting it. Ronald never had a lien on this fund. His lien was on the property on the premises, and was, by agreement between him and the trustee, transferred to the proceeds of the sale of that property. That fund was spent by the trustee in despite of that agreement, and the trustee probably on his bond is liable for it. It is therefore proper and equitable to pay it out of the fund to come from the water company before the trustee gets any of that fund in payment of his expenditures.

It should not be forgotten that any effort by the general creditors or by the trustee in their behalf to make profits by continuing to execute the outstanding contracts of the bankrupt was exerted solely in the interest of the general creditors. The secured creditors, to whom this was immaterial, relying upon their liens, had no interest in the venture of the trustee undertaken for the benefit of the general creditors, and without their express consent the lienors should not be regarded as having put to hazard their interests in the bankrupt's assets—a hazard for incurring which they received no consideration. True, section 2, cl. 5, Bankr. Act (30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]), as it was in force in June, 1902, gave the court power to authorize a trustee to conduct, for a limited period, the business of the bankrupt; but I am much inclined to think that a referee should never permit a procedure for the carrying into effect of the unexecuted contracts of a bankrupt, to be commenced upon the initiative of the trustee. Much abuse of the power might be avoided and temptation for the trustee removed by putting that burden on the creditors. Such authorization should generally be made upon the application of some or all of the general creditors. It should never be made if carrying it into full effect would be at the expense of secured creditors who have no interest in the question and who make no request for such authority. Indeed,

the claims of secured creditors should, if possible, be fully paid or provided for before the trustee or the general creditors are permitted, except in a very small way, to embark in any venture of that sort. Of course, after the secured creditors are paid, the general creditors are in practical control of the estate, and, if willing to take risks, may be indulged by the referee in proper instances, for they alone are concerned. But whether these general views are sound or not as to the proper course to be pursued by the referee in such cases, another course was in fact pursued here, though with unfortunate results. I think it was the duty of the trustee, under the circumstances disclosed in this case, to have clearly brought before the referee the fact that his expenditures were trenching upon the fund upon which others claimed liens, and to have sought specific instructions in that contingency, even to the extent of bringing the question before the judge if necessary. I think his not doing this, but going on at a loss after expending everything on hand, was, to say the least, improvident and greatly to his disadvantage in the present contingency. However this may be, the referee thought and adjudged that the trustee's claim for advances made under the referee's order were not only entitled thereunder to be a "first lien" on the fund in the water company's hands, but that these advances were parts of the "costs of administration," and to be allowed before the payment even of secured claims. I think, in the first place, that neither Ronald nor Root was in any wise bound by the order of the referee giving the trustee a "first lien" for advances. Ronald and Root were not parties to such of the proceedings as resulted in that order, nor did it concern either of them. As I find in the statute no provision authorizing it, I doubt the power and jurisdiction of the referee to make such an order, so far, at least, as it may affect the rights of Root and Ronald; for, if the trustee has a right to priority of payment as against them, it is not upon the ground that the referee could give or validly create a first lien on the assets by his order, but because the statute gives the right of priority, if it exists at all, upon the ground that the trustee's expenditures in the premises were part of the "costs of administration." A careful consideration, however, of the bankruptcy act, especially sections 62, 64, 30 Stat. 562, 563 [U. S. Comp. St. 1901, pp. 3446, 3447], has led me to a conclusion at variance with that of the learned referee upon this phase of the case. It does not at all seem to me that expenditures made at the instance either of the general creditors or of the trustee in their behalf to do what was done for their sole benefit in this instance are such "costs of administration" as were in the contemplation of Congress when it used that phrase in the act. Such expenditures occur in a special and abnormal case, which could hardly have been within such contemplation. The phrase has a much more restricted signification. See sections 40, 48, 51, 52 (30 Stat. 556, 557, 558, 559 [U. S. Comp. St. 1901, pp. 3436, 3439, 3440, 3441]). I go further, and doubt whether the expenses of continuing the business of the bankrupt for a limited period, under section 2, cl. 5, would take priority over valid liens already existing and fixed, such as were Ronald's and Root's. Section 67, cl. 3. In my judgment valid liens, properly acquired and fixed, could not be displaced by the trustee or the general creditors in any such subsequent proceeding

for the sole benefit of the latter. The liens, both of Ronald and of Root, being clearly fixed by previous events, and being well known to the trustee, it was the duty of the latter to remember them, and in expending the assets of the bankrupt to stop when those assets were exhausted up to the point where it took all of the remainder to satisfy those liens. The failure of the trustee to do this, and his expenditure of those parts of the assets which he knew were claimed to be fairly subject to the other liens, in my judgment reduced his equity far below those of Ronald and Root, and he must consequently suffer for his improvidence. The liens of Ronald and Root were prior in time certainly, and I think also prior in right. Without the improvidence referred to the trustee's outlays would not have exceeded the money in his hands belonging to the general creditors. He would have stopped when that was exhausted. Without that improvidence he would not have absorbed the money belonging in equity to Ronald and Root, respectively, and of whose claims he was fully advised. Where one of two innocent persons must suffer, he should do it who created the necessity for either to do so.

It seems to me upon these considerations, which might be amplified, that in this somewhat distressing case the petitions for review filed by G. W. Ronald and G. R. Root should be sustained, and the judgment and orders in the premises made by the referee should be reversed.

Upon the return of the case to the referee he should be directed to cause an order of distribution to be made in a proper procedure, in which the trustee should be required to pay to G. W. Ronald the amount of his claim; and he should furthermore direct the trustee, upon the coming in of the money due from the Louisville Water Company, first to pay thereout the claim of G. R. Root's administration, and out of what remains to reimburse himself, if possible, for the amount paid to G. W. Ronald. The failure of the trustee to pay the secured debt of Ronald, and his expenditure of the money that was, under his own agreement, applicable thereto, makes this ruling necessary, though he should, for this payment, be reimbursed, if the fund is sufficient, out of the money to be paid by the Louisville Water Company, subject, however, to the previous payment out of it of the debt due Root. A judgment may be prepared accordingly, in which should be recited the fact that this case, upon the petitions for a review, was heard upon what is contained in the original certificate of the referee, the amended certificate of the referee, and the facts as stated in this opinion.

## CRANDALL v. COATS et al.

(District Court, N. D. Iowa, C. D. January 7, 1905.)

No. 816.

## 1. BANKRUPTCY—PREFERENCE—INSOLVENCY—EVIDENCE.

In an action by a bankrupt's trustee to recover an alleged preference, evidence *held* to establish that the bankrupt was insolvent at the time the conveyance constituting the alleged preference was made.

## 2. SAME—CREDITORS—SURETIES.

Defendants, who were sureties on various obligations of a bankrupt, held a meeting with him, at which it was agreed that he should convey certain real estate to them at a certain price, in consideration of which they agreed to pay the indebtedness on which they were liable as sureties, and assume liens against the property. This agreement was carried out; the sureties executing new obligations to the creditors, as principals, and surrendering the old notes, etc., to the bankrupt. *Held*, that such sureties were creditors of the bankrupt, and that the conveyance constituted a preference, within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

## 3. SAME—INSOLVENCY—NOTICE.

In an action by a trustee in bankruptcy to recover an alleged preference, evidence *held* sufficient to charge the preferred creditors with notice of the bankrupt's insolvency at the time the conveyance was executed.

## 4. SAME—LIENS—PAYMENT—REIMBURSEMENT.

Where certain of a bankrupt's creditors, who had been given a voidable preference, by a conveyance of real estate, which was set aside, paid certain incumbrances thereon, they were entitled to be reimbursed, to the extent of such payment, from the proceeds of the property.

In Equity. Suit in equity by a trustee in bankruptcy to recover from defendants a preference alleged to have been given them by the bankrupt. Submitted on final hearing.

C. B. Reinhart was adjudged bankrupt by this court August 25, 1903, upon a creditors' petition filed against him July 7th, previous, and the complainant has been duly appointed trustee of his estate. June 8, 1903, the bankrupt conveyed to the defendants a parcel of real estate, the brick store building thereon, and the fixtures and iron safe in said building, in the village of Farnhamville, Calhoun county, Iowa, for the agreed price of \$5,000. The bankrupt was a merchant, and also did some business as a private banker. The complainant alleges that this property was so conveyed by Reinhart to the defendants while he was insolvent, in payment of debts owing by him to them, with intent to prefer them over his other creditors, and that defendants, when such conveyance was made, had reasonable cause to believe that such preference was intended thereby; and he seeks to recover such property from the defendants because of such preference. The defendants admit that the property was conveyed to them by Reinhart at the time and as alleged by complainant, but deny (1) that Reinhart was insolvent at the time of such conveyance; (2) that they were his creditors at such time; and (3) that they either knew or had reasonable cause to believe that a preference was intended by such conveyance.

Dunshee & Dorn, Boardman, Aldrich & Lawrence, and Frick & Crandall, for complainant.

Kenyon & O'Connor and M. R. McCrary, for defendants.

REED, District Judge. 1. The defendants admit that the bankrupt was insolvent July 7, 1903, when the petition in bankruptcy was filed against him. Without reviewing the testimony in detail, it must suffice



to say that a careful consideration of it shows that on June 8th, preceding, his assets and liabilities were substantially as follows:

Liabilities.	
Mercantile debts, more than.....	\$ 5,600
Debts paid by the property conveyed to defendants, at least.....	5,000
	<hr/> \$10,600

Whether or not this includes about \$130 of taxes owing by him is not certain. If it does not, then this amount should be added.

Assets.	
Building lot and safe conveyed to defendants, at the highest value fixed by any of the witnesses.....	\$5,000
Stock of merchandise, appraised by the appraisers in bankruptcy....	2,067
Accounts collected by the trustee.....	130
	<hr/> \$7,197

The trustee, after diligent effort, was unable to sell the goods for more than \$1,200, and that is the amount he realized therefrom. He knows of no other property of the bankrupt, and none had come to his custody. The value of the building and lot, as fixed by the several witnesses, does not exceed \$4,500. Upon a fair estimate of values, the liabilities of the bankrupt on June 8, 1903, exceeded the fair value of his property, including that conveyed to the defendants, by about \$4,500. That Reinhart was insolvent on June 8, 1903, admits of no doubt under the evidence.

2. The contention of the defendants that they were not creditors of the bankrupt at the time the property was conveyed to them is based upon the following named facts: Prior to June 6th the bankrupt had borrowed money from different persons, and given his promissory notes therefor, which were indorsed or signed by some of the defendants, at his request, as sureties for him. He was also liable as principal upon a guardian's bond, upon which he was indebted, as then estimated, at about \$350, and which bond the defendant Coats had signed as surety for him. The largest of the notes signed or indorsed by any of the defendants was for \$1,500, dated May 20, 1903. The other notes and guardian's bond had been made before. The property was incumbered by a mortgage and some judgment liens. Early in June, 1903, some of the defendants had negotiations with Reinhart about buying the building and lot, and he then told them he would have to sell the property in order to pay his debts. June 6th all of the defendants and Reinhart met at the building in Farnhamville, and it was finally arranged that Reinhart would convey the property to them for \$5,000, and, if the defendants would take up the notes or pay the indebtedness which they had indorsed or become liable for as surety for him, such indebtedness might be turned in as a part of the purchase price of the property. In pursuance of this arrangement, the parties again met on Monday June 8, 1903, and Reinhart conveyed the property to the defendants, and they assumed the mortgage and judgment liens thereon, and turned over to Reinhart the notes which the defendants had respectively indorsed or signed as sureties for him. In addition to this, Coats turned in a certificate or other evidence of money which he had previously deposited

with Reinhart as a banker. The amount due from Reinhart as guardian, upon whose bond Coats was surety, as above stated, was also turned in. The different amounts making up the \$5,000 as the consideration of the conveyance for the property are as follows:

Note to Kruckman, signed by the defendants Coats and Schneider, as sureties .....	\$1,500
Note to Gross, signed by the defendant Schneider as surety.....	500
Note to Campbell, signed by the defendant Kent as surety.....	600
Due from Reinhart as guardian—Coats surety—estimated.....	350
Mortgage upon the building.....	1,500
Judgment liens, about.....	140
Bank deposit owing by Reinhart to Coats.....	320
	<hr/>
	\$4,910

Interest upon these different amounts made up the \$5,000 which was the consideration paid for the building.

It is contended on behalf of defendants that, as they were only sureties or indorsers for Reinhart at the time of this transaction, they were not his creditors, within the meaning of the bankruptcy law, and cannot, therefore, be held to have received a preference by the transfer to them of this property; that it is only creditors who can receive a preference under the bankruptcy law. This question must be considered as settled, so far as this court is concerned, against the contention of the defendants, by the decision of the Court of Appeals of this Circuit in *Swarts v. Siegel*, 117 Fed. 13, 54 C. C. A. 399. It is there held, upon full consideration, that one who signs or indorses as surety for another is a creditor of such other, within the meaning of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], and, as such, may be held to have received a preference from the principal debtor in the event of the bankruptcy of such debtor, and the existence of the other conditions which are declared by the act to constitute a preference. See, also, *Livingstone v. Heineman*, 120 Fed. 787, 57 C. C. A. 154. But if this were not so held, the evidence in this case clearly shows that these defendants on June 6, 1903, took up, from the creditors holding them, each of the notes which they had signed as sureties for the bankrupt, by giving their own notes to such creditors in lieu of the Reinhart notes, each of which new notes was signed by all the defendants as principals. By so paying or assuming the debt of Reinhart, for which he was contingently liable to them as his sureties, they became the principal creditors of Reinhart on June 6, 1903, and his notes which they had taken up and then held against him were turned over to Reinhart on June 8th as payment pro tanto for the property conveyed by him to these defendants on that date. The amount due from Reinhart upon the guardian's bond had not been paid at the time of this transaction, but it has since been paid by Mr. Coats; and it was agreed between the defendants and Reinhart that this amount should be paid as a part of the purchase price of the building and the \$320 bank deposit, or loan whichever it may be called, was a direct indebtedness from the bankrupt to the defendant Coats. The conclusion is unavoidable, upon either view of the case, that each of the defendants was a creditor of Reinhart at the time this property was conveyed by him to them in payment of such indebtedness.

3. Did the defendants have reasonable cause to believe that a preference was intended by the conveyance of this property to them? It may be conceded that mere suspicion of a creditor that his debtor is insolvent is not sufficient to avoid a payment, or transfer of property as such, by the debtor to the creditor. In *re Goodhile* (D. C.) 130 Fed. 471, and cases cited. The property conveyed to these defendants was practically all of the bankrupt's property, except his stock of merchandise, which was appraised, as we have seen, at \$2,067. A day or so after this transaction Reinhart went to Wisconsin, and, after the petition in bankruptcy was filed, his family followed him, and he has never returned to Farnhamville. The defendants were all near neighbors of the bankrupt, were upon friendly terms with him, and the defendant Coats had previously loaned him money from time to time, and all had indorsed his paper or signed as surety for him to others at different times, as above stated. The last of such paper was dated May 20, 1903, and is the \$1,500 note to Kruckman, signed by Coats and Schneider as sureties. About the time this note was given, or shortly after, the bankrupt began to offer the building for sale, and the defendants began to talk with him about buying it. In regard to one or more of these conversations the bankrupt says:

"Now, the way we came to make the bargain was— One Sunday we were sitting there in the store, and we made the bargain, but we didn't make the papers. Q. Who first proposed the sale and purchase on that Sunday? A. Well, we always kind of hung together on Sunday. The way it come about— I had been figuring with Kruckman to sell to him, and he tried to make arrangements. \* \* \* So those fellows and I was kind of joking, and they made me an offer, and that is the way we made the deal. I told them I wanted to sell, because I was hard up and needed the money; that bills were coming due, and I could make no collections, and had to sell. Q. What did you tell them? A. I told them, if I could sell the property and get some money of my brother, it would let me out, if good times would set in. About May 20, 1903, I gave a note to Kruckman for \$1,500, with Coats and Kent [Schneider] as sureties. It seems to me it was to run a shorter time than a year. I can't say whether it was due when I made the sale, or not. It was agreed between us when we made the deal that they should take out of the purchase price the amount represented by the notes of \$1,500, \$600, and \$500, and when we made the deal they were taken out.

"Cross-examination: I didn't allow those notes which Coats, Kent, and Schneider indorsed for me to be taken out of the proceeds of the sale with any intention of making them preferred creditors. I didn't intend to discontinue business. I intended to pay all of my creditors."

None of the defendants deny that Reinhart told them his financial condition as testified to by the latter. In addition to this, Mr. McCrary, who acted for the defendants in examining the title to the property and drawing the deed, and who was present when the deal was closed, testified that at such time—

"I mentioned the bankruptcy law, and one of them spoke up and said that he always did a cash business, and he didn't think there was any danger. I told them about the Bowen case."

The information so imparted to these defendants cannot be regarded as mere suspicion. It was direct and positive that Mr. Reinhart was hard up, and could not pay his debts unless he could sell his property, borrow some money, and good times would set in. These are facts sufficient to put any prudent person upon inquiry as to the financial

condition of Mr. Reinhart; yet these defendants all say they made no inquiry of him as to what other property he had, how much or to whom he was owing, what for, or when it was due; neither did they make, or have made, any examination of his books, to ascertain such condition. Had they so inquired of Mr. Reinhart, or made investigation of his books or otherwise, which was clearly suggested by the information they had, there can be no doubt that they would have discovered that he was hopelessly insolvent. They were required to exercise ordinary prudence to investigate and ascertain whether or not Mr. Reinhart was solvent, and could convey this property to them in satisfaction or payment of his debts without violating the bankruptcy law. Having failed to investigate when so put upon inquiry, they are chargeable with all the knowledge it is reasonable to suppose they would have acquired if they had performed their duty in this respect. All of these parties must be held to have intended the necessary consequences of their acts—the bankrupt to give and the defendants to receive the preference which the conveyance of this property constituted. Such is the rule many times declared by the Supreme Court. In *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, it is said:

"It is the general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy. \* \* \* The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, or even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had, when such a state of facts was brought to their notice in respect to the affairs and pecuniary conditions of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

In *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280, the court says:

"But if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditors securing the preference as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and, if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty."

*Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130, and *Bank v. Cook*, 95 U. S. 343, 24 L. Ed. 412, are to the same effect.

It is plain, under the evidence, that these defendants either knew that Reinhart was insolvent at the time of this transaction, or that they purposely refrained from inquiring or investigating as to his financial con-

dition to avoid such knowledge, and that they took the conveyance of this property with the specific intent of securing for themselves a preference over the mercantile creditors of this bankrupt. The transaction is clearly within the provisions of the bankruptcy law, and cannot be sustained.

The evidence shows that the property was conveyed to the defendants in equal shares, and that they were to pay a mortgage of \$1,500, and other liens then upon the property, all of which were existing liens more than four months prior to the filing of the petition in bankruptcy. If the defendants have paid these liens, or any of them, the property has been relieved thereof to the extent of such payment, and the defendants should be reimbursed by the trustee from the proceeds of the property the amount so paid by them, with interest. The amounts received by the defendants as preferences by reason of the conveyance are:

The amount of the Kruckman note.....	\$1,500 and interest
The amount of Gross note.....	500 and interest
The amount of the Campbell note.....	600 and interest
The amount of the bank debt owing to Coats.....	320
The amount due on guardian's note, estimated.....	350

The remainder of the \$5,000 paid or assumed by the defendants was prior liens upon the property. The conveyance to the defendants will therefore be set aside, and from the proceeds arising from the sale of the property the trustee will pay to the defendants such amount of prior liens upon the property as have been paid by the defendants.

Ordered accordingly.

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#### In re HARPER.

(District Court, W. D. Virginia. December 20, 1904.)

#### 1. JUDGMENTS—RES JUDICATA—FINDINGS OF MATERIAL ISSUES.

A finding of the court, within the pleadings, on a material matter, and not on a matter merely incidental or collateral to issues tendered thereby, is final and conclusive, and cannot be impeached in another proceeding.

#### 2. BANKRUPTCY—DISCHARGE—FRAUDULENT DEBTS.

The words "while acting as an officer or in any fiduciary capacity," found in section 17, cl. 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], excepting from the operation of a discharge in bankruptcy debts created by fraud, etc., while acting as an officer, etc., qualifies the words "fraud, embezzlement, misappropriation, or defalcation," and are not restricted in their scope to the limitation of the word "defalcation."

#### 3. STATUTES—CONSTRUCTION—TECHNICAL WORDS.

In enacting section 17, cl. 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], excepting from the operation of a discharge debts created by fraud, etc., while acting as an officer or in any fiduciary capacity, Congress must be presumed to have known the construction placed by the courts on the words "fiduciary capacity" as used in former bankrupt acts, and to have known that such words might be construed not to embrace officers of private corporations.

#### 4. BANKRUPTCY—DISCHARGE—FRAUDULENT DEBTS OF OFFICERS—WHO ARE OFFICERS.

The bankruptcy acts of 1841 and 1867 excepted from the operation of a discharge debts contracted in consequence of a defalcation as a "pub-

lic officer." The act of July 1, 1898, c. 541, § 17, cl. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides that the discharge shall release a bankrupt from all provable debts, except such as were created by fraud, embezzlement, or defalcation, while acting as an "officer." *Held*, that it must be presumed that the change was intentional, and, by omitting the word "public," officers of private corporations are included within the term "officer."

Herron, Gatch, Herron & James, for receiver.  
Ayers & Fulton, for bankrupt.

MCDOWELL, District Judge. On May 18, 1904, E. L. Harper was by this court adjudicated a voluntary bankrupt on a petition filed by him on that day. On the filing of a verified petition of the bankrupt alleging the pendency, in the United States Circuit Court for the Southern District of New York, of an action by George C. Rankin, receiver of the Fidelity National Bank of Cincinnati, against the bankrupt, "founded on a claim from which a discharge in bankruptcy would be a release," an order was ex parte entered on October 18, 1904, staying said action. On November 21, 1904, Rankin, receiver, filed a petition praying that the aforesaid stay order be set aside, to which the bankrupt has demurred. It is alleged in said petition that the action in New York is founded on a judgment rendered by the United States Circuit Court, Western Division of the Southern District of Ohio, in favor of said receiver against the said Harper, for moneys embezzled and misappropriated by Harper while acting in the capacity of vice president of the Fidelity National Bank. A copy of the bill of complaint filed against Harper and others in the federal court in Ohio, and a copy of the decree of that court of October 10, 1903, are filed as exhibits with the petition. The bill of complaint in the court in Ohio was filed by the then receiver of the Fidelity National Bank in 1887. The defendants therein are the directors, including Harper, who was also the vice president of the bank. The decree, which is filed as an exhibit, reads as follows:

"This cause came on for hearing at the October term, 1903, of this court, and the court thereupon find as follows:

"That, since the bringing of this suit, David Armstrong, receiver of the Fidelity National Bank, and the original plaintiff in this case, has resigned, and that George C. Rankin has been appointed such receiver by the Comptroller of the Currency, and is now acting as such, and has been made plaintiff in this case by order of this court.

"That said Edward L. Harper has been personally served with process in this case, and has filed no answer to the allegations of the bill of complaint, and is in default, and has been notified, as ordered by the court, of the setting of this cause.

"And on consideration thereof the court find that the defendant Edward L. Harper was vice president and in general charge of the affairs of the said Fidelity National Bank from its organization until its failure, and that during said time he embezzled large sums of money of the funds of said bank; that he loaned large sums of money to firms and corporations in which he was interested, without authority and contrary to law, and that the proceeds of said loans were taken by him from said bank for his personal use, and that the said firms and corporations became insolvent, and the sums so loaned were entirely lost to the bank; that he used the funds of said bank in large amounts in personal speculations, and which sums were wholly lost to the bank; that the allegations contained in the bill of complaint in reference to said several matters are true, as therein set forth. By reason of which illegal

acts of the said Harper the said bank was damaged in more than the sum of two million five hundred thousand dollars (\$2,500,000), for which sum said Harper is liable to the bank.

"It is therefore ordered, adjudged, and decreed by this court that the said plaintiff recover, for the use of said bank, of the said defendant Edward L. Harper the sum of two million five hundred thousand dollars, with interest from June 20, 1887, the date of the failure of said bank, together with the costs of suit to be taxed, and that execution issue therefor."

The bill is of great length, but only one paragraph need be now noticed. In paragraph 23 it is averred as follows:

"And complainant avers that the monies hereinbefore alleged to have been loaned the firm of Wilshire, Eckert & Co., and the individual members of said firm, and the firm of E. L. Harper & Co., and to the companies and corporations of which the said E. L. Harper was a member or principal owner, and to the said Whitely, Fassler, and Kelly, as well as the monies, drafts, and other obligations of said company, hereinbefore alleged to have been embezzled and misappropriated by the said E. L. Harper and Benjamin E. Hopkins, were to a large extent used, and lost by the said E. L. Harper and Benjamin E. Hopkins, with others, in their said speculations in wheat."

As the finding of the court is within the pleadings on a material matter, and is not on a matter merely incidental or collateral to an issue tendered by the bill, it is final and conclusive. It is therefore not open to dispute here that the judgment was rendered on a debt created by fraud, or embezzlement, or misappropriation or defalcation on the part of the bankrupt. If this debt was created while Harper was either acting as an "officer" or while he was acting in any "fiduciary capacity," within the meaning properly to be given to the language of section 17, cl. 4, of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], his discharge would not release such debt, and the order staying the action in New York should be set aside. The opinion is expressed in *Re Butts*, 120 Fed. 966, and in numerous other cases, that the words "while acting as an officer or in any fiduciary capacity" qualify only the word "defalcation," and do not qualify the words "fraud," "embezzlement," or "misappropriation." But the opinion of the Supreme Court, of November 7, 1904, in *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. —, seems to settle the question otherwise. The amendment of clause 2 of section 17 of the bankrupt act, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], made since the case of *Crawford v. Burke* arose, does not affect the question.

The bankrupt act of August 19, 1841, c. 9, § 1, 5 Stat. 440, used the following language:

"All persons whatsoever \* \* \* owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity \* \* \* shall be deemed bankrupts \* \* \* and may be so declared \* \* \*."

The act of March 2, 1867, c. 176, § 33, 14 Stat. 533, used the following language:

"That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; \* \* \*."

The act of 1898, § 17, cl. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], reads:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as \* \* \* were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

While the question has not, so far as I am advised, been decided, it seems to me that the change in phraseology from "public officer" to "officer" shows an intent to change the meaning of the law in this respect. For authority supporting this view, we need go no further back than to the language so recently used by the Supreme Court in the above-mentioned case of *Crawford v. Burke*:

"Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and the Congress would not have used such different language in section 17 from that used in section 33 of the act of March 2, 1867, c. 176, 14 Stat. 533, without thereby intending a change of meaning."

The substitution of the word "officer" for the phrase "public officer" cannot properly be considered unintentional. The exact phraseology of such legislation is of too great importance to justify such a presumption. The change of language, therefore, evidenced some change of meaning, and I have been unable to ascribe to it any other change of meaning than to include officers of private corporations. The word "officer" is clearly of broader meaning than the words "public officer." That a director and vice president of a private corporation, such as a national banking association, is an "officer" of such corporation, not only in popular language, but in the language of almost countless judicial decisions and law text-books, and the acts of Congress (see, for instance, section 1, cl. 19, Bankr. Act 1898, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3419]; sections 1783, 5207, 5208, Rev. St. [U. S. Comp. St. 1901, pp. 1213, 3496, 3497]), will not be disputed.

It is said in *Collier on Bankruptcy* (4th Ed.) p. 201:

"The term 'officer' probably means any public official who, from the nature of his duties, may be guilty of embezzlement, misappropriation, or defalcation in office. \* \* \*"

No reason for this opinion is given. The cases cited as authority for this statement are: *Morse v. Lowell*, 48 Mass. 152; *Richmond v. Brown*, 66 Me. 373; *Johnson v. Auditor*, 78 Ky. 282; *Courtney v. Beale*, 84 Va. 692, 5 S. E. 708. I have been able to see only the two latter cases, but these do not in the least support the statement in the text. In the Virginia case cited is found the following:

"Abbott defines it [defalcation] to be 'the failure of one who has received money in trust, or in a fiduciary capacity, to account and pay over as he ought,' and it particularly applies, he says, to the acts of public and corporate officers."

And a reason of some force exists for the supposition that Congress intended by the change of language to extend the exception in clause 4 of section 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428] so as to include debts created by the fraud, or embezzlement, or misappropriation or defalcation of officers of private corporations. The Supreme Court, in *Chapman v. Forsythe*, 2 How. 202, 207, 11 L. Ed. 236, limited the meaning of the expression in the act of 1841, "any other fiduciary capacity," so that it did not include a fiduciary (other than an



executor, administrator, guardian, or "special" trustee) whose trust is one implied from his contract. In *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, *Palmer v. Hussey*, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362, and *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931, arising under the act of 1867, the construction given this phrase in *Chapman v. Forsythe* is adopted as the proper construction under the act of 1867. See, also, 3 Words & Phrases, p. 2759. The exact meaning of the language "special trusts" or "technical trusts," used in *Chapman v. Forsythe* (page 207, 2 How., 11 L. Ed. 236), is not, perhaps, as clear as might be. But it seems clear that implied trusts—a term usually employed in distinction from express trusts—where the trust obligation is to be implied from the contract, are in many cases not to be held as embraced within the term "fiduciary capacity" as used in the acts of 1841 and 1867. The trust or obligation of officers of private corporations, who are given such control of the funds or credits of the corporation as to be able to commit embezzlement, misappropriation, or defalcation, is rarely or never created by the express terms of any writing. On the other hand, such trusts correspond to and satisfy the commonly accepted definition of implied trusts:

"Those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties." 2 Bouv. Dict. 754.

In drafting the act of 1898, Congress must be presumed to have known the limited meaning given by the courts to the expression "fiduciary capacity," and the employment of this often adjudicated expression indicates that it is used with the limited meaning given it under the former laws. The consequence, therefore, of again using the term "public officer" might have been to reduce the embezzlements and defalcations not excepted from discharge in bankruptcy to a minimum. The vast numbers of private corporations, the immense sums necessarily put under the control of the officers of such corporations, and the evil results of allowing dishonest officials of private corporations who have committed embezzlement, misappropriation, or defalcation to have discharges in bankruptcy from debts thus created, afford a sufficient reason for an intent on the part of Congress to forbid discharges of debts so created by such persons.

It is true that the courts may not, when called on, in cases such as this, to construe the meaning of the phrase "fiduciary capacity" as used in the act of 1898, so construe it as to exclude such officers of private corporations as was *Harper*. But even if so, this possibility does not seem to me to materially weaken the force of the reasoning above. Congress must be presumed to have known of the former adjudications, and there was, to say the least, a possibility that the courts would so construe this phrase as to exclude such officers. That this expression, as used in the act of 1898, will receive a limited construction, seems more than probable. See *Bracken v. Milner* (C. C.) 104 Fed. 522; *In re Butts* (D. C.) 120 Fed. 966, 971.

I am forced to the conclusion that the word "officer" includes an officer of a private corporation. If the bankrupt here was an "officer"

within the true intent of the present bankruptcy act, the stay order should be set aside, and the receiver left at liberty to proceed with his action in New York.

As is above suggested, it is possible that the obligation of a director and actual manager of such a corporation as a bank is so analogous to that of an administrator, executor, guardian, or technical trustee that he should be held to be one acting in a "fiduciary capacity." In 3 Thompson on Corporations, § 4009, it is said:

"The directors \* \* \* of a corporation \* \* \* occupy a fiduciary relation towards the stockholders, and are treated by courts of equity as trustees for them."

In Goodin v. Cincinnati Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95, it is said:

"A director \* \* \* is trustee for the company, and whenever he acts against its interests \* \* \* he is guilty of a breach of trust."

And in innumerable judicial decisions similar language has been employed to define the relation between a director and his corporation.

It is also to be noted in the case at bar that the debt was created, as found by the court in Ohio, by acts amounting to fraud, embezzlement, misappropriation, or defalcation. Also that the fiduciary relation—if it be proper so to term it—existed independently of and prior to the creation of the debt. See Upshur v. Briscoe, 138 U. S. 365, 378, 11 Sup. Ct. 313, 34 L. Ed. 931; and Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232. But as a sufficient reason exists for deciding the matter before us in favor of the receiver, it is not necessary to reach a conclusion on this question.

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#### CAMBERS v. FIRST NAT. BANK OF BUTTE.

(Circuit Court, D. Oregon. December 12, 1904.)

No. 2,858.

##### 1. INDEMNITY—DEPOSIT TO INDEMNIFY SURETIES—RECOVERY BY DEPOSITOR.

One who deposited a sum of money with a bank, to be held by it to indemnify certain persons from liability as sureties on injunction bonds given by him, can recover it back only by showing that such persons have been discharged from liability on the bonds, or that by some act of theirs they have forfeited their right to the indemnity; and a complaint does not state a cause of action on the former ground by an allegation that an execution issued on a judgment rendered in the action against the depositor was returned satisfied, where it also shows that the return was subsequently amended to show that the execution was not satisfied, and it is not alleged that the judgment was in fact paid, nor on the latter ground by allegations that the persons indemnified joined in a conspiracy to defeat an appeal taken by plaintiff from the judgment by causing the withdrawal of the supersedeas bond given or procured by them, where, under the law of the state, such appeal would only have been effective if taken from a subsequent order denying plaintiff's motion for a new trial, and it does not appear that he made any attempt or intended to appeal therefrom.

##### 2. SAME—ACTION TO RECOVER DEPOSIT—PARTIES.

To an action to recover money deposited by plaintiff with a bank, to be held by it to indemnify third persons against liability as sureties for plaintiff, on the ground that by their acts and conduct they have forfeited the right to such indemnity, such persons are necessary parties.

At Law. On demurrer to complaint.

Veazie & Freeman, for plaintiff.

Dolph, Mallory, Simon & Gearin, for defendant.

BELLINGER, J. The facts upon which Cambers, the plaintiff, seeks to recover in this action, are substantially these: Cambers deposited with the defendant \$10,000, to be held by the latter to indemnify Andrew J. Davis and George W. Andrews against liability upon two certain injunction bonds executed by them in behalf of Cambers, and to be used in securing a supersedeas bond on appeal from a judgment rendered against him in the action in which the injunction bonds were executed, to stay execution during the pendency of a motion for a new trial. By the laws of Montana, all questions of law involving matters of fact, the introduction of evidence, and the giving or refusal to give instructions, can only be raised by appeal from an order denying a motion for a new trial. All of the errors relied upon by Cambers in that action were connected with matters of fact, and were rulings as to the introduction of evidence and the giving and refusal to give instructions, so that all the questions relied upon to reverse the judgment had to be raised by appeal from the order denying the motion for a new trial. There was no appeal taken from this order, but prior thereto there had been an appeal from the judgment, and a supersedeas bond given, with one Oppenheimer and one O'Rourke as sureties. This bond had been procured and caused to be filed by Davis and Andrews, for whose indemnity upon the injunction bonds theretofore given the deposit in question was made. It is alleged that thereafter, and while Cambers was in Jackson county, Or., and while his appeal was being perfected, Davis and Andrews entered into a fraudulent conspiracy with the plaintiffs in the action to defeat Cambers' appeal; that by such conspiracy it was agreed that Davis and Andrews should not be liable upon the judgment appealed from, but should be released from liability thereon, and that the parties should act together to defeat the appeal; that, in furtherance of such conspiracy, the conspirators caused an action to be brought in Jackson county, Or., by the plaintiffs in the Montana judgment, for the recovery of the amount of that judgment, namely, \$12,500, and on the 5th of November, 1902, without Cambers' knowledge, and while he was in Oregon, Davis and Andrews fraudulently stipulated with the plaintiffs in the Montana judgment that the bond on appeal from that judgment should be withdrawn, and the sureties on such bond exonerated, and the stay vacated, which stipulation was filed, and an order of court procured accordingly, as to all of which Cambers was without knowledge until it was too late to file an additional undertaking on appeal, by which means his right of appeal was defeated; that, except for this fraudulent conduct, such appeal would have been perfected. Before the stay upon the judgment, an execution had been issued, which was in the sheriff's hands when the stay became operative. On about the 21st of August, 1902, the sheriff, under the direction of the plaintiffs in the Montana action, returned the execution in his hands as fully satisfied; and the clerk entered a satisfaction of the judgment upon the judgment docket of the court, as he was by law required to do. It is not alleged that this return and sat-

isfaction was procured in pursuance of the alleged conspiracy, or was subsequent thereto. It is further alleged that about November 13, 1902, and after the return day of the writ, in pursuance of the alleged conspiracy, and in accordance with a written stipulation therefor, the sheriff's return was amended so as to show that the judgment in question was not satisfied. It is alleged that this plaintiff, Cambers, was ignorant of all these proceedings, and that neither Andrews nor Davis, nor the sureties in the stay bond, have ever paid anything on account of the judgment in question; and it is alleged, presumably as a conclusion from the facts stated, that they are not legally liable to pay anything on that account. Do these facts constitute a cause of action, and are Andrews and Davis necessary parties?

The allegation that the conspiracy was entered into while Cambers was in Jackson county, Or., and "while his appeal was being perfected," must refer to the appeal from the judgment which was taken in July, 1902, on which a supersedeas bond—the only one in the case—had been given. As just stated, no appeal had been taken from the order entered on the 18th day of October following, denying the motion for a new trial, although all the questions relied upon by the plaintiff here to reverse the judgment against him were required to be presented by such an appeal. He was in Jackson county when he learned of the withdrawal of the supersedeas bond, and he alleges that there was not then remaining sufficient time within which to "prepare and file an additional undertaking on appeal from said judgment." The date at which he learned of the canceling of the bond is not stated, and the court cannot know whether the conclusion pleaded as to the insufficiency of the time within which to prepare and file a new undertaking is justified by the facts. But more important is the fact that it is not alleged that any act of the defendants prevented him from taking an appeal from the order on his motion for a new trial, or that there was any intention on his part to take such an appeal; and, without that appeal, there could be no review of the errors upon which he relied. He alleges that, at the time the written agreement between the parties was entered into, it was agreed between Davis and Andrews and himself that the three should jointly prosecute an appeal, and should use their joint efforts to procure a supersedeas bond. This was on April 19, 1902, and on July 23d a supersedeas bond was filed on the appeal from the judgment rendered. Notwithstanding the allegation as to the agreement that the three parties were to join in prosecuting an appeal, the written agreement between them, executed at the same time, and made a part of the complaint, stipulates that, if the District Court refuses to grant him a new trial, Cambers will perfect his appeal to the Supreme Court of Montana, and give a good and sufficient stay bond pending said appeal. By this written contract Andrews and Davis assume no obligation in respect to the appeal, except to permit Cambers to use the \$10,000 deposited to indemnify them against liability on the injunction bonds, in assisting him (Cambers) "in securing said supersedeas bond." The stipulations in this writing are conclusive between the parties of the facts to which they relate. It is not claimed by Cambers that he has discharged the liability for which Davis and Andrews are held upon their bonds of in-

demnity, but he alleges, as his conclusion of the legal effect of the return of satisfaction made by the sheriff, that they are discharged from such liability. But this contention cannot be sustained. If the judgment was not in fact satisfied, and the amended return conforms to the fact, then their liability is not discharged. A sheriff's return may be amended by permission of the court even after his term of office has expired, so that it will be made to speak the truth. 25 Encyclopedia of Law, p. 780. Upon the facts as they appear, Davis and Andrews are still liable upon their bond, if they have not already paid the judgment; and, while that liability continues, Cambers cannot recover the money deposited for their indemnity, unless they have done something to forfeit their right to indemnity.

How is the court to ascertain the extent of the injury and damage, if any, that has resulted to Cambers from the acts complained of? There is no presumption that the judgment appealed from would have been reversed or modified on appeal. It cannot be known whether the trial court erred in its judgment, to Cambers' prejudice; and, while the thing complained of constitutes a legal wrong, it cannot be known what, if any, loss and damage have resulted. If this court, upon a hearing relative to the matter, should conclude that the judgment against Cambers was the result of error, this would be merely a matter of the opinion of one court against that of another court of equal authority. It cannot be determined that the right of which Cambers claims to have been deprived had any value, and so there is nothing tangible which he can oppose to the right of indemnity secured to Andrews and Davis in their contract with him. Furthermore, it does not appear that the appeal in question was prevented by the alleged withdrawal of the appeal bond. The alleged wrongful act of the plaintiff in the judgment appealed from, in collusion with Andrews and Davis, whose only relation to the action was that of suretyship, could not defeat the appeal. The act complained of was unauthorized and ineffective to prejudice the defendant in the action. It is legally impossible for a respondent in an appeal to defeat the appeal by wrongfully procuring the withdrawal or cancellation of the appeal bond. But without all this, the fact already stated—that there was no appeal, nor attempted appeal, nor, so far as appears, intention to appeal, from the order denying the motion for a new trial, and that that was the only appeal upon which the errors relied upon by Cambers could be reviewed—disposes of the case.

So far as the question of parties is considered, the defendant has no interest in the controversy, and is not involved in the acts and conduct upon which plaintiff bases his right to recover in the action. The complaint is that there has been a violation of plaintiff's right by Andrews and Davis, conspiring with others not in the case. It is solely a question of right between the plaintiff, on the one side, and Andrews and Davis, on the other. They are the sole and immediate disputants.

It is argued, in effect, that Andrews and Davis are not necessary parties, because a judgment against the defendant will enable the plaintiff to get what he wants; and the inference is that any inconvenience, expense, and loss that may otherwise result to the defendant in recouping its loss from the real parties in interest should not be considered,

because these matters do not concern the plaintiff. But the law has regard to the rights of the defendant, equally with those of the plaintiff; and it does not comport with justice that the defendant, having no interest in the controversy, shall be compelled to maintain the dispute of Andrews and Davis against the plaintiff, and thereafter maintain the plaintiff's side of the same dispute against Andrews and Davis, to recoup for its expenses of litigation, and for such judgment as the plaintiff may have recovered against it. It is no answer to the plain requirements of the case to say that the defendant can have Andrews and Davis made parties. It is the plaintiff's business to bring his action against the parties whose conduct he complains of, and with whom, upon his own showing, he has the dispute to be decided.

The demurrer to the complaint is sustained.

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### NOTTAGE v. SAWMILL PHOENIX.

(Circuit Court, D. Washington, E. D. December 21, 1904.)

**1. MASTER AND SERVANT—INJURY OF SERVANT—ASSUMED RISK.**

An employé in a sawmill, who, for extra compensation, agreed to operate a saw on Sunday, which was not required by his general employment, and with knowledge that the saw was not guarded for the protection of employés as required by the statutes of the state, and that it was a dangerous implement, assumed the risk, and cannot recover for an injury, although it would not have occurred if the owner of the mill had complied with the law.

**2. SAME—USE OF UNGUARDED MACHINERY—WASHINGTON STATUTE.**

Laws Wash. 1903, p. 40, c. 37, for the protection of employés in factories and mills, requires any person or corporation operating a factory or mill where machinery is used to provide and maintain safeguards for such machinery, and prohibits the use of any machine not so guarded. It further makes its violation a criminal offense, punishable by fine or imprisonment. *Held*, that such statute is penal, enacted in the exercise of the police power of the state, and that it cannot be construed by the courts as changing the common-law rule as to assumption of risk by an employé who knowingly uses unguarded and dangerous machinery, nor as in any way affecting the rights of the parties in a civil action to recover for an injury resulting from the use of unguarded machinery.

Action at law to recover damages for a personal injury suffered by the operator of an unguarded rip saw. Tried by the court, a jury having been waived. Findings and judgment for the defendant.

Robertson, Miller & Rosenhaupt, for plaintiff.  
Danson & Huneke, for defendant.

HANFORD, District Judge. This is an action to recover damages on account of an injury to the plaintiff's hand, caused by contact with a circular rip saw, which the plaintiff was operating in the defendant's mill. The accident happened on a Sunday, the plaintiff having accepted an offer of employment on that day for extra pay.

¶ 1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

The defendant failed to comply with the requirements of a statute of this state, which makes it an imperative duty of sawmill owners to provide for the safety of their employes by having substantial safety guards attached to all circular saws of the kind which caused the injury to this plaintiff, and the court finds as a fact, proven by the evidence, that if the protection which the statute requires had been provided the accident by which the plaintiff was injured would not have happened. The defendant is convicted by the evidence of culpable negligence, which the statute makes criminal, and that negligence was the proximate cause of the severe and permanent injury for which this plaintiff claims damages.

So far the court has proceeded without difficulty in finding facts established by the evidence and reaching conclusions favorable to the plaintiff's side of the case; but, on the other hand, it is an undisputed fact in the case that the plaintiff voluntarily accepted an offer of employment as operator of this particular saw, after he had been working continuously at other employment in the same mill for a period of at least six weeks, his station being less than 10 feet distant from this rip saw, so that he had abundant opportunity to have become familiar with it, and necessarily knew that it was unguarded and lacking in the means of safety which the statute prescribes. He was not obliged to work on Sunday, under the terms of his general contract of employment, but accepted an offered opportunity to work as operator of the rip saw on a Sunday for extra compensation, knowing that the saw was unguarded and a dangerous implement.

These facts bring the case clearly within the rule of law which exempts an employer from liability for accidental injuries to employes on the ground that they are held to a degree of responsibility for their voluntary acts, and are deemed to have assumed the risk of accidental injuries happening from exposure to known or obvious dangers.

It is absolutely necessary in the conduct of human affairs for people to have liberty to engage in dangerous employments, and the law takes into consideration the circumstances surrounding each contract of employment, and fixes the relative responsibilities of the parties with reference to what may be fairly assumed to have been their own understanding and agreement. The law does not place upon employes an obligation to investigate conditions and assume the risk of accidents which may happen from dangers which might be revealed by a reasonably thorough inspection of places and appliances, but merely takes for granted that by voluntarily entering into an employment, or continuing therein, they do thereby assent to the exposure of themselves to all such dangers as they know to exist, and such as are necessarily obvious to them in view of their capacity, knowledge, and experience, each case being judged by its peculiar facts.

The principles of the common law applied to the facts in this case afford no ground for an award of damages to the plaintiff; but in his behalf it is contended that he has a right of action, and is entitled to an award of damages, by virtue of a statute of this state

providing for protection of employes in factories and mills, enacted March 6, 1903. See Laws Wash. 1903, p. 40, c. 37.

This statute provides in terms—

"That any person, corporation or association, operating a factory, mill or workshop where machinery is used, shall provide and maintain in use \* \* \* proper safeguards for all vats, pans, trimmers, cutoff, gang edgers and all other saws that can be guarded advantageously. \* \* \* If a machine, or any part thereof, is in a dangerous condition, or is not properly guarded, the use thereof is prohibited and a notice to that effect shall be attached thereto. \* \* \*"

#### Section 4:

"Any person, corporation or association who violates or omits to comply with any of the foregoing requirements or provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five nor more than one hundred dollars or by imprisonment for not less than fifteen days nor more than ninety days."

This is a penal statute, enacted by the Legislature in the exercise of the police power of the state, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employes any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law, nor does it prescribe an arbitrary rule of evidence, like the provision contained in the act of Congress making the use of automatic couplings on railroad trains compulsory, which prescribes, in effect, that trainmen shall not be deemed to have assumed the risk of injuries from their employment on trains not provided with automatic couplers. See U. S. Comp. St. 1901, vol. 3, p. 3176.

In support of the plaintiff's contention the following cases have been cited, in which it is argued that the statute must be construed to further the object intended of affording protection to employes in mills and factories, and that the law would be defeated of its purpose by exempting an employer guilty of its violation from liability to an injured employe for damages in a civil action: *Green v. Amer. Car & Foundry Co.* (Ind. Sup.) 71 N. E. 268; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Baltimore & O. S. W. R. Co. v. Cavanaugh* (Ind. App.) 71 N. E. 239; *Sipes v. Michigan Starch Co.* (Mich.) 100 N. W. 447; *Marino v. Lehmaier* (N. Y.) 66 N. E. 572, 61 L. R. A. 813; *Buehner v. Creamery Package Mfg. Co.* (Iowa) 100 N. W. 345; *Western Anthracite Coal & Coke Co. v. Beaver* (Ill.) 61 N. E. 336; *Narramore v. Cleveland C. C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; *Green v. Western American Company*, 30 Wash. 87, 70 Pac. 310.

With all due respect to the learned judges who have expressed such views on the subject, I feel constrained to reject these arguments as being unsound. The courts have no authority to extend or amplify the provisions of statutes so as to make them comprehend additional rights and remedies which the Legislature omitted to provide. A statute which is plain and free from ambiguities is



not subject to judicial construction, but must be interpreted by the courts and enforced according to the legislative intention expressed by its words. It is not true that the purpose of the statute will be defeated by a decision of a controversy between individuals involved in a civil action in accordance with the long-established rules of the common law. It may be fairly inferred that the Legislature did not intend to encourage this class of litigation, which is already stimulated to abnormal proportions by the solicitations of employment by specialists, but preferred, as a means of protecting employes in factories from the consequences of recklessness in the use of dangerous agencies, to make the unnecessary use of unguarded machinery criminal and punishable. The real intention of the Legislature is made apparent by the fact that the law does not discriminate between employers and employes. It is not a law subjecting only the owner or manager of a mill or factory or an employer of labor to the penalties prescribed, but section 4 applies generally to every "person, corporation or association who violates or omits to comply" with the requirements of the act. Section 1 provides that, if a machine is not properly guarded as required, the use thereof is prohibited; therefore an employe in a mill who operates an unguarded saw commits a prohibited act, and is a violator of the statute, and subjects himself to punishment as provided in section 4.

Another of the arguments found in the dictum of cases relied upon by the plaintiff is a rather far-fetched theory that the statute has by necessary implication abolished the common-law principle of assumption of risk by voluntary employes, because that principle is based upon an implied contract, and, since the statute makes the use of unguarded machinery criminal, any such implied contract would be an inconsistency in the law itself, in so far as the law would create a contract to do an act which the law prohibits.

In this there is a misunderstanding of the legal implication in such cases. A contract of employment is not a creation of the law. Nor is the assumption of risk of injury from the employer's wrongful neglect of his duty a burden imposed by the law. It only deals with actual conditions, and it is the actual use of dangerous agencies to which the law attaches the implied agreement on the part of an employe to make no claim against the employer for any injury which may happen, as a consequence of his voluntary exposure to known or obvious dangers. Were a man to stipulate in express terms to operate a dangerously defective machine for a definite period of time, the law would not hold him liable as a violator of a valid contract for refusing to expose himself to such danger, when no peculiar circumstances excused the employer's failure to correct the defect. Such a stipulation in an executory contract would be illegal and void because obnoxious to the natural law of self-preservation and contrary to public policy. There is no substantial difference between an agreement which is unlawful because harmful and an agreement to do an act prohibited by a statute. In either case the unlawfulness of the agreement constitutes a bar to its enforcement by judicial proceedings.

If the violation of the statute by the operation of an unguarded saw places the guilty employer in a position in which he cannot be permitted to invoke a well-established rule of law as a defense in a civil action to recover damages for an injury resulting from such violation of the statute, it is so because the law leaves willing wrongdoers to suffer the consequences of their voluntary acts, and the same rule applies with equal force as a bar to the maintenance of an action to recover damages for such an injury resulting from a violation of the statute, in the operation of a dangerous and prohibited machine, by the injured operator.

For the reasons above set forth, it is my opinion that this plaintiff has neither a common-law nor statutory right of action for the injury which he has suffered, and that a judgment must be rendered that he take nothing by this action.

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UNITED STATES v. SEABURY.

(District Court, N. D. California. December 30, 1904.)

No. 4,152.

1. ALIENS—CHINESE PERSONS—LANDING.

The transfer of a Chinese person from the vessel in which he was brought to the United States to a detention shed maintained by the owners of the vessel on their dock, where he was detained under guard pending determination of his right to enter the United States, did not constitute a "landing" of such person within Act Cong. May 6, 1882, c. 126, § 2, 22 Stat. 59, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1306], prohibiting the master of any vessel from knowingly landing or permitting to be landed any Chinese laborer, etc.

2. SAME—ESCAPE—VESSELS—LIABILITY OF MASTER.

Where a Chinese laborer escaped from the custody of the master of the vessel in which he was brought to a port of the United States, after being transferred to a detention shed pending determination of his right to enter, without the permission, connivance, knowledge, or negligence of such master, the latter was not guilty of knowingly permitting such Chinese person to land in the United States, within Act Cong. May 6, 1882, c. 126, § 2, 22 Stat. 59, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1306].

Marshall B. Woodworth, U. S. Atty.  
J. E. Foulds, for defendant.

DE HAVEN, District Judge. The indictment in this case charges the defendant with the crime of knowingly bringing within the United States, on a vessel of which he was master, three Chinese laborers, and permitting them to be landed in the United States, in violation of section 2 of the act of May 6, 1882, c. 126, 22 Stat. 59, as amended by the act of July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1306]. The section is as follows:

"Sec. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer, from any foreign port or place, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year."

The defendant waived his right to be tried by a jury, and the question of his guilt or innocence was submitted to the court for determination, upon the following agreed statement of facts:

"(1) That on the 12th day of November, 1900, and at all of the times hereinafter mentioned, the defendant, W. B. Seabury, was the master of the steamship China, a vessel owned by the Pacific Mail Steamship Company, and plying between the port of Hongkong, in the Empire of China, and the port of San Francisco, in the state and Northern District of California; that the port of San Francisco was at all of the times herein mentioned the terminal point of the voyage of the steamship China.

"(2) That said defendant, W. B. Seabury, as master of the China, on the said 12th day of November, A. D. 1900, knowingly brought to the port of San Francisco, in the state and Northern District of California, on said vessel from the port of Hongkong, in the Empire of China, three certain Chinese laborers, named Yee Wing, Yee Que, and Yee Kone Chong, respectively.

"(3) That said Yee Wing, Yee Que, and Yee Kone Chong were not, nor was either or any of them, members of any of the classes of Chinese persons who were permitted by the laws of the United States to enter or remain within the United States; that said Yee Wing, Yee Que, and Yee Kone Chong had not, nor had either or any of them, established or proved their right to enter and to be landed in the United States as members of any of the classes of Chinese persons who were permitted by law to enter or remain therein, to the satisfaction of any person, officer, court, or tribunal having jurisdiction to permit them, and each of them, to enter and to be landed within the United States.

"(4) That after the arrival of the said Yee Wing, and after the arrival of the said Yee Que and the said Yee Kone Chong, the Chinese laborers herein mentioned, at said port of San Francisco, on said steamship China, the defendant herein, W. B. Seabury, caused and permitted the said Yee Wing, and the said Yee Que, and the said Yee Kone Chong, and each of them, by and with the express permission of the collector of customs at the port of San Francisco, to be taken from said steamship China and placed and detained in a certain shed, building, loft, and inclosure known as and called a 'detention shed' or 'detention loft,' situated upon the Pacific Mail Dock in the city and county of San Francisco; that this shed, building, loft, and inclosure was at all of the times herein mentioned used and employed by said defendant and by the Pacific Mail Steamship Company, by which company the said steamship China was owned, operated, and controlled, by and with the express permission of said collector of customs, and also, after the 6th day of June, 1900, by and with the express permission of the Commissioner General of Immigration, for the detention of Chinese persons brought within the United States at the port of San Francisco from the vessels owned, operated, and controlled by said company, pending the determination and adjudication by the collector of customs at the port of San Francisco of the right of said Chinese persons to enter and remain within the United States.

"(5) That said detention shed or detention loft was erected and owned by the said Pacific Mail Steamship Company, and was employed and maintained by the said Pacific Mail Steamship Company for the convenience of said company in detaining Chinese passengers arriving at the port of San Francisco upon the steamship China and upon the other vessels owned, operated, and controlled by said Pacific Mail Steamship Company, pending the determination of their right to be and remain in the United States as aforesaid; that said Pacific Mail Steamship Company employed and maintained guards and watchmen in said detention shed; that said detention shed was permitted by the Secretary of the Treasury to be used as aforesaid, for the convenience of the masters, owners, agents, and consignees of the vessels aforesaid, and in the interest and for the convenience of commerce and navigation at the port of San Francisco.

"(6) That on November 26, 1900, the said Yee Wing, Yee Que, and Yee Kone Chong, and each and all of them, escaped from said detention shed or detention loft, and landed in the United States at the port of San Francisco.

"(7) That the said Yee Wing, the said Yee Que, and the said Yee Kone Chong have not, nor has either or any of them, been returned to China, the country from which they, and each of them, came.

"(8) That at all of the times hereinbefore mentioned said Pacific Mail Steamship Company and said defendant used reasonable and proper means and precautions to prevent the escape from the detention shed aforementioned of any and all Chinese laborers placed and detained therein, and that none of the Chinese persons escaped therefrom as aforesaid did so escape by or with or by reason of any permission, connivance, knowledge, or negligence on the part of said steamship company or of the defendant herein.

"(9) That none of the escapes of the Chinese laborers herein mentioned occurred by reason of vis major or inevitable accident.

1. The defendant, in causing the Chinese persons named in the indictment to be taken from the steamer of which he was master, and placed in what is termed in the agreed statement of facts the "detention shed," did not land, or permit the landing of, such Chinese persons, within the meaning of the law. The case in this respect is the same in principle as those of *Nishimura Ekin v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, *In re Ah Kee* (C. C.) 21 Fed. 701, and *In re Way Tai* (C. C.) 96 Fed. 484, in each of which cases it was held that the mere removal of a passenger from the vessel to the shore did not constitute a landing, so long as he was not left free to go at large. It was also so held in *United States v. Duffy*, tried in this court in the year 1902. The defendant in that case was charged with having aided and abetted the landing in the United States of one Ma Foo, a Chinese person, from a vessel, and it was shown upon the trial that such Chinese person had been removed from the vessel and placed in the detention shed, and thereafter, while in the custody of the defendant, the defendant had knowingly permitted him to go at large. Upon this state of facts the court charged the jury as follows:

"The contention is made that there could be no aiding and abetting the landing of Ma Foo from the Coptic, because Ma Foo had been in what is denominated by the witnesses a 'detention shed.' Upon this point I charge you, gentlemen, that Ma Foo was not landed in the United States so long as he remained in the custody of the company owning the steamship which brought him to this port. He was not landed until he was permitted to go at large in this country, and if he was detained in the detention shed, awaiting the determination of his right either to go in transit across the country or to remain here as a native born, \* \* \* he was not landed within the meaning of the law."

It necessarily follows, from the law as thus stated, that defendant did not violate the statute in placing the Chinese persons referred to in the detention shed, although they may have been placed there for the convenience of the owners of his vessel, pending the determination by the officers of the government of the right of such Chinese persons to enter the United States.

2. The only question that remains for consideration is whether the defendant is criminally responsible for their escape from the detention shed, it being conceded by the agreed statement of facts that he "used reasonable and proper means and precautions" to

prevent their escape, and that none of such persons escaped "with or by reason of any permission, connivance, knowledge, or negligence \* \* \* of the defendant." The case as thus stated is too plain to admit of argument. The statute under which the defendant is prosecuted provides:

"That the master of any vessel, who shall knowingly bring within the United States on such vessel, and land \* \* \* or permit to be landed, any Chinese laborer, \* \* \* shall be deemed guilty of a misdemeanor."

The acts thus made criminal are: First, the voluntary act of the master in landing Chinese laborers in the United States with perfect freedom to go at large; second, expressly permitting them to leave his vessel without restraint, and with the privilege, so far as he is concerned, to go where they will or when he has been guilty of such negligence in the matter of detaining them that an intention to let them go at large can be imputed to him; and there can be no doubt that, to constitute the crime mentioned in this statute, there must be an intentional violation of its provisions by a defendant; that is, it must appear that he has intentionally done that which the law forbids. It is a principle of natural justice, and of universal application, that in every crime there must be a concurrence of act and intent. This principle is so well settled that it has become one of the maxims of the law, and, when applied to the facts appearing in this case, makes but one conclusion possible. The admitted facts show that the defendant did not intentionally do anything which the statute forbids; that he was in no wise responsible for the escape of the Chinese laborers named in the indictment; that he used reasonable and proper means to prevent their escape; and that they escaped without his "permission, connivance, knowledge, or negligence." Upon the facts so admitted, I find that the defendant is not guilty of the offenses charged in the indictment.

Let judgment be entered in accordance with this finding.

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#### DADY v. BACON.

(District Court, S. D. New York. December 8, 1904.)

1. TOWAGE—CONTRACT TO TOW BARGE TO CUBA.

The claim of the owner of a barge that a contract for her towage from New York to Cuba by a steamship required the ship to keep along shore, and take unusual care of the barge in view of her age and condition, *held* not sustained by the evidence.

2. SAME—LOSS OF TOW THROUGH UNSEAWORTHINESS—LIABILITY OF TOWING VESSEL.

The charterer of a steamship *held* liable for half the damages arising from the loss of a barge and cargo while being towed by the steamship from New York on a voyage to Cuba, where the sinking of the barge resulted from her unseaworthy condition for the voyage, due to her age and condition, her low freeboard when loaded, and the fact that she was without a rudder, which caused her to sheer and added to the strain upon her, but where such facts were known to the master of the steamship when he undertook the service, and he proceeded at his usual speed notwithstanding.

In Admiralty. Suit for loss of tow.

Peter S. Carter, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by Michael J. Dady, as owner of the barge James L. Ogden and her cargo against Daniel Bacon, the charterer of the steamship Vimeira, to recover damages said to amount to \$6,000, arising out of the loss of the barge with cargo, while being towed, on a hawser, by the steamship from New York to Cardenas, Cuba, on the 4th day of June, 1902.

The action is brought on a theory of the failure on the part of the respondent to fulfill the obligations of the towing contract, which, it is alleged, required the respondent to tow the vessel along the coast, whereas the steamship was making a direct course from New York to Cape Hatteras, which carried her a considerable distance from the coast, probably about 40 miles at the place in question; also failure upon the respondent's part to tow at reduced speed and take special care of the barge, in view of her age, as he had agreed to do.

The testimony shows that the only writing between the parties was a memorandum, made apparently after the loss of the barge, but doubtless before it was known, as follows:

"New York, June 5, 1902.

Due Daniel Bacon on account of freight per S. S. Vimeira, Seven hundred /<sub>00</sub> dollars.

If barge lost, proportionate rate according to place lost.

M. J. Dady  
per W. Van Tine."

Arrangements were first made for the towing of two barges, for which the compensation was to be \$1,250, but it was subsequently found by the libellant, that he only had one ready to go, which resulted in a towing contract to take that one for \$700. It is now contended by the libellant that the one was to be taken at half the price of the two and that for the \$75 extra, the respondent agreed to tow along the coast and take special care of the barge which contract was violated by the respondent's vessel in going out to sea with the barge, so that when the loss occurred, she was a considerable distance from the coast and the loss was due to such fact and the failure on the steamship's part to take the agreed care.

The making of the alleged special agreement is explicitly denied by the respondent and his agents, who say that the only arrangement was for the payment of \$700 for the towage. The respondent and his agents have testified that no agreement whatever was made as to the course of the steamship on the voyage; that when such matter was broached, early in the negotiations, by the libellant's agent, Mr. Van Tine, who alone supports the libellant's claim in this respect, he was told by Mr. Hassler, respondent's agent, who alone was present when the idea was presented, that the barge would not be taken on any such terms.

Mr. Van Tine also claims that a reference was made to the tow-

age of the barge Palmer, belonging to the libellant, by the steamship David and that this towage was to be done in a similar manner. This is also denied by the respondent's agents and it appears that the David was under charter to the libellant for a round trip to Cuba and return at a fixed sum, which entitled him to use her as he pleased. There is no similarity between this case and the Palmer and David and the reference to that case only tends to discredit the libellant's witness.

It is testified that it would have taken the steamer about a week beyond the ordinary voyage to have carried out the contract as contended for by the libellant and her charter hire of \$115 per day, with her expenses for coal, make a total cost of the steamship to the respondent of about \$175 per day, so that if the contract was as contended for by the libellant, the respondent would have incurred a liability for expenses considerably in excess of the towage returns. The improbability of such a contract being made, in connection with the testimony, satisfies me that the respondent's version of what occurred between the parties should be accepted. I, therefore, conclude that the contract as contended for by the libellant has not been established and the libel in this respect must fail.

This barge was built at Poughkeepsie, New York, in 1864 and intended for service on the North River or interior waters. When she was offered to the Vimeira, she was without a rudder, it having been taken out, as it was thought to be unavailable for sea use, and the consequence of her having no steering apparatus was, that she sheered badly while being towed. For such reason, the pilot of the steamship refused to take her in tow when tendered in New York harbor and she was towed outside to the Sandy Hook Lightship by a tug. On the way down to the lightship, the barge slewed from side to side. She was made fast to the steamship at the lightship with hawsers furnished by the barge running from the steamship's quarters to the barge's towing bitts, about amidships. She then had a part of a cargo on board which put her down in the water somewhat so that her freeboard amidships and aft was only about  $2\frac{1}{2}$  to 3 feet. Forward it was  $4\frac{1}{2}$  to 5 feet. Signals were arranged whereby those on the barge could indicate to the steamship whether or not she was towing safely.

The steamship started, with her tow, on the 3rd day of June, about 4 o'clock A. M., laying a course for Cape Hatteras. The weather was fine and continued so up to the end. The steamship's usual speed was from 8 to 9 knots. During the day she made about 7 knots. Up to about 8 o'clock P. M., so far as the steamship was advised, nothing unusual occurred on the barge, although she was sheering badly, owing to her lack of rudder, but at that time a signal was displayed to the steamship asking that she proceed slowly. The steamship complied with this request and during the night went at the rate of about 2 knots. There is a conflict between the witnesses from the barge as to her condition at this time, one of the three men on board testifying that there were then 2 feet of water in the hold, and another that the barge was not then leaking seriously. I am inclined to believe the former. There is no dis-

pute between the two witnesses, who have been examined of those on board, that after the signal she leaked badly. During the night, one of her two pumps became choked and useless. By pumping all night with the other, she was kept afloat but when day broke on the morning of the 4th, a sign was displayed on the barge that she would not float more than two or three hours and the men were then taken off by a boat from the steamship. At this time, the tow was opposite a point on the coast about half way between the Delaware and Chesapeake Bays. The master of the steamship so estimated and that they were then about 50 miles from the coast and about 90 miles from Cape Henry. Under the circumstances, he did not feel bound to deviate from his course, especially as the appearance of the barge indicated that it was not probable she would last much longer, though in fact, she did not sink for 8 or 10 hours. If that could have been known at the time, it does not seem that it would have made much difference, as it is doubtful if in view of her position she could have been saved in any event. Her distance from the coast and the nearest port of refuge was such that going at the slow rate of speed she was obliged to use under the circumstances, she was practically without reasonable hope of reaching harbor, after she became partially filled with water.

Apart from the alleged contract, the real question in the case is, was the charterer of the steamship in any way liable for the loss. I have found there was no such contract as the libellant claims, but the question remains, whether under the general principles of towage, i. e., the duty of the towing to the towed vessel, the respondent should be held for the loss, or a part of it.

The master of a boat offering her for towage represents her as sufficiently strong and staunch to withstand the ordinary perils to be encountered on the voyage. If she be unseaworthy by reason of weakness, decay or leaks, and such defects are not obvious to the master of the tug, he will be absolved from responsibility when the unseaworthiness causes the loss. *The Edmund L. Levy*, 128 Fed. 683, 63 C. C. A. 235.

It appears here, that the barge was unseaworthy in the sense of not being in a fit condition to tow safely in ordinary weather, without special care. She was old and weak, and without a rudder, which added greatly to the strain put upon her by the towing. It is said that she travelled, by reason of her sheering, 9 knots while the steamship was going 7. The respondent himself was not advised of her condition but sufficient has been shown to make it clear that the master of the steamship knew the risk that would be assumed. In the beginning, the pilot, to the master's knowledge, refused to take the barge in tow because of her rudderless condition, which made it obvious to any one familiar with towing, that the venture would be attended with more or less risk. The small freeboard was observed by the master of the steamship, when he saw the barge in the harbor and again when she was made fast at the lightship. He knew the reason for the pilot's refusal to tow the barge out to the steamship. He also knew that the towing hawsers were made fast on the barge to her bitts amidships, so that



she would sheer. He also knew that the barge was not all right when he commenced the towing but started with her upon a signal from her that she was all right, and took her because she was given him to tow. He said that he proceeded at his usual full speed of 8 or 9 knots, except for the tow, which reduced it to about 7, in the face of the fact that he considered one knot too great for the barge. It is not pretended that the respondent gave the master of the steamship any instructions as to the method of towing. No doubt the respondent expected that a suitable vessel for towing would be furnished by the libellant. What the master did, however, was clearly within the scope of his authority as agent of the respondent.

In view of the unseaworthiness of the barge, and the negligence of the respondent's agent in taking her in tow and in not observing proper caution according to her condition, this seems to me to be a case for a division of damages. *The Bordentown* (D. C.) 16 Fed. 270; *The Syracuse* (D. C.) 18 Fed. 828; *Pettie v. Boston Tow Boat Co.*, 49 Fed. 464, 466, 1 C. C. A. 314.

Decree for libellant for half damages, with an order of reference.

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#### COLUMBIA RIVER PACKING CO. v. TALLANT.

(Circuit Court, D. Oregon. December 12, 1904.)

No. 2,764.

1. ACCOUNT STATED—IMPLIED PROMISE TO PAY—PREVIOUS DENIAL OF LIABILITY.

An account stated rests upon a promise to pay, expressed or implied, and where liability had been long and persistently denied on the ground that the indebtedness, whatever it was, had been satisfied by a subsequent transfer of property, the failure of the person charged to object to the correctness of a statement of account sent him, or to make any reply, does not imply a promise to pay, or convert the account into an account stated.

On Petition for Rehearing.

For former opinion, see 132 Fed. 271.

BELLINGER, District Judge. The petition in this case sets forth numerous errors, oversights, and mistakes of fact, and errors of law, as grounds for the rehearing prayed for. The instances are specified where the court is alleged to have overlooked, failed to consider, and disregarded the evidence, where it overlooked plaintiff's objections, did not consider some of the points made in plaintiff's brief, and disregarded others, admitted evidence that was incompetent, was misled in regard to the evidence, was misled in making its decision as to the accounting, and misapplied the case cited in the opinion.

It is stated in the opinion of the court in this case that "there is nothing to show that Tallant [the defendant] made any promise in respect of this report [a report made by an accountant of the

¶ 1. See *Account Stated*, vol. 1, Cent. Dig. § 18.

result of his examination of the books, accounts, and vouchers of the firm of Tallant & Kendall], or that he had any knowledge respecting it, except that derived from Fulton." As showing that in this statement the court disregarded the evidence, the petition for a rehearing submits that it is admitted by the defendant that the books of account of the business in question were kept by him; that the plaintiff's theory of its case was not that there was an express promise or assent by the defendant, but that he impliedly acquiesced, and for a long time, upwards of 18 months prior to the beginning of the action, made no objections whatever to the status of the account, and that an accounting was had between the defendant and Kendall, and thereafter they agreed that the expert should make a statement of what the books showed, and that that statement was made after the accounting had between defendant and Kendall; and, further, that, as a matter of law, it is not necessary to a recovery by plaintiff that the defendant should have made any promise in respect of the amount due, or with respect to the expert's report. But this testimony, so far from being disregarded by the court, is summarized in the opinion, where it is stated in effect that Kendall testified that the packing company and defendant had an accounting as to the seining business, at which the defendant and witness were present; that they had the books of the company, and went mutually over the different sides of the account between them, and that there was found due from defendant the sum of \$4,785.46; that the result of that accounting was, by agreement between Kendall and defendant, placed in the form of a paper writing, etc.; and the conclusion of the court was that in this testimony Kendall was not stating facts, but that he was stating his conclusion that there was a mutual going over the books, etc., from the fact that the accountant's statement was made from the books, vouchers, etc., of the company, at the request of the witness, and furnished to the witness, and thereafter mailed to the defendant, or to an attorney to be presented to the defendant. It is charitable to this witness to assume that he thought that this statement, so prepared, constituted an accounting, and that he implied from it "an agreement," etc.

Two things clearly appear from Kendall's cross-examination: First, that the witness and the defendant did not at any time go mutually over the different sides of the account, and that there was no agreement put in the form of a writing between them; and, second, that the statement of the accountant constitutes the account to which Kendall testifies. The following is an excerpt from the cross-examination of Kendall:

"Q. Do you mean to testify that, at any time or place, you and Mr. Tallant agreed between you, verbally, that there was a certain balance due from Mr. Tallant to your company, the Columbia River Packing Company? A. The books showed it all the time. Q. I don't care what the books showed. Do you mean to say that you gentlemen agreed that there was any amount due? A. The amount that appeared on the books? Q. No, I want the sum certain in which you say the account was stated. Was there ever any agreement between you and Mr. Tallant, or your company and Mr. Tallant, or acknowledgment verbally made, that he owed the plaintiff the sum for which

this action is brought, namely, \$4,785.46? A. There never was any dispute after the account was stated."

This witness had previously, in his direct examination, testified as hereinbefore stated. When questioned in his cross-examination as to this statement, he said they went over the books together in San Francisco, and the testimony above quoted shows the nature of that "accounting." It fails to show any agreement, express or implied, by the defendant, and it justifies the inference that the witness did not state facts, but his conclusions from what "the books showed \* \* \* all the time," and from the fact that he never heard from the defendant after the accountant's report "was sent him."

The defendant gives a circumstantial account of what took place between himself and Kendall in San Francisco at the time of the alleged accounting. This was in January or February, 1902. The defendant had several meetings with Kendall, and with Kendall and Cutting, the president and secretary of the plaintiff company, in San Francisco, at the time referred to in Kendall's testimony, and one meeting with the two in the presence of a lawyer, Mr. Chickering. From defendant's testimony it appears that the books in question were not gone over. So far from acquiescing, by his silence or otherwise, in any statement of liability on his part, the defendant testifies that he informed both Cutting and Kendall of his contention that he was not liable on the account claimed; that the three parties went to Mr. Chickering's office, when the defendant stated his side of the case, as he stated it on the trial, to the attorney; that Mr. Chickering advised Kendall and defendant to try to settle the dispute between themselves; that defendant went to Kendall's office the next day, when defendant showed Kendall a few of the seining accounts, with the statement, "You understand, Mr. Kendall, I claim you should pay everything;" that Kendall, having a dinner appointment, said he would have to leave the matter until he came to Astoria, and that defendant thereupon left Kendall and returned to Portland. There is no contradiction of any detail of this circumstantial narrative, and I have no doubt of its truth.

It goes without saying that even the silence of the defendant, if he had been silent, would not imply acquiescence, in view of the long standing and well-defined dispute between the parties as to who was liable for the account.

The petition states that, whatever the dispute was, it had nothing to do with the plaintiff, and was not communicated to the plaintiff. But it is the fact that the plaintiff company was concerned in the dispute and knew all about it. Whether the plaintiff is liable for the demand out of which the action grows is not important; but the defendant's contention was, and is, that his sale of his interest to Kendall, or to Kendall & Sanborn, was for the plaintiff, and so, in the opening statement of Mr. Smith, attorney for the defendant, it is stated that:

"The defendant sold his interest—in the seining grounds—to the company, although the deed was taken in trust in the name of the president of the

company, and that it was the understanding of the parties when the sale was made that a part of the consideration for the conveyance was the cancellation of the debt to the company against Mr. Tallant."

The defendant testifies that his contract, antecedent to the sale, to supply fish to Kendall & Sanborn, was entered into on the representation that, although the business went by the name of Kendall & Sanborn, it was all Columbia River Packing Company; that thereafter, the catch becoming great, Kendall notified defendant that they could not take all the fish, whereupon defendant agreed with Kendall to take \$3,000 at the end of the season for his half of the profits (one-half of the seining grounds belonged already to the packing company), Kendall to pay all bills; that Kendall represented that he was acting for the packing company, the plaintiff. The contention of the defendant upon these facts does involve the plaintiff. If Kendall's representations that he was acting for the plaintiff were true, then the liability in question was that of the plaintiff; and, whether true or not, it is at least true that there was a dispute, and that such dispute involved the question of the plaintiff's liability in the premises. It was the subject of discussion, by letter and otherwise, between Kendall and the defendant, long prior to the alleged accounting, as to whether the plaintiff, or Kendall as the plaintiff's president and representative, was liable. There was this dispute when the defendant was in San Francisco, and, according to the defendant's testimony, the subject was talked over between the defendant, Kendall, and Cutting, who was the secretary of the plaintiff company, as already appears. The company knew that this claim of liability was being made, if it is possible for the company to know anything, since defendant's "case" had been stated to an attorney indicated by the secretary of the company, and in the presence of its president and secretary.

It is idle to discuss the matter of Fulton's agency. Kendall sent the accountant's report to Fulton for demand against the defendant, and Fulton assumed that agency. Whom, then, did he represent, if not the party at whose instance and in whose interest he was acting? The demand was the demand of the company, and the attempt to enforce it was made in its behalf. The testimony of Kendall to the effect that he mailed the defendant a copy of the account, the argument that Fulton was not the agent of the plaintiff, and that no knowledge of the defendant's repudiation of liability made to Fulton in answer to the latter's demand made in plaintiff's behalf was ever communicated to plaintiff, might all be excused if they had any bearing upon the question of an account stated. Whether the plaintiff knew that defendant disputed its claim or not, is not material. There must be more than the mere fact that plaintiff did not know that the defendant denied liability. The plaintiff must know and prove that the defendant, impliedly or otherwise, assumed liability. The circumstances which show knowledge on the company's part, also show the persistence of the dispute, and the uncompromising attitude of the defendant respecting it. And yet it is in the face of these facts that the defendant is said to have "acquiesced" or impliedly or otherwise "agreed" in

advance that an accountant should make a report which should show the amount of an undisputed liability on his part; that the defendant has not disputed the "correctness" of the account; in other words, that he has admitted that such expenses were incurred while he was conducting the seining business, and, although such admission states that the plaintiff had agreed to pay, nevertheless the statement is an admission of liability on defendant's part. In other words, the defendant, by the very act of denying liability for these expenses, is said to have admitted liability because he admits that such expenses were incurred.

An action upon an account stated is an action upon the promise, expressed or implied, in the account. The action is not upon the original liability, but upon the new promise. A denial of liability negatives any implication of a promise. The truth of this is self-evident. The ground of the denial is of no consequence. It is the fact of denial that is decisive. Such facts as are referred to in this petition—that the defendant kept the books of account, that he has not denied that such books are "correct," and any fact or facts having the effect of admitting the original liability, or of estopping the defendant to deny it—are not sufficient to sustain a complaint upon an account stated, nor do they tend to prove such account. All admissions and estoppels must refer to the new promise. And, as already stated, there can, in the nature of the thing, be no implication of the new promise against an express denial of liability, on whatever ground, or on no ground. The case of *Ryan v. Gross*, 48 Ala. 370, is directly in point. In that case there was an account for goods furnished the defendant, who was a widow, pending the administration of her husband's estate. The complaint contained two counts, one upon an account stated, and one upon an open account for the same indebtedness. In support of the account stated, the plaintiff proved that some four years subsequent to the last item in the original account he sent the account to the defendant, who had remarried in the meantime, with a request that she and her husband execute a note therefor. To this the defendant and her husband answered, "not denying or disputing the correctness of the items of the account," but insisting that the defendant was not liable, but that the account should be paid by the administrator of the deceased husband's estate; and so the identical case was presented that we have here. The trial court instructed the jury to the effect that the admission by the defendant of the correctness of the items of the account would be an admission making the account a stated account, on which suit could be brought in the statutory period. The contention for the plaintiff is the same in this case. On appeal this charge was held erroneous, upon the ground that defendant's refusal to pay, and insistence that another person was justly chargeable with and ought to pay, defeated the account stated. The court said that the evidence of the defendant, perhaps, might be sufficient to enable the plaintiff to recover on the common count for goods sold, if the statute of limitations were out of the way, and that the plaintiff sought to avoid the defense of the statute by showing that the account was changed

from an open to an account stated—the limitation in the former case being three years, while in the latter it was six.

It is stated in the petition for a rehearing that the Alabama case is not in point, because of the plea of the statute of limitations interposed in that case; but that plea only referred to the second count in the complaint, which was upon the open account or original liability. It had nothing to do with the cause of action upon the account stated, as to which the case was in no wise affected by the fact that there was such a thing as a statute of limitations.

The petition for a rehearing is denied.

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LAWRENCE v. LOWRIE et al.

(District Court, M. D. Pennsylvania. November 28, 1903.)

**1. BANKRUPTCY—FRAUDULENT TRANSFERS—BONA FIDE PURCHASERS—BURDEN OF PROOF.**

In proceedings by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt, the burden is on defendants to show that they are bona fide purchasers for value.

**2. SAME—JURISDICTION OF DISTRICT COURT.**

Under Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417], amending section 70e of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], and conferring jurisdiction on courts of bankruptcy to set aside fraudulent transfers of the bankrupt, the district court of another district than that in which the bankruptcy proceedings are pending may entertain a suit to set aside a fraudulent transfer made by the bankrupt to parties residing in such other district.

Rule for a Preliminary Injunction.

Charles P. O'Malley, for plaintiff.

M. J. Martin and George D. Taylor, for defendants.

ARCHBALD, District Judge. The fraudulent disposition of his property by Lowrie, the bankrupt, is manifest, and so is the complicity of the defendants therein. Goods sold by different manufacturers to Lowrie, in Buffalo, N. Y., are traced into the possession of Ike Joseph, his former partner, and Moses Hendler, an associate and friend, of Forest City, Pa., and Aaron Schwartz, of Scranton—some through the so-called firm of G. Mitchell & Co., some through Morris Schwartz, a brother of Aaron, who was in the employ of Lowrie, and some from Lowrie direct. No doubt—on the question of identity—goods of the same character could have been purchased elsewhere in the general market by Mitchell & Co., if there was such a firm; but it is not credible that exactly the same job lots of different kinds of goods of half a dozen different manufacturers, who sold to Lowrie, should have been sold to Mitchell & Co., and that they should all turn up together in the defendants' hands, shipped by Mitchell & Co. from the fourth floor of the building

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 453.

where Lowrie was located just about the time that they disappeared from Lowrie's establishment below. The scheme is too transparent to stand, and deceives no one. Moreover, the active agent in the shipments from the rooms rented by Mitchell & Co., who seem to have had no other business except to make such shipments, was Harry Joseph, a brother-in-law of Lowrie, and an uncle of Ike Joseph; the latter being also a son-in-law of the defendant Schwartz, whose brother, Moses, as we have seen, was in Lowrie's employ, and was himself the nominal consignor of some of the goods. Moses Hendler, the other defendant, if not a relative, is shown in close association with both the Josephs, as well as with Lowrie. Nor is the force of these facts in any way met by anything to be found in the testimony given before the referee in the Lowrie bankruptcy, where all these parties were examined, which is introduced here. The most damaging evidence is an explanation which does not explain, and that is the character of what they had to say for themselves in the transactions in question. If they were purchasers for value, this is an affirmative defense, and the burden was on them to show it, which they certainly have not done. I am convinced, therefore, by the case as now made out, that the defendants, in collusion with the bankrupt, have in their possession property which he fraudulently disposed of, and I must hold it there by injunction until the matters in controversy can be regularly heard and disposed of.

The jurisdiction of this court is questioned, but is fully sustained by section 70e of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], as amended by the act of February 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417]. *Pond v. Exchange Bank*, 124 Fed. 992, 10 Am. Bankr. Rep. 343. It is suggested that it is only the district court in which the proceedings in bankruptcy are pending that is given jurisdiction by the amendment, and that in going into another district, if a federal court is desired, resort must be had to the Circuit Court, with all the jurisdictional requirements fulfilled. But this would carry us back to *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which it was admittedly the purpose of the amendment to overcome. The jurisdiction which is conferred is on any court of bankruptcy, which, as defined in the act, means—speaking generally—any District Court of the United States throughout the states and territories. This jurisdiction, moreover, is made concurrent with that of the state courts, which would have had jurisdiction if bankruptcy had not intervened, which is only fulfilled by giving the trustee the choice, where he goes out of the district of his appointment, of resorting either to the state court which would have been competent to dispose of the case, or to the United States District Court located in the same territory.

Let a preliminary injunction issue as prayed for, to continue until the further order of the Court.

NOTE. It was held in *Gregory v. Atkinson*, 11 Am. Bankr. Rep. 495, 127 Fed. 183, that the amendment of 1903 conferring jurisdiction upon courts of bankruptcy in common with state courts to set aside a fraudulent transfer

of property by the bankrupt could only be exercised upon the conditions imposed by section 23b, by securing the consent of the proposed defendant. But see *Johnston v. Forsyth Mercantile Co.*, 11 Am. Bankr. Rep. 669, 127 Fed. 845.

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In re SULLY et al.

(District Court, S. D. New York. December 19, 1904.)

No. 6,873.

1. BANKRUPTCY—RECEIVERS—COMPENSATION.

Where the receivers appointed for a bankrupt were men of integrity, ability, and extensive experience in large business affairs, one of them being a cotton merchant, familiar with the business of the Cotton Exchange, and the other a lawyer, and such receivers succeeded in collecting nearly \$1,200,000 in assets, and realized \$100,000 more for certain pledged cotton belonging to the bankrupt than it would have realized at any subsequent period, an allowance of \$16,000 for their services by the referee should be increased to \$21,000.

In Bankruptcy.

Boothby & Baldwin, for receivers.

George H. Culver, for Clayton E. Rich and others.

HOLT, District Judge. This is a motion to confirm a referee's report fixing the receivers' allowance. I do not intend ordinarily to interfere with the decisions of referees respecting allowances, except for weighty reasons. They have a personal knowledge of what has been done in a case, and can usually judge as well as, and, upon the whole, better than, I can what compensation should be allowed. But in this case the referee states in his opinion that he has been guided by certain decisions in which some judges have held that the object of Congress was to render the administration of estates in bankruptcy as cheap as it could possibly be made, and to reduce to the lowest minimum the expenses of administration. Such decisions have been made, and the referee properly considered it his duty to follow them, but I think that there is a tendency to construe them too strictly. The amounts paid for services in administering the bankrupt act should never be lavish or extravagant, and should always be rigidly scrutinized, but I know of no reason why they should not be reasonable and adequate. I think it unwise to establish a scale of compensation for services in administering bankrupt estates at so low a rate that the best class of lawyers will refuse to practice at the bankruptcy bar, and the best class of business men refuse to serve as trustees or receivers. In this case the bankrupts were cotton merchants and brokers. The estate is large. The receivers have collected and hold nearly \$1,200,000 in assets. When called on to appoint the receivers I concluded to select a cotton merchant familiar with the business of the Cotton Exchange and a lawyer. I wanted men of the highest standing, who were not only men of integrity and ability, but of an extensive experience in large business affairs. I appointed such men. They have acted with ability and efficiency in all respects. Immediately



after their appointment they sold a large quantity of pledged cotton, obtaining prices by which the estate has realized about \$100,000 more than it would have realized at any prices subsequently obtainable. In short, these receivers have discharged their trust, not only with integrity and ability, but with the sagacity of men thoroughly experienced in large business transactions. It is, in my opinion, very important that the court should be able at all times, in proper cases, to obtain the services of such men, and in order to obtain their services it is necessary that they should be paid a remuneration fixed on a scale similar to that ordinarily paid to men of similar standing for services of similar responsibility in this city. There is a heavy responsibility upon the court in appointing receivers of such large estates. The appointment of receivers of the highest character is the surest guaranty of the safety and the wise management of the assets. In this case the referee has recommended that the two receivers be paid \$16,000. That is substantially  $1\frac{1}{3}$  per cent. on the assets in their hands. I think, in view of the amount involved, the responsibility undertaken, the work done, the business and professional standing of the respective receivers, and the general standard of compensation for such work by such men in the business community of New York, that the sum recommended is not enough. I do not consider the amount of \$25,000, which the receivers themselves asked, as excessive, but I desire in such a matter to be conservative. I think that \$21,000, which is substantially  $1\frac{3}{4}$  per cent. of the amount in the receivers' hands, is a perfectly reasonable compensation.

The referee's report is modified by allowing the receivers \$21,000 instead of \$16,000, and is in all other respects confirmed.

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#### UNITED STATES v. PIAZA.

(District Court, W. D. New York. November 26, 1904.)

**1. EXTRADITION—SURRENDER OF ACCUSED—SUFFICIENCY OF EVIDENCE.**

In order to justify a commissioner in issuing a certificate to the executive authority for the surrender of the accused in extradition proceedings, it is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged. The evidence need not be conclusive, nor must the commissioner be absolutely convinced of the guilt of accused.

**2. SAME—INFORMATION—DESIGNATION OF OFFENSE.**

An information in extradition proceedings charging accused with "assault with intent to kill and murder" sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder."

On Return of a Writ of Habeas Corpus Sued Out by Basilio Piazza. Writ dismissed.

Hamilton Ward, Jr., for petitioner.  
Donald Bain, for the United States.

HAZEL, District Judge. The petitioner is a fugitive from justice. It clearly appears that the magistrate before whom these extradition proceedings were heard had jurisdiction of the subject-matter, and that the evidence before him justified the issuance of a certificate to the executive authority for the surrender of the accused. Authorities abound which hold that it is sufficient if the accused is held on competent legal evidence, and, further, if probable cause exists for believing the defendant guilty of the offense charged. The evidence need not be conclusive, nor must the commissioner who hears the proceedings be absolutely convinced of the defendant's guilt, before exercising the power to commit him. *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787. The principal question presented is whether the crime charged by the complaint or information is within the terms of the treaty or extradition. The accusation before the commissioner, as appears by the complaint or information, is assault with intent to kill and murder. The offense specified by the extradition treaty with Great Britain (article 10) is assault with intent to commit murder. It is claimed by counsel for petitioner that the specific crime mentioned in the treaty is not charged. The proposition that the crime must be charged in the identical language of the treaty is unsound. An assault with intent to kill and murder is practically the same as an assault with intent to commit murder. It is true, the words "to kill" do not necessarily imply more than the destruction of life, which may have been caused without guilt, while to commit murder implies killing with malice aforethought. The use of the word "kill" in the conjunctive with "murder" shows that it was intended to charge the commission of the crime of assault with intent to kill with malice aforethought. It must be noted that the intent with which the crime is committed is of the essence of the offense. The phraseology charging the crime unquestionably brings it within the terms of the treaty, and it is extraditable. If the intent to destroy life is proven, it is unjustifiable killing, or murder, by the common law and by the act of Congress. It is thought that the principle announced in *Grin v. Shine*, 187 U. S. at page 184, 23 Sup. Ct. 100, 47 L. Ed. 130, where the court used the following language, applies:

"In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent."

Again:

"But where the proceeding is manifestly taken in good faith a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably, at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged."

Other questions presented need not be considered.  
The writ of habeas corpus is now dismissed.

## In re WEINTRAUB et al.

(District Court, D. New Jersey. January 6, 1905.)

1. **BANKRUPTCY—DISCHARGE—FAILURE TO APPLY—TIME—RES JUDICATA—SUBSEQUENT PROCEEDINGS.**

Where a bankrupt failed to apply for a discharge within the time limited by the statute, his right to such order was res judicata, and barred him from obtaining a discharge in a subsequent proceeding by him in another district from debts provable in the former proceeding.

On Motion to Vacate Stay of Proceedings.

Jacob L. Newman, for the motion.

Walter T. Kohn, opposed.

LANNING, District Judge. On June 20, 1899, Louis Weintraub, Benjamin Lewis, and Samuel Golden, partners trading as Weintraub, Golden & Lewis, were adjudged bankrupts in an involuntary proceeding instituted in the United States District Court for the Southern District of New York. They did not apply for an order of discharge within the time limited by the bankruptcy act. On December 30, 1903, they filed their voluntary petition in bankruptcy in this court, setting forth, as their affidavits admit, in the schedules annexed to their petition, the same debts that appear in the New York proceeding. The object of the suit in this court is to secure a discharge from the same debts from which the bankrupts failed to secure a discharge in the New York court. The proceeding in the New York court, furthermore, has not been terminated. On March 14, 1904, the above facts having been presented to the late Judge Kirkpatrick, of this court, he made an order staying and enjoining the bankrupts from taking any further proceedings upon their voluntary petition in this court pending the determination of the proceedings in the New York court. The counsel for the bankrupts now applies for an order vacating the above-mentioned order of March 14, 1904.

The application must be denied. It is a settled rule of law that, where a bankrupt has failed to apply for his order of discharge within the time limited by the statute, his right to such order is res judicata, and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings. See *Kuntz v. Young* (C. C. A.) 131 Fed. 719.

An order will be signed denying the motion of the bankrupts.

## In re MANGAN.

(District Court, M. D. Pennsylvania. November 27, 1903.)

No. 328.

1. **BANKRUPTCY—TRUSTEE—APPOINTMENT—REFEREES—REFUSAL TO CONFIRM.**

Where a trustee of a bankrupt was selected by the vote of a majority in number and amount of those present at the creditors' meeting, the referee had no power to appoint a different trustee merely because he did not approve of the selection of the creditors.

**2. SAME—OBJECTIONS.**

Where serious charges were made with regard to the disposition of goods by an involuntary bankrupt just prior to the institution of the proceedings, it was no ground for the referee's withholding his approval of the trustee chosen by the creditors that he had incurred the violent hostility of the bankrupt, nor that as receiver he had unreasonably delayed to account for the funds in his hands, thereby hindering their distribution to creditors, being accountable for any dereliction in the latter particular to the court which appointed him.

In Bankruptcy. On certificate from referee.

C. A. Van Wormer, for exceptions.

John T. Lennahan, opposed.

ARCHBALD, District Judge. The referee in his supplemental report concedes that he was mistaken in his original rulings, and that, by the vote of a majority in number and amount of those present at the creditors' meeting, Thomas English, heretofore acting as receiver, was duly elected trustee; also that he had no authority as referee to go on, as he did, and appoint a trustee simply because he did not approve of the selection of Mr. English. In *re MacKeller*, 8 Am. Bankr. Rep. 669, 116 Fed. 547. It is somewhat peculiar, after the decision by this court in that case, that the referee should the second time fall into the same error.

The only question, therefore, is whether the withholding by the referee of his approval of the trustee chosen by the creditors was justified. Two reasons are given: First, because Mr. English has incurred, as it is said, the violent hostility of the bankrupt; and, second, because, as receiver, he has unreasonably delayed to account for the funds in his hands, thereby hindering the distribution of them to creditors. But neither of these, in my judgment, is sufficient. The proceedings in this case were involuntary, and serious charges are made with regard to the disposition of goods by the bankrupt just prior to their being instituted. A careful investigation of his conduct by the trustee, and a vigorous prosecution by action to recover the property, if necessary, is therefore called for, and one who will do so without fear or favor is required in the interests of creditors, rather than one who may happen to be agreeable or otherwise to the bankrupt. And as to the charge that Mr. English has stood in the way of a distribution of the money collected by him as receiver, he is accountable for any dereliction of duty in this respect, not to the referee, but to the court which appointed him, and it will be sufficient to consider that question when occasion is found to complain of him here.

The action of the referee is reversed, and the choice by creditors of Thomas English as trustee is approved.

## THE ST. PAUL.

(District Court, S. D. New York. November 26, 1904.)

## 1. SEAMEN—WAGES—FORFEITURE—FINES—ENTRY OF OFFENSE—LOGBOOK—TIME.

Where a sailor was fined a portion of his wages for disobedience of orders, as authorized by Rev. St. U. S. § 4529 [U. S. Comp. St. 1901, p. 3077], but the master of the ship did not make an entry of the offense in the ship's logbook on the day the offense was committed, as required by section 4597 [U. S. Comp. St. 1901, p. 3115], such fine was no defense to an action by the sailor against the ship to recover the same as wages.

## 2. SAME—PAYMENT OF WAGES—UNREASONABLE DELAY—FINES.

Where a fine had been imposed on a seaman for disobedience, but the same was unavailable as a defense to an action for wages for failure of the ship's master to enter the offense in the ship's logbook on the day it occurred, the ship was justified in contesting its liability, and was therefore not liable to a fine for unreasonable delay in payment of the seaman's wages.

Action for balance of wages due libelant as trimmer and fireman, and penalty for delay in payment, under section 4529, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3077]. The claimant set up in defense that libelant had been fined several days' pay for disobedience of orders, and offered to pay the balance which it claimed was due. The evidence showed that the entries in the ship's logbook were not made in accordance with section 4597, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3115].

Richard D. Currier, for libelant.

Robinson, Biddle & Ward, for claimant.

HOLT, District Judge. It is important that discipline be maintained on vessels, and I think, from the evidence in this case, that quite probably the fines imposed on the libelant may have been just. But it is of great importance, if sailors are to be fined a portion of their wages, that the act authorizing such fines shall be strictly complied with, and particularly that the entry in the logbook shall be made on the day on which the offense is committed; otherwise on a long voyage there might be such a delay in making the entry, and in notifying the sailor that a fine had been imposed, that it might be impossible or difficult for him to meet the charge on which the fine was based. It is admitted that the entries were not made on the days that the alleged offenses were committed, and I think that, under the provision of the statute, it is a proper exercise of the court's discretion to refuse to receive evidence of such offenses.

My conclusion is that there should be a decree for the libelant for the amount of \$19.82 demanded in the libel, with costs. The claimant, in my opinion, was justified in contesting its liability, and there should be no fines imposed under the statute imposing them for unreasonable delay in the payment of wages.

## KLUTT v. PHILADELPHIA &amp; R. RY. CO.

(Circuit Court, E. D. Pennsylvania. December 23, 1904.)

No. 25.

## 1. CONTRIBUTORY NEGLIGENCE—ATTEMPTING TO CROSS STEAMER'S BOWS IN ROWBOAT.

A decedent was guilty, as matter of law, of contributory negligence which precludes a recovery for his death, resulting from his attempting to cross in a small rowboat in front of two car floats in tow on either side of a tug, which were passing up the Delaware river, where it was full daylight, and he had an unobstructed view for a long distance, and must have seen the approaching vessels if he looked, and could have avoided any danger, if he looked in time, by stopping a minute or two until they passed.

At Law. On motion for new trial.

Francis Fisher Kane, for plaintiff.

John G. Lamb, for defendant.

J. B. McPHERSON, District Judge. A reconsideration of the testimony offered by the plaintiff on the trial has only strengthened the opinion that led me to direct a verdict for the defendant on the ground that the contributory negligence of plaintiff's husband was plainly apparent. He was rowing a small boat in broad daylight across the Delaware river from Petty's Island to the Pennsylvania shore, a distance of about half a mile, and lost his life in an effort to cross the bows of two loaded car floats, one lashed upon either side of a tug that was taking them up the river against the tide to the wharves of the defendant company. The view down the river from the shore and the island and from the rowboat was unobstructed for a long distance, and if the decedent did not see the floats at all it could only have been because he did not take enough care of his own safety to look in that direction. If he did look in season, he must have seen the approaching vessels, and in that event no doubt supposed—mistakenly, as it turned out—that he had time to cross in front of them. Undoubtedly, if he saw them at some distance, he chose to take the risk of crossing in front, instead of resting on his oars for a moment or two, and crossing in perfect safety in the rear. The only alternative supposition is that he did not look until the danger was close upon him, when he either became confused, and did the wrong thing, or did not then have time to escape. Whether, therefore, the decedent failed to look at all, and therefore saw nothing until he was struck; or failed to look in time to take the necessary precautions; or looked in time, but took the risk of crossing the bows of the tow—it seems to me that in either event he was guilty of contributory negligence. He should have been watchful enough to see the approaching vessels, and should have crossed behind them, where he would have been in no danger whatever. The undisputed facts seem to bring the case into close analogy with the class of decisions of which *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, s. c., 2 Penny. 159,

may be taken as the type, where a plaintiff, who has been struck by an approaching train as he steps upon the track, has often been conclusively presumed to have been negligent in spite of his formal assertion that he did stop, look, and listen before attempting to cross. "It is idle," the court declare in a brief opinion, "for a man to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive." This ruling has been approved in many later cases, of which *Myers v. R. R. Co.*, 150 Pa. 386, 24 Atl. 747, and *Hess v. R. R. Co.*, 181 Pa. 492, 37 Atl. 568, may suffice as examples. So here, as it seems to me, it is vain to argue that the decedent took proper care of his own safety, when upon a broad river, in full daylight, with an unobstructed course before him, he is struck by the bows of an approaching tow, which he must have seen if he had looked, and could certainly have avoided if he had looked in time and had taken the proper course.

The motion for a new trial is dismissed.

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**DUN et al. v. INTERNATIONAL MERCANTILE AGENCY.**

(Circuit Court, S. D. New York. November 15, 1904.)

**1. EVIDENCE—REQUIRING PRODUCTION OF BOOKS.**

The court will, on motion, require a plaintiff to produce a book alleged by defendant to be material to the issues, in order that the questions raised thereon may be fully presented.

On Motion to Require Production of Book.

See 127 Fed. 173.

Alexander & Green, for complainants.

Edward H. Hawke, Jr., for defendant.

**TOWNSEND**, Circuit Judge. At the former hearing the motion for an order to produce the book in question was denied because it appeared that its production was sought solely for the purpose of enabling counsel for defendant to attack the credibility of the witness. On the reargument, counsel for defendant contends that said book has a material bearing on the issues raised by the allegations of the complaint, and that in his belief its contents may be shown by cross-examination to contradict said allegations and the evidence of one of plaintiffs' witnesses other than the witness Frith. In these circumstances, in accordance with the established practice in this circuit, it seems to be the duty of this court to order the production of the book, in order that the questions raised thereon may be fully presented to the tribunal before which the cause is to be tried at final hearing.

The motion for an order to produce is granted.

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 1540, 1541.

## THE LASCA.

(District Court, S. D. New York. December 9, 1904.)

**1. SALVAGE—VALIDITY OF CONTRACT—EXCESSIVE CHARGE.**

A contract to pay a tug \$1,000 for the salvage of a yacht worth \$20,000, which was stranded on the beach off Coney Island, where she was in danger of "sanding in," which would have caused damage to her, or rendered it more difficult to get her off, *held* not to be excessive, especially in view of damage to the extent of \$400 received by the tug in the service.

In Admiralty. Suit to recover for salvage services.

Wilcox & Green, for libellants.

Godkin & Chadbourne, for claimant.

ADAMS, District Judge. This action was brought by Edwin M. Millard and others, the owners of the tug John Nichols, to recover against the schooner yacht Lasca, the sum of \$1,000 for salvage services rendered, on the 15th day of September, 1904, in getting the yacht off the beach somewhat inside the western end of Coney Island, near Norton's Point.

On the night of September 14th the yacht was anchored to the northward and westward of Coney Island, about  $\frac{1}{2}$  mile distant. Later, a strong blow from the South-east commenced, accompanied by heavy rain. The master let go both anchors, with 30 fathoms of chain on the port and 15 on the starboard. About midnight, the storm lightened up somewhat and became almost calm. The wind started afresh about 1 o'clock on the morning of the 15th. At 2 o'clock it was blowing heavily and the master paid out 50 fathoms on the port anchor and 30 fathoms on the starboard. At 3:30 o'clock a heavy squall from the North North-west came on and the yacht dragged her anchors so fast that the master thought she had parted her cables. She went ashore almost immediately.

In the early morning of the 15th the tug Nichols was lying off Liberty Light. The wind came on so strong that the master could not keep her lights going and he went into Erie Basin, where the tug remained until daybreak, when she started for sea. On the way down, she was informed that a yacht was ashore on Coney Island and the Nichols went to look for her. The yacht was found between 6 and 7 o'clock in the situation described, lying broadside on the beach and so high out of the water that she could be seen under her bilges. The master of the tug hailed her through a megaphone and two men came off in a boat and asked the master of the tug what he would charge to haul the yacht off. He replied \$1,000, and they replied that the master of the yacht would probably agree to it, as he was very anxious to get off. They tried to communicate with the latter but owing to the wind could get no response and they went to the yacht. Subsequently the master of the yacht came off. He said he thought \$1,000 was too much and

¶ 1. Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.



that \$800 would be fair. The master of the tug declined this amount and the master of the yacht finally agreed to pay the \$1,000. He took the tug's hawser ashore with him.

While these negotiations were pending, after 6:30 o'clock, the steward of the yacht, under directions from the master, communicated with the owner, the claimant here, by telephone, who, after being advised that the yacht was ashore but in no danger, and the tug's terms, said that he could not judge of the conditions and told the master to use his own judgment. The owner subsequently went to Coney Island, reaching there about 10 o'clock in the morning and saw the work going on without expressing any disapproval to the tug but said to his own master that the price was an outrageous one and a swindle.

A little before 7 o'clock the hawser from the tug was run through the hawse pipe of the yacht and made fast to her foremast. The tug then stood off and held the yacht till the tide rose sufficiently to move her. Then about 10:30 or 11 o'clock, she was pulled off, uninjured, and towed to Staten Island, reaching there about 12:30 o'clock P. M. A bill for \$1,000 was then presented by the tug to the master of the yacht for approval. He at first demurred, but when it was explained to him that the tug was injured in the service, he signed it without further opposition. This bill was subsequently taken possession of by the claimant, when it was presented to him for payment and collection of the contract amount resisted, apparently at the instigation of the yacht's underwriters, because it was thought to be exorbitant.

About 9:30 o'clock, the tug's screw was damaged in the service by one of the blades being broken off and another injured through striking some driftwood which the storm brought off the shore. A new one was required which cost about \$175, and 3 days were lost by the tug in putting it on. Her charter value was \$75 per day. Her total disbursements and actual loss of time amounted to about \$400. There was some risk attending the service to a new hawser, which became chafed, and the tug was subject to some risk herself of getting ashore. She was a large and powerful tug worth about \$28,000. The weather was still windy when the services were rendered but not dangerously so. Spray, however, was flying over the yacht in the beginning.

The yacht was about 119 feet long, over all, built of steel, and worth \$20,000. She was in danger of "sanding in," as it is called, which is often the result of a vessel remaining ashore in such a situation. An expert in the wrecking business, in response to a telegram from the Atlantic Yacht Club, located in the vicinity, came to the place, with wrecking equipment, about 7 o'clock A. M., while the Nichols was holding the yacht. He testified that a vessel on a sandy beach is apt to bury herself in the beach, through the sand working away from the inside and piling up on the outside, with a tendency to eventually fill the vessel full of sand, if she remains long enough, sometimes breaking her in two; in any event, increasing the difficulty of getting her off the beach.

The claimant urges that the charge of \$1,000 was excessive and

exorbitant and that the repudiation of the contract by the claimant should be sustained and an amount not exceeding \$300 allowed to the libellants. He cites: *Brooks v. Steamer Adirondack* (D. C.) 2 Fed. 387; *The Sophia Hanson* (D. C.) 16 Fed. 144; *The Young America* (D. C.) 20 Fed. 926; *The Baker* (C. C.) 25 Fed. 771; *The Schiedam* (D. C.) 48 Fed. 923; *The G. W. Jones* (D. C.) 48 Fed. 925.

It is doubtful if the admiralty courts now have the same power to revise salvage contracts as those authorities indicate formerly existed. The matter has recently been before the Supreme Court in *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413, where it was held, that where the stipulated compensation in a salvage contract is dependent upon success, it may be for a larger compensation than quantum meruit and such contract will not be set aside because the compensation is excessive, unless shown to have been corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of important facts, or under circumstances amounting to compulsion, or when its enforcement would be contrary to equity and good conscience. The mere fact that the contract was a hard bargain or that the service was attended with greater or less difficulty than was anticipated, will not justify its abrogation by the court.

But whether the contract is covered by *The Elfrida* or not, it is apparent that the compensation stipulated for, especially in view of the damage to the tug, was not excessive. The sum does not exceed what would have been awarded as a salvage compensation, without regard to the contract, as in *The Schiedam*, *supra*.

Decree for the libellants for \$1,000, with interest.

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#### DOUILLET v. UNITED STATES.

(Circuit Court, S. D. New York. October 28, 1904.)

No. 3,513.

#### 1. CUSTOMS DUTIES—CLASSIFICATION—LEATHER GLOVES—CUMULATIVE DUTIES.

The provision relative to leather gloves in paragraph 445, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1677], that "in addition to the foregoing rates there shall be paid the following cumulative duties," justifies the imposition of more than one of said "cumulative duties" in addition to the rates applicable by virtue of the preceding provisions for gloves.

On Application for Review of a Decision of the Board of General Appraisers.

In the decision in question, G. A. 5,595, T. D. 25,038, the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on certain gloves imported by L. A. Douillet. These gloves were made of leather, and were both piqué and embroidered. In addition to the regular rates applicable to such gloves when not embroidered or piqué, the collector imposed a duty of 40 cents per dozen pairs for the embroidery, and the same rate for the piqué feature, taking as authority for this action the provision in paragraph 445, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1677], reading: "In addition to the foregoing rates there shall be paid the following cumulative duties: \* \* \*

On all piqué or prix seam gloves, forty cents per dozen pairs; on all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs." The importer contended that these duties are alternative or "cumulative" only with reference to said "foregoing rates," and not to each other, and that the language of said provision justifies the imposition of but one of the cumulative duties therein specified. This contention was overruled by said board as above stated. Note, *In re Wertheimer*, 55 Fed. 281, 5 C. C. A. 107.

W. Wickham Smith, for the importer.  
Henry A. Wise, Asst. U. S. Atty.

HAZEL, District Judge. Judgment affirmed on the decision of the Board of General Appraisers.

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EARLE v. MUNCE.

(Circuit Court, E. D. Pennsylvania. December 30, 1904.)

No. 59.

1. BANKS—BONDS—OVERDRAFTS—ACTIONS—AFFIDAVIT OF DEFENSE.

In an action by the receiver of a national bank on a bond and for an overdraft, an affidavit of defense alleging that the president of such bank prior to its failure was also president of another institution in which defendant was a depositor, and that the president falsely assured defendant of the soundness of such other institution, and that defendant thereby lost a sum in excess of the claim in suit, was insufficient.

In Assumpsit.

Asa W. Waters, for plaintiff.  
George F. Munce, pro se.

HOLLAND, District Judge. The plaintiff moves for judgment for the want of a sufficient affidavit of defense. The declaration is upon a bond executed by the defendant and another in favor of the plaintiff, and for an overdraft by check on the Chestnut Street National Bank, of which the plaintiff is now receiver. The defense is that the president of the Chestnut Street National Bank, prior to its failure, was also president of another institution in which the defendant had a deposit, and that the president of the Chestnut Street National Bank assured defendant of the soundness of this other institution, which assurance was afterwards found to be erroneous, and by reason thereof the defendant claims to have lost a sum in excess of the claim in this suit. Because the president of the Chestnut Street National Bank was the president of the other institution about which this erroneous information was furnished, the defendant attempts to set off his loss there against the claim here. This cannot be allowed.

Judgment for debt, interest and costs, in accordance with the claim, will be entered for want of a sufficient affidavit of defense.

¶ 1. Actions by and against receivers and "agents" of national banks, see note to *McCartney v. Earle*, 53 C. C. A. 398.

## DESPEAUX et al. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. December 30, 1904.)

No. 44.

## 1. CARRIERS—DISCRIMINATION—OVERCHARGES—PLEADING—AMENDMENT — LIMITATIONS.

Where plaintiffs filed a statement of claim in assumpsit against a railroad company in two counts to recover for alleged unlawful discrimination in the transportation of freight, as authorized by the Pennsylvania act of June 4, 1883 (P. L. 72), they were not entitled, 14 years thereafter, to file an amendment charging defendants with a common-law liability, on the ground that the charges made were unreasonable and constituted an overcharge; the latter being a new cause of action, different from that originally alleged, and barred by limitations.

Petition to Amend Dismissed.

James W. M. Newlin, for plaintiffs.

John Hampton Barnes, for defendant.

HOLLAND, District Judge. On February 28, 1890, summons in assumpsit was directed to be issued in the above case, and on February 10, 1892, a statement of claim was filed to recover 13 cents per barrel on 1,263,231 barrels shipped by plaintiffs on defendant's railway between August 25, 1883, and December 27, 1889, upon which it is alleged that "the defendant did then and there, during all the time aforesaid, unduly, unreasonably, and unlawfully discriminate against them, the plaintiffs, in the transportation of said merchandise, in this: that the defendant, to the great injury and damage of the plaintiffs, did charge, demand, collect, and receive from the plaintiffs for the transportation of said merchandise a sum in excess of that charged and collected by the defendant from others for like conditions, under similar circumstances, and during the same period of time." In the second count of the plaintiffs' claim the same cause of action is set forth, and treble damages claimed under the act of Assembly of the commonwealth of Pennsylvania approved June 4, 1883 (P. L. 72), entitled "An act to enforce provisions of the seventeenth article of the Constitution relative to railroads and canals." Both counts, however, are drawn under this act for unlawful discrimination in the transportation of freight "upon like conditions, under similar circumstances, and during the same period of time." On July 14, 1904—fourteen years after the cause of action had accrued—the plaintiffs ask leave of court to amend this statement as follows:

"The plaintiffs say the defendant did then and there, and during all the time aforesaid (to wit, between the 25th day of August, 1883, and 27th day of December, 1889), unduly and unreasonably charge excessive freight to the said plaintiffs for the transportation of said merchandise, in this: that the defendant, to the great injury and damage of the plaintiffs, did charge, demand, collect, and receive from the plaintiffs for the transportation of the said merchandise a sum equal to twenty-two and one-half cents per barrel in excess of a reasonable charge for the said carriage. The excess of freight thus charged over and above a reasonable charge therefor amounts to and is the sum of \$284,226.97½."

This amendment should be allowed, unless it introduces an entirely new cause of action which is barred by the statute of limitations, and this, in the opinion of the court, would be the effect. In the original statement it will be seen the plaintiffs claim damage for an injury resulting to them by reason of an unlawful discrimination in charges between them and other shippers, and it is now proposed to amend this statement to permit them to recover for an excessive charge of freight during the period mentioned, which is a totally different cause of action from that of an unlawful discrimination, as that may or may not be an excessive charge, in other words, an unlawful discrimination, either at common law, or under the Pennsylvania statute, may be an entirely reasonable rate of freight, but, as compared with charges made to others, unlawful, because of the injury resulting to the plaintiffs by reason of a lower rate allowed to competitors for the transportation of merchandise upon like conditions, under similar circumstances, and during the same period of time. An overcharge is an injury upon which a recovery can be had without regard to the question of discrimination. They are different and distinct causes of action, and the fact urged by the plaintiffs that evidence of lower freight rates to others would be competent evidence in the trial of a case for overcharges does not establish the proposition that the causes of action are identical. The narr. or pleadings determine the evidence relevant in the case, and the fact that it may be, to some extent, the same in both causes of action, is no test of their legal identity. The true criterion, as all the authorities show, says Sharswood, J., is, "did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claimed?" *Wilhelm's Appeal*, 79 Pa. 120. The plaintiffs in this case now claim for an overcharge on freight, and to support that contention they will be required to show the defendant charged more than a reasonable compensation for the service of transportation, whereas in their original claim for unlawful discrimination the question of reasonableness of the freight rate would be immaterial. The right to recover would depend upon the plaintiffs' ability to show that the defendant charged a less rate to some one else for like service, regardless of the question as to whether it was excessive or not.

In the case of the *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, the Supreme Court held that:

"A declaration for personal injury, based upon the general or common law of master and servant, could not be amended, after the statute of limitation had run, so as to make the railroad company liable under a statute of the state of Kansas giving the employé in such a case a right of action against the company in derogation of the common law."

It is there held to be an introduction of a new cause of action in attempting to change from the common law to the statute law of Kansas, while in the case at bar it is an attempt to change from the statute law of Pennsylvania to the common law; although it may be said that the case is not entirely in point because of the fact that the cause of action set forth in the Pennsylvania statute is only declaratory of the common-law liability for unlawful discrimination. But whether the original

cause of action, to wit, unlawful discrimination, be considered a statutory or common-law liability, it is entirely a different cause of action from that of an overcharge, and the cases cited in *Union Pacific Railway Company v. Wyler*, supra, by Justice White, are entirely in point.

The petitioners, however, assert that when suit was brought and a declaration filed it was not judicially determined that the common law constituted a part of the jurisdiction of the courts of the United States, and that it had not been determined that the persons situated like the plaintiffs could, as against the defendant, enforce a common-law right, and for that reason the statement was filed, and the cause based on the Pennsylvania statute. The Supreme Court of the United States, in the case of the *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765 (decided in 1901), holds that the principles of common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment; and Justice Brewer, in deciding the case, says:

"This question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699—a case which involved interstate commerce—it was said by Justice Brown, speaking for the court: 'Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 Stat. 379, c. 104 [U. S. Comp. St. 1901, p. 3154]), railway traffic in this country was regulated by the principles of common law applicable to common carriers.' In *Bank of Kentucky v. Adams Express Co.*, and *Planters' Bank v. Express Co.*, 93 U. S. 174, 177, 23 L. Ed. 872 (decided in 1876), the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Justice Strong, delivering the opinion of the court, after describing the business in which the companies were engaged, said: 'Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.' The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled."

In the case of *Murray v. The Chicago & Northwestern Railway* (C. C.) 62 Fed. 24, District Judge Shiras, in an elaborate opinion delivered in 1894, collated a number of extracts from the opinions of the Supreme Court, all tending to show that there was always a recognition of a general common law existing throughout the United States; not, it is true, as a body of law distinct from common law enforced in the states, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute; and Justice Brewer, in *Western Union Telegraph Co. v. Call Publishing Co.*, supra, refers to this opinion with approval.

The request of the plaintiffs to amend in this particular is refused, and the petition dismissed. The plaintiffs, however, are allowed to amend the original declaration as to the amounts claimed as per petition filed November 14, 1904.

## In re STUBBS.

(Circuit Court, D. Washington, W. D. January 3, 1905.)

**1. CRIMINAL LAW—SOLDIERS—OFFENSES—ACQUITTAL BY CIVIL TRIBUNAL—EFFECT.**

Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the state was prosecuted for murder, and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial for "conduct to the prejudice of good order and military discipline," in violation of the sixty-second article of war [U. S. Comp. St. 1901, p. 957], though based on the same act.

**2. SAME—CHARGES—SUFFICIENCY.**

A charge of assault with a rifle and the infliction of a mortal wound by accused upon a fellow soldier, with particulars of the time and place clearly stated, sufficiently alleged an offense within the sixty-second article of war [U. S. Comp. St. 1901, p. 957], providing for trial and punishment of all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline.

**3. SAME—SENTENCE.**

The President having fixed a term of 10 years as the maximum of imprisonment in cases prosecuted under the sixty-second article of war, as authorized by Act Cong. Sept. 27, 1890, c. 998, 26 Stat. 491 [U. S. Comp. St. 1901, p. 969], a court-martial, on convicting a soldier of conduct prejudicial to good order and military discipline in violation of such article, had jurisdiction to sentence accused to a term of five years imprisonment, though such term extended beyond the term of military service for which he had enlisted.

Application by a military prisoner of the United States army, under sentence by a court-martial, to be restored to liberty, on the ground that the military court acted without legal authority. Heard on the petition and return to a writ of habeas corpus. Prisoner remanded.

W. H. Abel, for petitioner.

Maj. Henry M. Morrow, Judge Advocate U. S. A., and Edward E. Cushman, Asst. U. S. Atty., for respondent.

HANFORD, District Judge. During an encampment for military education and maneuvers at American Lake, in Pierce county, in this state, during the month of July, 1904, at which several thousand soldiers of the regular army of the United States and of the National Guard of Oregon, Washington, and Idaho were assembled, the petitioner, a soldier of the Nineteenth Regiment, United States Infantry, killed a fellow soldier of the same regiment by shooting him with a rifle. For that act the officers of his regiment, pursuant to the fifty-ninth article of war [U. S. Comp. St. 1901, p. 955], delivered the petitioner into the custody of the civil authorities, and he was prosecuted under the laws of this state in the superior court for Pierce county for the crime of murder, and upon his trial was acquitted by a jury. Afterwards, he was again taken into military custody, and was subsequently arraigned before a general court-martial upon the following charge and specification:

"Charge 1. Conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war.

"Specification. In that Private Freddie R. Stubbs, Co. K, 19th U. S. Infantry, did assault Private Tom C. Vandiver, Co. K, 19th U. S. Infantry, by shooting him with a rifle, and did wound the said Vandiver, thereby causing his, the said Vandiver's, death.

"This at American Lake, Washington, on or about the 9th day of July, 1904."

And by the judgment of that tribunal he was found guilty as charged, and sentenced to be dishonorably discharged from the service of the United States, and to forfeit all pay and allowances due him, and to be imprisoned for a term of five years, and by the return to the writ of habeas corpus issued from this court the commanding officer of Vancouver Barracks shows that he is imprisoned in pursuance of that sentence.

The grounds upon which the petitioner has invoked the jurisdiction of this court to restore him to liberty are two, viz.: First, that by surrendering the petitioner to the civil authorities, pursuant to the fifty-ninth article of war, and the subsequent proceedings, complete and exclusive jurisdiction attached to the superior court to finally determine the question of guilt or innocence of the crime of murder, and of each lesser offense necessarily included within that charge as it was identified by the specifications of time, place, and means of accomplishing the alleged murder, and his acquittal was a complete vindication, so that no other court or special tribunal can lawfully assume jurisdiction to try the petitioner again upon a criminal charge based upon the same facts; second, that the charge and specification upon which the petitioner was arraigned before the court-martial does not state facts constituting any offense nor a violation of the sixty-second article of war [U. S. Comp. St. 1901, p. 957].

The record of the proceedings against the petitioner in the superior court is conclusive in his favor in so far as it shows an adjudication that he is not guilty of any crime of which he might have been convicted under the information filed against him; but that is all. It does not establish as a fact that he did not kill a man, nor that the homicide was not a consequence of "conduct to the prejudice of good order and military discipline in violation of the sixty-second article of war." Although the act described in the specification of the charge upon which the petitioner was brought to trial before the court-martial is identical with the act alleged in the information for murder, the elements constituting the offense charged are radically different. After having surrendered him to the civil authorities, his military superiors could not lawfully deal with the petitioner for murder, manslaughter, or a criminal assault considered as a crime against society in general; but it is equally true that the superior court had no jurisdiction to adjudicate any question with respect to the petitioner's conduct as a soldier. The exactions of military discipline are such that an act, if committed by a civilian, may not be criminal, but, if committed by a soldier on duty, or in a military camp, may constitute a military offense, by reason of the relationship of the actor to the army, and the time, place, and circumstances of the act. The Constitution of the United States contains an absolute guaranty that no person shall "be subject for the same offense to be twice



put in jeopardy of life or limb." Amendments, art. 5. This record, however, does not present a case to which that clause of the Constitution is applicable. In the interpretation of the Constitution, and in enforcing its provisions, strict attention must be given to the accurate meaning of the words of this supreme law; and in this connection it is to be observed that the words "same offense" found in this clause of the Constitution are not synonymous with the words "same act," and, since more than one offense may be actually committed by a single act, the Constitution does not shield the perpetrator from punishment for other offenses when he has been convicted or acquitted of one, although it does exempt him from a second prosecution for that identical offense. The sixty-second article of war, upon which the second prosecution is founded, excludes capital crimes, and from the record it is manifest that when the petitioner was arraigned before the court-martial special care was taken to charge him with an offense different from the one of which he was acquitted by the superior court. Although the same act is specified, the gist of the offense charged is unsoldierly conduct by a soldier, subversive of military discipline. For that offense the petitioner continued to be amenable to military law, notwithstanding the verdict of the jury declaring him to be innocent of the alleged violation of the laws of the state. 17 Amer. & Eng. Enc. Law (2d Ed.) pp. 604, 605; Cross v. North Carolina, 132 U. S. 139, 10 Sup. Ct. 47, 33 L. Ed. 287; Steiner's Case, 6 Op. Atty. Gen. 413; Howe's Case, Id. 506. The charge and specification does not accuse the petitioner of any willful or felonious act, but I cannot assent to the proposition advanced in the petitioner's behalf that the facts alleged do not constitute an offense cognizable by the court-martial. An assault with a lethal weapon and the infliction of a mortal wound by one soldier upon another, with particulars of time and place, is clearly stated, and that is amply sufficient to support the charge of a crime comprehended by the sixty-second article of war, which reads as follows:

"Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." 1 U. S. Comp. St. 1901, p. 957.

This has been supplemented by the act of September 27, 1890, c. 998, 26 Stat. 491 [U. S. Comp. St. 1901, p. 969], which provides that punishment at the discretion of a court-martial shall not, in time of peace, exceed a limit which the President may prescribe, and I am informed that pursuant to this law the President has fixed as a maximum of imprisonment in cases prosecuted under the sixty-second article of war a term of 10 years.

It is my opinion that the surrender of the petitioner to the civil authorities did not have the effect to absolve him from his obligation under the terms of his enlistment; nor to divest his superior military officers of their authority to proceed against him for the military offense. And it is also my opinion that the charge and specification of that offense are not defective, and that the court-martial did not exceed its jurisdiction by sentencing him to suffer punishment by imprisonment

for a term extending beyond the term of military service for which he enlisted. Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213.

It is the judgment of the court that the prisoner be remanded to the custody of the respondent to carry the sentence of the court-martial into effect.

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THE ESPERANZA.

(District Court, S. D. New York. November 30, 1904.)

1. SHIPPING—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Plaintiff, a kitchen boy on a steamship, was ordered to obtain kindling wood, and, contrary to orders, was directed by the ship's carpenter to get the same from "below." Plaintiff unsuccessfully endeavored to obtain a lantern, and then went through one of the hatches, which was only slightly open, and required further opening, to the between-decks, whence he fell through an open hatch to the bottom of the ship while groping for wood in the dark. *Held*, that plaintiff, in opening the hatch wider and going below, assumed the risk, and was not entitled to recover for his injuries.

2. SAME—FELLOW SERVANTS.

A kitchen boy on a steamship was a fellow servant of the ship's carpenter, and was therefore not entitled to recover for injuries sustained by the latter's negligence.

In Admiralty.

Clark H. Abbott and Bartholomew B. Coyne, for libellant.  
Nadal & Carrere, for claimant.

ADAMS, District Judge. This action was brought by Abraham Lieberman, through his guardian ad litem, to recover for personal injuries suffered on the steamship *Esperanza* on the 21st day of June, 1903, while she was lying in the port of Vera Cruz, Mexico, by falling through an open hatch in the between decks of said vessel.

It appears that the libellant, then about 16 years of age, was employed in New York as a kitchen boy, or assistant to the cooks, and shipped on or about the 9th day of June, 1903, to make a voyage from New York to Havana, Progreso, Vera Cruz and return. The boy represented himself as Charles Smith for the purpose of concealing his identity as a former employee of the New York and Cuba Mail Steamship Company, the claimant here, which he feared would prevent his securing employment, owing to the alleged practice of that company not to re-engage former employees. He had little experience on board of vessels, not having previously spent more than a month at sea. When he went aboard the *Esperanza* he was assigned to work with one of the cooks and regularly performed his duties, one of which was to secure kindling wood for the kitchen fire.

¶ 1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

¶ 2. Who are fellow servants, see notes to *Northern Pac. Co. v. Smith*, 8 C. C. A. 668; *Canadian Pac. Ry. Co. v. Johnston*, 9 C. C. A. 596; *Flippin v. Kimball*, 31 C. C. A. 286.

The libellant's story is that on Sunday, the 21st day of June, he was directed by the cook to secure necessary kindling wood for the kitchen and endeavored to pick it up about the main deck, when he was ordered by the carpenter of the ship to desist and told he should get the wood from below but not to let the officers of the ship see him go there. That accordingly, between 9 and 10 o'clock, after having tried unsuccessfully to get a lantern from some of the crew, he went through No. 2 hatch, which was slightly open but required opening further to permit him to reach the ladder leading below and he pushed back one of the sections of the hatch cover and climbed down to the between decks. There he groped around in the dark on his hands and knees for wood and after having collected a quantity was looking, or feeling, for more, when he fell through a hatch to the bottom of the ship, receiving severe injuries, including a wound to the spine, which have probably crippled him for life.

The testimony establishes that the hatch the libellant fell through was a blind hatch, about 10 feet square, some 40 feet aft of the hatch he went down through. The vessel was pursuing a usual method in keeping the hatches open below the main deck while in port (see *The Carl* [D. C.] 18 Fed. 655; *The Saratoga*, 94 Fed. 221, 36 C. C. A. 208) and it is shown that it was contrary to the orders of those in authority on the ship for any of the crew to go below when the main deck hatches were closed without special permission from the master or first officer. The hatch had been actually closed during the night and covered with tarpaulin. How it got partially open in the morning, as the boy contends it was, does not appear. The carpenter denies that he opened it and says that he warned the boy about going below. Whatever the truth may be in this respect, I think there can be no doubt that the libellant assumed the risk of opening the hatch wider and of going below. If there was negligence on the carpenter's part it would be the act of a fellow servant, which would preclude recovery of damages. Even under such circumstances the libellant would probably be entitled to surgical attention and care at the expense of the ship but it does not appear that he needs such attention from the ship as he was almost immediately sent to a hospital in Vera Cruz and upon being subsequently brought to New York was admitted to the Marine Hospital on Staten Island and is receiving proper attention there, without expense to him.

The libellant's theory is that it was careless and negligent upon the ship's part to have the unguarded hatches open below and in the absence of special warning as to their dangerous condition, the libellant, being ignorant of their condition, is entitled to recover. His injuries are such that he is a subject of compassion but the authorities are clearly against a recovery of damages under the circumstances disclosed by the evidence. *The City of Alexandria* (D. C.) 17 Fed. 390; *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

The libellant's advocate lays stress upon the fact of the libellant being a minor, and refers to sections 4504 and 4508 of the United

States Revised Statutes which provide for the shipment of seamen by commissioners appointed for that purpose or by the masters of vessels in certain cases. It is further provided that apprentices may be bound to sea service by shipping commissioners, under certain restrictions. U. S. Comp. St. 1901, pp. 3063-3067.

These provisions, however, do not seem to have any bearing upon this case. It appears that the boy here was practically emancipated from the control of his parents. He had been taking care of himself for a number of years and using his earnings for his own support. Moreover, a boy of his age and general experience can not be relieved from all responsibility for his own acts by the statutory imposition of duties upon shipping commissioners, nor can a vessel in this way be held liable for the results of a trespass, even by a minor, which could not reasonably be anticipated.

The libel must be dismissed, but without costs.

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**In re MILLER.**

(District Court, E. D. Pennsylvania. December 12, 1904.)

No. 1,691.

**1. BANKRUPTCY—DISCHARGE—INSANITY OF BANKRUPT.**

The insanity of a bankrupt, which has prevented his examination by creditors, and still continues, is not a bar to his discharge under Bankr. Act July 1, 1898, by which a discharge is made a matter of right unless certain objections are established, and which further provides in section 8, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane."

In Bankruptcy. On motion to dismiss specifications of objection to discharge.

Charles F. Warwick, for bankrupt.

William F. Brennan, for objecting creditor.

J. B. McPHERSON, District Judge. The specifications of objection to the bankrupt's discharge are as follows:

"1. The said Hiram A. Miller did not appear at the first meeting of his creditors, or at any other meeting, to be examined publicly by his said creditors, trustee, and referee.

"2. The evidence shows that the said Hiram A. Miller has not been mentally capable of undergoing an examination by any of his creditors since his adjudication as a bankrupt.

"3. His creditors should first be given an opportunity to examine him before he is discharged.

"4. The evidence shows that the said Hiram A. Miller is non compos mentis, or without reasoning power, and he is therefore unable to properly make an application for his discharge as a bankrupt and to be discharged as such."

Ordinarily, objections of this kind, raising a question of fact, should be sent to the referee for investigation and report; and, if this were done, the proper practice would require the appointment

of a guardian ad litem to represent the interest of the alleged lunatic. *Re Burka* (D. C.) 107 Fed. 674. In the present case, however, it was agreed at bar that the facts are as averred in the specifications, and further inquiry upon this point therefore would be superfluous. Assuming the bankrupt to be insane, the question for decision is whether his lunacy, which has prevented his examination by the creditors, and still continues, is a bar to his discharge. It would doubtless have been more regular if a petition had been made on his behalf for the appointment of a guardian ad litem; for, in strictness, it is true that, if the bankrupt is so far deprived of the use of his faculties that he cannot submit to an examination by the creditors, he should be held to be incapable also of taking any other step in the proceeding. The fourth specification, therefore, states a valid objection, and, if I understood it to be seriously insisted upon, I should decline to act upon the petition until a guardian should be appointed and should join therein, or until a next friend should come forward for a similar purpose: but as such declination would only cause delay, and as the defect is no more than formal at the best, and is not vigorously attacked by the objecting creditors, I shall treat the petition as properly before the court for consideration.

By section 29 of the act of March 2, 1867, c. 176, 14 Stat. 531, the bankrupt was obliged to take a specified oath before he could be discharged, and for this reason his death or insanity before doing what he was thus bound to do personally prevented the discharge. See cases cited in *Brandenberg on Bankruptcy* (3d Ed.) note 6 to section 227, p. 160. But the act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], contains no such provision. No oath is required upon the part of the bankrupt, and the discharge is of right, unless certain objections thereto are made to appear. These are specified in clause "b" of section 14, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], and none of them is involved in the present inquiry. Section 8, Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], however, seems to be precisely in point: "The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be continued and concluded in the same manner, so far as possible, as though he had not died or become insane." To my mind, this is so plain as not to require construction. "So far as possible" the proceedings are to go on and be concluded as if the bankrupt had not died or become insane; and this can only mean that the statute is not unmindful of the fact that his death or insanity must, of necessity, interfere to some extent with the ordinary method of procedure. In either event he cannot be examined by the creditors, he cannot himself prepare the proper schedules, he cannot himself claim his exemption or take the necessary steps toward his final discharge; but, in spite of these obvious difficulties—and there are others equally obvious—the proceedings are to go on "so far as possible" as if he were alive or sane. His right to be discharged is therefore not affected, for it is only possible to oppose such discharge successfully by proving one of the acts de-

scribed in section 14, and such proof may be made whether the bankrupt be sane or insane, living or dead. In this conclusion the text-writers and the decisions agree, so far as I have been able to discover. *Re Hicks* (D. C.) 107 Fed. 910; *Re Risteen* (D. C.) 122 Fed. 732; *Re Parker*, 1 Am. Bankr. R. 615; *Gould & Blakemore*, p. 28; *Loveland* (2d Ed.) p. 653; *Brandenberg* (3d Ed.) c. 8; *Collier* (4th Ed.) § 8.

The specifications of objection are dismissed.

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## MEMORANDUM DECISIONS.

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**AMERICAN SURETY CO. OF NEW YORK v. UNITED STATES.** (Circuit Court of Appeals, Fifth Circuit. January 3, 1905.) No. 1,355. In Error to the District Court of the United States for the Northern District of Texas. *Jos. E. Cockrell and Edward Gray*, for plaintiff in error. *Wm. H. Atwell, U. S. Atty.* Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the District Court is affirmed, on the reasoning in the opinion of Attorney General Knox, 23 Ops. Attys. Gen. 476, and in *National Surety Company v. United States*, 129 Fed. 70, 63 C. C. A. 512. See, also, section 4058, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2756].

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**ATLANTIC & N. C. R. CO. v. CUYLER et al.** (Circuit Court of Appeals, Fourth Circuit. September 22, 1904.) No. 554. Appeal from the Circuit Court of the United States for the Eastern District of North Carolina. *Pou & Fuller, R. D. Gilmer, W. C. Munroe, A. D. Ward, O. H. Guion, Thomas J. Jarvis, and Busbee & Busbee*, for appellants. *Woodville Fleming, W. C. Maxwell, Argo & Shaffer, Day & Bell, and W. W. Clark*, for appellees. Dismissed, under rule 20 (90 Fed. clxii, 31 C. C. A. clxii), by agreement of attorneys. See 132 Fed. 568, 570; 131 Fed. 95.

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**FIRST NAT. BANK OF CUERO, TEX., v. PEAVY.** (Circuit Court of Appeals, Fifth Circuit. January 3, 1905.) No. 1,353. Appeal from the District Court of the United States for the Western District of Texas. *J. B. Lewright*, for appellant. *C. A. Keller*, for appellee. Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The opinion of Judge Maxey (127 Fed. 891), found in the record, fully covers the case, and we concur with him in his conclusion. The appellant was guilty of laches in the prosecution of his claim. The decree appealed from is affirmed.

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**GEORGIA IRON & COAL CO. v. SIMONDS.** (Circuit Court of Appeals, Fifth Circuit. November 7, 1904.) No. 1,399. In Error to the Circuit Court of the United States for the Northern District of Georgia. For opinion below, see 133 Fed. 776. *L. Z. Rosser and Morris Brandon*, for plaintiff in error. *Geo. L. Bell and C. L. Pettigrew*, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. After a careful consideration of the errors assigned, in the light of the record, briefs, and oral arguments, we find no reversible error, and, considering that the verdict and judgment do substantial justice between the parties, the judgment of the Circuit Court (133 Fed. 776) is affirmed.

**HAARSTICK et al. v. ST. LOUIS VALLEY TRANSFER RY.** (Circuit Court of Appeals, Seventh Circuit, October 4, 1904.) No. 1,060. In Error to the Circuit Court of the United States for the Southern District of Illinois. Charles W. Thomas, for plaintiff in error. W. S. Forman and L. D. Turner, for defendant in error. Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

**GROSSCUP, Circuit Judge.** This case is ruled by the case of James Taussig, plaintiff in error, v. St. Louis Valley Transfer Railway (just decided) 133 Fed. 220. The decree of the Circuit Court will be affirmed.

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**HUDNUTT v. BRITANNIA MINING CO.** (Circuit Court of Appeals, Ninth Circuit, October 3, 1904.) No. 1,018. Appeal from the Circuit Court of the United States for the District of Montana. John A. Shelton, for appellant. Stapleton & Stapleton, B. S. Thresher, and W. A. Pennington, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

**HAWLEY, District Judge.** This is a suit in equity, brought by appellant to compel appellee to issue and deliver to him certificates for certain shares of the capital stock of the corporation, appellee herein, and for judgment against said corporation for certain sums of money declared as dividends upon said stock. The court below, upon the pleadings and proofs herein, ordered, adjudged, and decreed "that the bill of complaint be dismissed, and the prayer of the said bill be denied, and that the defendant herein have and recover its costs." From this decree the appeal is taken. This suit is similar to that of Moore v. Nickey (just decided) 133 Fed. 289, in many of its facts, and is substantially identical in relation to the question of laches, which was there discussed and decided. Upon the authority of that case upon this question, the decree of the Circuit Court is affirmed.

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**KNEPPER v. SANDS.** (Circuit Court of Appeals, Eighth Circuit, October 13, 1904.) No. 1,751. Appeal from the Circuit Court of the United States for the Northern District of Iowa. I. S. Struble (G. T. Struble, on the brief), for appellant. M. B. Davis and John H. King (John T. Stearns, on the brief), for appellee. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**SANBORN, Circuit Judge.** This suit came here upon a demurrer to a bill in equity presented by John A. Sands, a homesteader, to obtain a decree that the title under the patent to the land in his possession, which had been issued to Elmira Knepper as a bona fide purchaser from the Sioux City & St. Paul Railroad Company, under the fourth section of the act of March 3, 1887, for the adjustment of land grants (24 Stat. 557, c. 376 [U. S. Comp. St. 1901, p. 1596]), is held by him in trust for the complainant. The court below overruled the demurrer, and rendered a decree for the relief sought by the complainant. A technical objection to that decree was once made in this court upon the ground that the bill did not clearly show that the patent had been issued. But its issue to Elmira Knepper was subsequently conceded, and the case was submitted to this court for decision under that admission. The crucial question in the case, viz., "Could Elmira Knepper be esteemed a purchaser in good faith or a bona fide purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, as against John A. Sands, in view of the acts of Congress, of the acts of the Legislature of the state of Iowa, and of the open possession of the land by Sands on June 21, 1887, when Elmira Knepper purchased?" was certified by this court to the Supreme Court, and that question has been answered in the negative. Knepper v. Sands, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083. It would be a futile task to repeat here the laws and the facts which condition this question. They are recited at length in the opinion of the Supreme Court to which reference has been made, and the decision embodied in that opinion leaves nothing for the consideration of this court. The decree below is accordingly affirmed, on the authority of that decision.

**LANSING BOILER & ENGINE WORKS v. JOSEPH T. RYERSON & SON et al.** (Circuit Court of Appeals, Sixth Circuit, November 15, 1904.) No. 1,376. Appeal from the District Court of the United States for the Western District of Michigan. Bowen, Douglas, Whiting & Murfin, for appellant. No opinion. Dismissed on stipulation. See 128 Fed. 701, 63 C. C. A. 253.

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**LEATHERS v. UNITED STATES.** (Circuit Court of Appeals, Fifth Circuit, November 7, 1904.) No. 1,350. In Error to the District Court of the United States for the Northern District of Georgia. John F. Methvin, for plaintiff in error. E. A. Angier, Geo. L. Bell, and C. D. Camp, for the United States. Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

**PER CURIAM.** After a careful examination of the statutes of the United States involved in this case, and the record and briefs, we are of opinion that the petition filed by the plaintiff in error in the court below shows no sufficient facts entitling the petitioner to relief, and that the demurrer to said petition was properly sustained. The judgment of the District Court (127 Fed. 776) is affirmed.

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**LINDSAY v. TEXAS & P. RY. CO.** (Circuit Court of Appeals, Fifth Circuit, December 8, 1904.) No. 1,330. In Error to the Circuit Court of the United States for the Northern District of Texas. S. P. Hardwicke and G. E. Miller, for plaintiff in error. B. C. Bidwell, T. J. Freeman, and J. M. Wagstaff, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

**PER CURIAM.** Under the evidence the negligence of the plaintiff in error was the proximate cause of his injury, and there is nothing to show that the railway company or its employes were in fault. The peremptory instruction in favor of the defendant below was required under the proved facts, and the judgment of the Circuit Court is affirmed.

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**LOVELAND et al. v. ELGIN NAT. WATCH CO.** (Circuit Court of Appeals, Eighth Circuit, October 24, 1904.) No. 2,135. Appeal from the Circuit Court of the United States for the Northern District of Iowa. Dutcher & Davis, Chas. A. Clark & Son, and Wm. G. Clark, for appellants. Frank F. Reed, Edward S. Rogers, and Cooper, Clemans & Lamb, for appellee. No opinion. Appeal docketed and dismissed, with costs, per stipulation, and on motion of appellee. Attorney fee waived by appellee. See 132 Fed. 41.

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**MOK GEE YING v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit, October 10, 1904.) No. 844. Appeal from the District Court of the United States for the Northern District of California. George A. McGowan and A. L. Worley, for appellant. Marshall B. Woodworth, U. S. Atty.

**PER CURIAM.** Upon motion of Marshall B. Woodworth, U. S. Atty., appeal dismissed, upon authority of opinion in case No. 830. *Mok Chung v. U. S.*, 133 Fed. 166.

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**RODIGER v. THADDEUS DAVIDS MFG. CO.** (Circuit Court of Appeals, Second Circuit, November 21, 1904.) No. 50. Appeal from the Circuit Court of the United States for the Southern District of New York. Frank T. Brown, for appellant. W. P. Preble, Jr., for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

**PER CURIAM.** The decree of the Circuit Court is affirmed, with costs, on the opinion below, reported in 126 Fed. 960.



**TEXAS COTTON PRODUCTS CO. v. STARNES.** (Circuit Court of Appeals, Fifth Circuit. January 3, 1905.) No. 1,337. Appeal from the Circuit Court of the United States for the Western District of Texas. Eugene Williams, for appellant. T. B. Cochran, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

**PER CURIAM.** We find no equity in the complainant's bill. Therefore the decree of the Circuit Court (128 Fed. 183) is affirmed.

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**TSOI YII v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. October 3, 1904.) No. 1,013. Appeal from the District Court of the United States for the Northern District of California. Charles T. Hughes, for appellant. Marshall B. Woodworth, U. S. Atty. Before GILBERT, ROSS, and MORROW, Circuit Judges.

**PER CURIAM.** Upon the authority of the case of *Lee Yue v. United States* (No. 1,025, just decided) 133 Fed. 45, the judgment is affirmed.

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**UNITED STATES v. BUTT.** (Circuit Court of Appeals, Fourth Circuit. July 12, 1904.) No. 539. On Petition for Writ of Error. Reese Blizzard, U. S. Atty. James D. Butt, pro se. No opinion. Writ of error denied. See 126 Fed. 794; 122 Fed. 511.

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**UNITED STATES v. THAYER et al.** (Circuit Court of Appeals, Ninth Circuit. October 3, 1904.) No. 1,038. In Error to the Circuit Court of the United States for the Central Division of the District of Idaho. Marsden C. Burch and R. V. Cozler, U. S. Attys. Fremont Wood and W. E. Borah, for defendant in error. Before GILBERT, ROSS, and MORROW, Circuit Judges.

**PER CURIAM.** On the authority of the case of *United States v. Rossi et al.* (No. 1,039, just decided) 133 Fed. 380, the judgment is affirmed.

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**UNITED STATES LIFE INS. CO. v. McMAHON et al.** (Circuit Court of Appeals, Fifth Circuit. December 3, 1904.) No. 1,378. In Error to the Circuit Court of the United States for the Eastern District of Texas. Geo. Clark and D. C. Bollinger, for plaintiff in error. Cecil H. Smith, Amos L. Beaty, and R. R. Hazlewood, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

**PER CURIAM.** The merits of this case were fully passed upon at our last term. See 128 Fed. 388. The rulings now complained of seem to be in accord with our views then expressed, and the judgment of the Circuit Court is therefore affirmed.

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**WILSON v. ATLANTIC COAST LINE CO.** (Circuit Court of Appeals, Fifth Circuit. November 7, 1904.) No. 1,410. In Error to the Circuit Court of the United States for the Northern District of Georgia. Burton Smith, for plaintiff in error. C. F. du Bignon and Robt. C. Alston, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

**PER CURIAM.** The elaborate opinion of the trial judge, found in the record, satisfactorily disposes of all the points raised in the case, and we notice no error therein. The judgment of the Circuit Court (129 Fed. 774) is affirmed.

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**GUYETT v. McWHIRK et al.** (Circuit Court, D. Oregon. October 20, 1904.) No. 2,684. In Equity. Suit by Indian to recover lands alleged to have been wrongfully allotted. On demurrer to bill. R. J. Slater and J. T. Hinkle, for plaintiff. John H. Hall, U. S. Atty., and T. G. Hailey, for defendants.

**BELLINGER, District Judge.** In this case the complainant's mother, Louisa Morrisette, being an Indian entitled to allotment of lands upon the

Umatilla reservation, selected the lands in question, the same being then in her possession; but said lands were wrongfully allotted to the defendant McWhirk. Louisa Morrisette subsequently died, and the complainant brings this suit as her heir at law. The case is within the rule laid down in the case of Philomme Smith v. Bonifer, 132 Fed. 889. The demurrer is overruled.

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PE-WA-LO-SON-MI v. AL-ON-TA-MOP-NET et al. (Circuit Court, D. Oregon. October 20, 1904.) No. 2,783. In Equity. Suit by Indian to recover lands alleged to have been wrongfully allotted. On demurrer to bill. T. G. Hailey, for plaintiff. John H. Hall, U. S. Atty., for defendants.

BELLINGER, District Judge. This is the case of a mother claiming as heir of her son, and is within the rule decided in the case of Philomme Smith v. Bonifer, 132 Fed. 889. The demurrer is overruled.

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In re HENDERSON. (District Court, E. D. Pennsylvania. December 6, 1904.) No. 1,532. Petition for Discharge on Habeas Corpus. Petition refused. See 130 Fed. 385. J. Alfred Smith, for relator. Julius C. Levi, for trustee.

HOLLAND, District Judge. David W. Henderson was committed to prison in Philadelphia county on June 1, 1904, for contempt of court in not complying with an order to pay over to his trustee in bankruptcy a sum of \$5,000 which was found to be in his possession or control. Upon his petition, a writ of habeas corpus was issued, and argument heard for his discharge. I have again gone over the evidence in this case with considerable care, with the result that the conclusion arrived at by the referee and court in making the order of commitment was undoubtedly right, and that Henderson has in possession or control the property directed to be delivered to his trustee. It is not necessary to further discuss either the law or the facts in this case. I have, however, come to the conclusion that the petitioner, David W. Henderson, should not be discharged at this time. Petition for discharge is therefore refused, and David W. Henderson is remanded to the custody of John B. Robinson, the United States marshal for the Eastern District of Pennsylvania, until the further order of the court.

END OF CASES IN VOL. 133.